

Constitutional Legal Systems in the Modern World

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ABSTRACT

Based on a theoretical and comparative legal analysis of the phenomenon of “constitutional legal system”, the authors formulate its definition and highlight its structural elements. The constitutional legal system is a complex multilevel phenomenon where constitutional law is represented by a combination of existing sources of national constitutional law, constitutional justice, and the legal technique of constitutional lawmaking and law enforcement. They carry out a specific classification of the main constitutional and legal systems of the modern world: British, American, European constitutional legal systems, the constitutional legal system of Islamic law). The main features of the formation and functioning of the main constitutional and legal systems are highlighted. The specific features of the constitutional legal system of modern Russia are analyzed separately. It is concluded that the current Russian constitution has a number of serious contradictions, due to the fact that it simultaneously retained a number of key characteristics of the Soviet constitutional system and, at the same time, borrowed (largely mechanically) elements of the modern Western tradition. The authors point out that the Russian state and society are making another attempt to move from state voluntarism to legal constitutionalism. It appears feasible to complete the transition in the coming decades.

Keywords: *constitutional law, constitutional legal system, sources of constitutional law, conflicts and contradictions of constitutional law, ontology of constitutional law, constitutional tradition*

1. INTRODUCTION

Unlike the “constitutional law branch system”, characterizing the law as an abstract theoretical construct, emerging and functioning regardless of national, cultural and political features of state and society organization, the “constitutional legal system” is a complex multi-level phenomenon where constitutional law is represented by a combination of the existing sources of the national constitutional law, constitutional sense of justice and the legal technique of constitutional law-making and law enforcement.

In this context, the category of the constitutional legal system is a characteristic of the “living” constitutional law that takes shape at a certain historical stage in the national legal system development and is determined by the trends and patterns underlying the national constitutional legal tradition in its dynamics.

In the modern world, numerous constitutional legal systems have developed and are currently operating. Yet, the basic ideological principles laid down in the constitution are not absolutely unique, they come from a limited number of competing models [1]. It seems

appropriate to single out the main constitutional legal systems.

- The British constitutional legal system.
- The American constitutional legal system.
- The European constitutional legal system.
- The constitutional legal system of Islamic law.

In legal science and the study of constitutional law, the theoretical and comparative legal methods have been widely acknowledged as crucial to the analysis of the phenomenon of a constitutional legal system. Up to now, it has been quite problematic for scholars to clearly define the concept of a constitutional legal system in such a way that may be useful not only to academia but also to the professional legal community including professionals in electoral law, judges of the constitutional (statutory) courts, and persons who participate in the organization of the election process.

Clearly, in order to provide such a definition, we should carefully and systematically analyze the main features of the phenomenon, as well as its structural elements. After reviewing relevant literature and regulatory documents, the authors came to a conclusion that the constitutional legal systems of the present time should be examined as multifaceted complex phenomena, since these systems play a vitally important role in defining constitutional law

as a set of existing sources of national constitutional law, and they also reflect constitutional legal awareness, constitutional lawmaking, and enforcement. The creation of a holistic scientific view of constitutional legal systems would not be possible without a detailed classification of the main constitutional legal systems of the modern world (i.e., British, American, European, and Islamic systems).

In addition, in order to successfully analyze constitutional legal systems, it is necessary not only to characterize each system but also to consider the primary and secondary features of their emergence and development. It is a well-known fact that the constitutional legal systems of our time have undergone a long process of evolution, purification, and adaptation, which ultimately (as of today) determines their integrity and stability. When exploring the modern constitutional legal systems, one should not ignore a powerful and large system such as the constitutional legal system of modern Russia.

However, we have to take into consideration that Russia's constitutional legal system is characterized by a large number of fundamental contradictions. The authors believe that such contradictions stem from the collision between some elements of the former Soviet constitutional structure that were partially retained after the dissolution of the USSR, and the incorporation of modern Western elements, which were borrowed later (largely, without sufficient adaptation to the Russian reality). In fact, it should be noted that on July 4, 2020, the amendments to the Constitution of the Russian Federation came into legal force, and they were largely aimed at overcoming the existing contradictions.

For example, according to the new version of the constitution, marriage is clearly defined as a union of a man and a woman, rather than a union of two persons. The government of the Russian Federation now sets out to ensure the implementation of a uniform social policy aimed at preserving traditional family values. The government also makes a pledge to support the institutions of civil society (including non-profit organizations) and to ensure their active participation in the development and implementation of state policies.

The government declared to take measures to ensure digital privacy and security of individuals, society, and the state when using information technologies and transmitting digital data. At the same time, we should mention that the parliament's control and influence on decision-making are quite weak and unclear according to Russia's constitution, which makes it different from most developed constitutional legal systems in the world. Naturally, that causes contradictions in legal and political logic, since it violates the core principles and values of the constitution in terms of political checks and balances. It is a sign that the dominant role is given to the political power of the President and the government, which reflects the history of the emergence and development of the modern Russian state.

At the same time, we should not underestimate a large number of favorable and positive changes to Russia's constitution that will contribute to the development and reinforcement of the Russian statehood, stimulate the

progressive development of the institutions of civil society and the rule of law. For instance, such amendments declare that the Russian Federation is the legal successor of the USSR on Russia's territory and that the Russian Federation, united by a thousand-year history, aims to commemorate the ancestors, who passed their values and faith in God on to the Russian citizens.

Russia protects the continuity in the development of the Russian state, fully recognizing its historical unity and way of development. The Russian language was also officially declared to be the language of the state-forming people. The concept of a union of multinational peoples was also introduced in the new amendments (previously, there used to be only one multi-ethnic nation).

Another amendment declares that the Russian Federation facilitates the creation of the conditions for sustainable economic growth and an increase in the well-being of citizens, promotes mutual trust between the state and society, protects the dignity of citizens, respects the rights of working persons, maintains a balance of the rights and obligations of citizens, and ensures economic, political and social solidarity in society.

2. MATERIALS AND METHODS

Research on constitutional legal systems in the modern world requires a comprehensive methodological approach and the use of relevant legal frameworks and concepts. Therefore, in this paper, the authors used a number of special juridical methods (such as the method of interpreting the norms of national law, normative dogmatic and formal legal methods) in order to fully explore the constitutional legal systems in the modern world.

A broad methodological approach and the use of an extensive regulatory framework allows us to reach scientifically sound conclusions, and enables us to make inferences that have practical and predictive potential. A thorough review of the relevant literature discusses some fundamental works on the general theory of law, among many others. A theoretical and comparative legal analysis of the phenomenon of the constitutional legal system made it possible to formulate its definition and highlight its structural elements.

3. RESULTS

3.1. Characteristics of the Main Constitutional Legal Systems

The main feature of the British constitutional legal system is the absence of a written constitution. The British constitution is represented by a combination of sources that together form a "living" constitution, expressed in the national British constitutional tradition.

For the British, the main value is not the constitutional form (text of the constitution), but the constitutional substance (spirit), understanding, interpretation, and practical implementation, which is the prerogative of judges.

Understanding British law as a “common” one implies the equal legal force of various sources (laws/statutes, precedents, legal doctrine), as well as public (state) and private (corporate and personal) law. In the figurative expression of M. Marchenko: The British legal system, in contrast to the continental legal systems, has never known and does not know the hierarchical subordination of sources of law led by statute [2]. In case of a dispute, the positions of parties are considered to be equivalent, regardless of the level of represented interests. In any case, the final decision rests with the court, which fully represents an independent branch of state power in the British/UK constitutional legal system. As F. Cowell points out, the UK’s internal constitutional institutions are unique, partly because of their historical origin and longevity [3].

The American constitutional legal system has developed under the influence of two interrelated, but not identical processes. These are a struggle for the formation of sovereign statehood by the former British colonies located on the North American continent and formation of a federal union North American state. American constitutionalism was closely linked with the process of emancipation [4]. In contrast to the “maternal” legal culture of Great Britain, based on the paradigm of the permanence of the national legal tradition and a clear distinction between the culture of the British metropolis and “colonial barbarism”, the emerging American constitutionalism was based on socio-cultural diversity and the priority of innovative “living” law that arose in the “New World”, rather than the traditional law of the “Old World”.

It is interesting that the denial of the British constitutional tradition, which took place in detail, was combined in American constitutionalism with the adoption and practical embodiment of the main British quality – constancy in the basic constitutional value. Thus, America’s founding fathers perceived the text of the Constitution as the one, unaffected by changes, along with the Bible symbolizing divine predestination and protection. And while the Bible symbolizes the supremacy and immutability of religious values, the American Constitution fulfills the same role with respect to political and legal values.

The European constitutional legal system was formed in the era of bourgeois revolutions and received its most vivid expression in the French constitutional legal system. The first French constitution owed its origin to the Great French Revolution, which resulted in the emergence of a new French state – the First French Republic. Being initially an ideological and political tool rather than a legal one, the French constitutional system at all stages of its formation and development acted as a derivative of the state. Each “new” French republic was accompanied by a new constitution. Thus, the main task of the “next” French

constitution was the legalization and legitimation of the “next” French republic.

The specificity of the constitutional legal system of Islamic law is that the constitution as a legal act is secondary in its social significance in comparison with the Holy Book of Muslims – the Qur’an. The main feature of the Islamic law sources concept is their religious nature, manifested in the divine origin of the most significant of them [5].

The main idea of Islam is the idea of divine predestination. In this understanding, positive law in general, and the constitution in particular, are just a legal interpretation of the provisions of the Qur’an and the biography of the Prophet Muhammad (Sunnah). Islamic jurisprudence defines the rule of Islamic law as a rule of conduct established by Allah the legislator on any issue for believers directly (by revelation) or indirectly – in the form of a conclusion made by the greatest scholars of Sharia – based on the interpretation of Allah’s will [5].

With this approach, the main objective of constitutional law, as well as of all other legal branches, is to implement the values of Islam, expressed in Sharia law, which are essentially mono-normative and represent an indissoluble unity of religion, law, national and cultural rituals and traditions [6]. It is curious that despite the fact that theories of Islamic law appeared throughout the history of Islam, modernity is one of the first cases when the practical theory of Islamic law is applied in practice through the mechanism of the constitution [7].

The analysis performed allows us to conclude that in the modern world there are constitutional systems that are different in form and content, in understanding the constitution and constitutionalism, in determining its social and legal nature, place and role in the national legal system, and in legal and technical features of constitutional rulemaking and implementation of constitutional norms and principles.

The study of the formal and substantive characteristics of these systems allows us to conclude that they are highly volatile. The authors of this paper cannot but agree with F. Hayek, who said that “few countries are lucky to have a strong constitutional tradition ... In most countries, the constitution simply did not have time to create a deeply rooted constitutional tradition, many countries still lack a general cultural situation, imbued with traditions and beliefs, which, in more successful countries, nourishes the constitutional spirit and allows the constitution to work where some of its provisions are not explicitly fixed, and even where the constitution is not written down at all” [8].

3.2. Characteristics of the Modern Constitutional Legal System

To understand the specificity of the constitutional legal system of modern Russia, it is important to consider that at various stages of its political history, the government’s attitude toward the constitution was ambiguous and ranged

from demonization (in the Russian Empire) to idealization (in the current period).

In the Russian Empire, the constitution was seen as a prerequisite and instrument of rebellion. For example, considering the peculiarities of the constitutional development of Russia in the 19th century, the researchers note: He [Alexander I] started thinking that creating a constitution could serve as a catalyst for further upheavals in the country, even more terrible and unpredictable. As a result, the intentions of Alexander I to introduce constitutional ruling in the Russian Empire remained unimplemented [9].

In Soviet Russia, constitutions were “tied” to the state building stages and were seen as a means of state ideology and politics. In particular, A. Medushevsky wrote: For the Soviet practice of adopting constitutions, the mobilization aspect is of fundamental importance. The act of adopting the 1977 Constitution itself was seen as an expression of widespread public support for the regime, and “public discussion” imposed by it was a significant tool for propaganda and ideological control [10].

In modern Russia, the constitution is a kind of a legal ideal, which existence justifies equally ideal constructions, that have been consolidated in the constitutional text.

N. Vitruk quite rightly noted that the 1993 Constitution of the Russian Federation officially secured the transition to a new social system and established a new constitutional order [11]. At the same time, the analysis of the constitutional legal system that has been forming in the Russian Federation since the moment of gaining state sovereignty (1992) allows to state that this system is constitutionally unbalanced combining the contradictory tendencies of the previous (socialist) and modern (Roman-Germanic) legal families [12]. In this way, the current constitution is a relationship of the embodiment of the historical experience and the repository of Russian traditions, on the one hand, and Western values, on the other [13].

From the socialist legal family, the Russian constitutional legal system inherited, first of all, the declaration of a unified multinational nation. The only difference is that the “multinational Soviet nation” was replaced by “multinational Russian” one. The idea of social equality (equalization, to be more precise) was also retained, which was constitutionally enshrined in articles on universal suffrage, equal access to education, justice, social security, etc. Calling Russia a federation determined the actual copying of the Soviet state structure. At the same time, if the USSR included 15 symmetrical entities – the Soviet socialist republics, in modern Russia the number of entities has increased to 85, and the equality of entities declared at the constitutional level (Part 1 of Article 5), in practice shows significant differences in their statuses. National republics, in particular, have retained the constitutional status of states and have their own constitutions (Part 2 of Article 5).

Noting the preservation of a number of key characteristics of the Soviet constitutional system in modern Russia, one cannot but notice significant innovations, most of which

had the character of mechanistic borrowings from Western Europe and the USA constitutional legal systems.

The current Russian Constitution included such liberal values as recognition of a person, as well as his/her rights and freedoms as a fundamental value (Article 2); formalization of the variety of ownership forms and the economy multi-structure (Article 8); prioritization of international law in relation to national law (Article 15); determination of the separation of powers principle in organization and exercise of state power as a fundamental one (Article 10), etc.

A significant innovation is the inclusion of a separate institution of constitutional justice in the modern Russian constitutional legal system, which is endowed with a number of significant prerogatives in the interpretation of the Constitution text and implementation of constitutional justice.

However, the constitutional consolidation of “Western” values, as well as the actual transition of Russia to the “Western” type of socio-economic structure, did not lead to the transition of our state from the Soviet to the Western European one. Moreover, at the moment, there are deepening contradictions and conflicts both between Russia and the West, and between Russia and its recent allies – the countries of Eastern Europe, as well as a number of the former union republics, and the Russian Federation is in open confrontation with some of them (Georgia, Ukraine).

4. CONCLUSION

Summarizing the above, we should conclude that the constitutional legal system of modern Russia, while being at a transitional stage, retains a number of serious contradictions, significantly reducing the socio-legal “authority” of the current Constitution, which, in the opinion of most Russians, continues to remain a more declarative than legislative act.

At the same time, the expressed assessment cannot be considered as deliberately negative. The existing problems are nothing more than “growth diseases” typical of any newly formed constitutional legal system [14]. The Russian state and society are making another attempt to move from state voluntarism to legal constitutionalism. In the authors’ opinion, it will be possible to judge about the success of this attempt in the foreseeable future, outlined by the coming decade.

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