

# Constitutional Law in the 21<sup>st</sup> Century: Impacts of Digitalization

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## ABSTRACT

The article raises the question of the scope and intensity of constitutional regulation of the economy in the 21<sup>st</sup> century that is distinguished by the impact of digitalization. It is shown that the subject of constitutional law is steadily expanding, including at the present stage already a whole bunch of economic relations. Currently, the Constitution does not only set some general standards for regulation and development of the economics (introducing, for example, the list of economic rights of citizens or the competence of the authorities). Today the norms of other law fields (contained in the Civil Code, Land Code, etc.) acquire constitutional content, they should be interpreted precisely in the light of constitutional doctrines and values. These features require an adjustment of the methodology of legal science and more broadly - a revision of the model of legal thinking of lawyers.

**Keywords:** *Constitutional law, digitalization, law and economics, business relations, economy rights, economic analysis.*

## 1. INTRODUCTION

The economic crisis makes the discussion about the model of regulation of the economy up today. Such discussions are often emotional, and the arguments of the parties of the dispute are ideologically motivated. Clearly, the stability of society and the sustainability of its development can be achieved only when important economic decisions are made on the basis of any firm principles. This becomes particularly important in the 21<sup>st</sup> century which is marked by the ongoing digitalization of society which penetrates all spheres of social and economic life thus making an impact on law and legal relations.

We believe that the role of such principles can and should be fulfilled by the norms of the Constitution. This hypothesis requires a solution to the issue of the scope and intensity of constitutional regulation of the economy. In essence, it is a question of characterizing the field of constitutional law. This paper introduces a view at the problem through the lens of Russian constitutional science.

However, the article also analyzes the practice of other states, which allows the authors to conclude that the trend of expanding the field of constitutional regulation is global and goes hand in hand with the phenomenon of digitalization.

## 2. THE SCOPE AND THE NATURE OF THE CONSTITUTIONAL LAW

The deep analysis of different viewpoints on the scope of public relations settled by the constitutional (state) law was done by academic Kutafin in his funda-

mental work "Field of Constitutional Law" [1]. It can be noted that all scholars who have written about the scope of the field are divided into two groups: those who limit it only to political relations, and those who include in the orbit of constitutional law also a wide range of other social relations (in particular, economic). The first group of scientists includes almost all pre-revolutionary Russian researchers. Thus, such names as Andreevsky, Gradovsky, Lazarevsky, Korkunov boiled down constitutional law only to the relations concerning power [1, 10 p.].

In the Soviet period of time some experts also supposed that political sphere was the only part of constitutional law. We can mention among them Arzhanov, Golunsky, Gurvich, Lepeshkin, Strogovich, Denisov [1, pp. 11-16].

At the same time the fundamental statement of those time science was economic determination of social processes. Therefore, quite expectedly the viewpoint that economy is also included in the field of constitutional law arose. Among those, who supported this idea were Studenkin, Ymanskiy, Kotok, Ravin and others [1, pp. 12-15].

The metaphor of Professor Osnovin, who called the structure of state relations a two-layer pie, is memorable [2, 29 p.]. In the first layer of this "pie" are the relations of the global order, covering all state and society (such as, for example, citizenship or democracy), in the second are specific state-legal relations arising in the process of formation and functioning of state power.

There is no doubt that the state power, making certain decisions, affects the economic sphere, therefore, the emergence of state relations with economic content is inevitable.

In the post-Soviet period, this position found even more supporters. A number of scientists write directly about it (such as Kozlova) [1, 18 p.]. Authors such as Baglay, Kozlov, Strekozov, Koveshnikov, Kolyushin, Dmitriev, Mukhachev and others express this idea indirectly, including the institute of the human rights to the field [1, pp. 20-22]. The institute also contains economic human rights, which are the so-called second-generation [3, pp. 31-32]. Therefore, it can be argued that these scholars actually recognize the inclusion of economic relations into the subject of constitutional law.

Bobrova considers property as an obligatory element of constitutional relations and as a material guarantee of power [4, 5 p.]. She states: "No property, no power. If there is no recognition of public property, then there is no people sovereignty" [5, 70 p.].

Kutafin himself took an interesting position. In his view, the field of constitutional law could be divided into two groups of relations: inherent one (population, territory and power), as well as those that became an element of the field of constitutional law if a particular state is interested in it. That is, the scope of constitutional regulation is different from state to state, from one historical period to another [1, pp. 23-26].

Russia's modern constitutional law regulates among other the basis of the economic system, including the establishment of forms of property and guarantees of its protection, ways of economic activity, labor protection, the proclamation of a certain system of ensuring the social needs of members of society in various areas of life.

According to Kutafin's idea of economics as part of the of constitutional law field was developed in one of his last works, "Russian Constitutionalism". In this work is stated that constitutional norms have the priority in regulating property relations, emphasizes the responsibility of the state for the most important aspects of the organization of production and distribution [6, 328 p.].

Summarizing all of the above, one can say that the analysis of scientific positions on the field of constitutional law shows that over time the number of researchers considering the economic system of society as one of its components is steadily increasing.

### **3. PRACTICE OF CONSTITUTIONAL REGULATION**

There is no doubt that the very same tendencies could be traced also in the practice of constitutional regulation. There are no rules in the 19th century's Constitutions that regulate the order and ways in which

the state can influence the economic sphere [7, 8 p.]. However, as noted in the legal literature, the first Constitutions of different countries of the world contained provisions governing economic issues. For example, a significant portion of the authority of the U.S. Congress, under the 1787 Constitution, is devoted to the economy [8, 25 p.]. The rules on property rights as the most important economic and legal institution are also contained in the French Constitution of 1793. The principles of property inviolability ("no one can be deprived of the slightest part of his property without his consent") and freedom of work ("citizens cannot be prohibited from engaging in any kind of work, agriculture, crafts, trade") are the most important gains of liberal democracy.

The noted feature of the economic content of the first Constitutions very brightly shows the interaction of constitutional law and economics. Being liberal in their nature, denying the need for a state intervention on the economy, these documents nevertheless had such an impact. Here we can draw a parallel with the constitutional norm on the prohibition of official state ideology. This ban is criticized by many scholars from the position that the absence of state ideology is itself an ideology [9], [10]. If the State deliberately refrains from interfering the economy, it also influences it in a certain way. Consequently, the complete "economic neutrality" of the state is not possible.

In the Constitutions of the twentieth century, the proportion of economic regulations is steadily increasing. It is believed that the first Constitution, which found the place for the detailed regulation of the economy, is the Mexican Constitution of 1917 [11, 33 p.]. In the same series, the Weimar Constitution of 1919 is often mentioned. It contained a whole section on the organization of economic relations [12].

A vast array of economic norms was contained in the Constitutions of Socialist Countries. Thus, in all the Constitutions of the USSR were norms devoted to economic relations. The 1936 Constitution contained articles 4-6, which established the economic foundation of the state and the most important rules on property; The 1977 Constitution already contained the entire Chapter "Economic System".

Subsequently, the trend of increasing the socio-economic component of the Constitution was continued, and as a result, as Kazannik notes, almost all the latest Constitutions of Europe (including Russian), Latin America, Asia and North Africa provide social components [13, 59 p.]. It is illustrated in the most vivid way, according to experts, by the Constitutions of Brazil 1988 and Spain 1978 [7, 10 p.].

Thus, the intensity of government' intervention in the economy varies from country to country, but the

global process of increasing the number of constitutional norms governing the economic system is clear.

The modern stage of legal development is characterized by the fundamentally new level of expansion of constitutional norms into the economy. It is necessary to state not only the existence in the Constitutions of rules governing the basis of the economic system, but also the influence of constitutional ideas and doctrines on the other field's regulation of economic. Bondar expressed this idea very brightly, describing it as "constitutionalization of the economic space" [14].

Doroshenko writes about similar phenomena, emphasizing that constitutional law establishes norms that reveal the content of the basic principles of the state and society in the context of pension, budgetary law, social security law [15, 61 p.].

Kokotov, analyzing the effect of the Constitutions at the present stage of legal development, notes that "the developed constitution contains the basic genetic codes of national law" [16, pp. 8, 61]. Undoubtedly, the economy and economic relations are one of the main issues of legal regulation. Consequently, the Constitution, by defining the basic genetic codes of national law inevitably invade the economic sphere.

Kravets follows the similar position, putting forward the concept of constitutional law as a meta-field, that is, a field that sets benchmarks and goals for all other fields [17, 4 p.].

Professor Gadziev also emphasizes that basic economic rights are implemented only if they are respected in all fields of law. "Therefore, passing laws containing the norms of private law, the legislator is bound by the basic rights of citizens and their interpretation given by the constitutional courts" [7, 18 p.].

Professor Kruss developed the original concept of constitutional right use as the main form of the exercise of the law [15, 3 p.]. Shortly, Kruss's position can be expressed by his thesis that the courts should be guided solely by the law embodying the spirit of the Constitution [18, 230 p.]. In a number of his works, the scientist operates with the concept of "constitutionalization", emphasizing that this process is determined by the Institute of Human Rights and Freedoms [19, 16 p.], [20, 70 p.], [21, 63 p.].

This is perhaps a key position for understanding the reasons for the constitutionalizing of the economy. Indeed, the Constitution can provide a large number of economic rights, guarantees of a market economy, but their practical implementation depends on the quality of field's regulation. And in this sense, field's norms take on constitutional significance, which predetermines the necessity (and inevitability) of their study by constitutionalists.

It is important to emphasize that the trend is not only the Russian specificity. Thus, the European Court of Human Rights (ECHR) is actively taking an integration approach to the interpretation of human rights. It is based on the fact that there is no rigid distinction between personal and socio-economic human rights, and the violation of personal human rights can be manifested in the economic sphere. For example, in the case of *Sidabras and Džiautas v. Lithuania*, the ECHR noted that a ban on work in certain sectors of the economy could violate the right to privacy [22]. We believe that this regulation sets a high standard of protection of fundamental rights of the individual. Its implementation will inevitably lead to increased constitutional influence on field's legal regulation (in the particular case, labor law).

#### **4. CONCLUSIONS AND DISCUSSIONS**

In the light of mentioned above, the field of constitutional law is being expanded both as a science and as a field of law that governs not just fragmented social relations in the sphere of the economy, but a whole layer of relations concerning state interference in the economy. At the same time, it is crucial to note that at the current stage of the development of the legal system, the way of constitutional regulation of economic relations is changing.

At present, the Constitution does not simply set some general standards for regulation and development of the economic sphere (introducing, for example, the list of economic rights of citizens or the competence of the authorities). Today the norms of other law fields (contained in the Civil Code, Land Code, etc.) acquire constitutional content, they should be interpreted precisely in the light of constitutional doctrines and values.

With regard to the above discussion, the statement of Kruss, who believes that business relations are both private and public, looks fair (although it seems paradoxical at first glance) [23, pp. 29-30].

The main conclusion of this article is the thesis that the field of constitutional law in the 21st century is significantly transformed, taking fundamentally new elements. This is not just a theoretical observation of narrow academic significance; it is a new legal reality in which we all have to live. It is clear, for example, that the methodology of science will need to be revised: without understanding the economic underpinnings of legal relations, there is a depletion of legal understanding.

In this regard, the note of Professor Bobrova that "the theory of state and law should merge with the science of constitutional law, stem from it, as it happens in the law of many other countries" [5, 85 p.] is interest-

ing. Bobrova goes further and points out that "a separate theory of the state and law, in isolation from the constitution of this state" should not exist at all [5, 86 p.].

Indeed, if we look at the works of, for example, the most famous representative of the American scientific direction Law & Economics - Posner, it will be quite difficult for us to characterize his field's specialization. In his writings, this scientist, based on the methodology of Law & Economics, does not limit himself to any field frameworks, interfering into a variety of fields - family, electoral, antitrust, tax law, explores the problems of parliamentarianism, human rights, etc. [24 - 26].

In its extreme form, such an approach becomes "economic imperialism", trying to extend economic analysis to a wide range of the so-called non-market behavior. For example, the American economist Gary Stanley Becker and his followers analyzed a variety of social phenomena, from family and marriage to crime, based on this methodology. It should be noted that G. Becker was awarded the Nobel Prize in 1992 "for extending the field of microeconomic analysis to a number of aspects of human behavior and interaction, including non-market behavior."

Economic imperialism, as its name implies, is a methodological extreme and, like any extreme, is not entirely adequate. At the same time, there is certainly some rationality in this concept. Using the achievements of economic thought in general and some methods in particular, legal science can significantly enrich itself and obtain the key to solving many of its traditional problems, both at the theoretical level and at the narrow-practical level.

It is appropriate to apply to the position of Posner, who, characterizing the economic analysis of law, notes that this discipline has two directions. Relatively new is the economic analysis of non-market behavior, which is exactly the methodological basis of the research of the American lawyer himself. The oldest direction, going back to Smith - economic analysis of those legal fields that regulate obviously economic relations, such as tax law, antitrust law, international trade law, etc.

Lawyers should be wary of the penetration of economic analysis into non-market legal relations (family institutions, suffrage, parliamentarianism, etc.) because they have patterns and requirements other than economic efficiency. However, in the part where economic analysis of the law tries to explore market-based relationships, its methodology can be fruitful.

Perhaps, a lawyer operating an interdisciplinary methodology, and not constrained by the framework of any legal field, this is the constitutionalist, turned into a legal theorist, about whom Professor Bobrova writes.

Of course, there are objective difficulties in advancing such a methodology in the continental system of law. In the United States, economic analysis is used

mainly by the courts in specific cases, which is possible under case law, but difficult in the European legal family. Therefore, it is noteworthy to take into consideration the position of Kirchner, who pointed out that there are three levels at which the "law and economics" approach could be introduced into the system of continental law:

- 1) As a law-making tool at the legislator level;
- 2) As an analytical tool for criticizing and reviewing both legislation and court decisions;
- 3) As part of the methods of interpreting (interpretation) of the legal norms [27, 390 p.].

Based on the Russian experience, it can be noted that the introduction of this method at the level of the legislator happens, although not so fast as we would like it to happen. Thus, Article 3 of the Tax Code of the Russian Federation establishes the principle of economic validity of taxes and fees. Therefore, the legislator, adjusting certain rules of tax law, is obliged to use economic analysis.

As for economic analysis as a method of interpreting legal norms, the natural way of things going also encourages the courts to apply such analysis. Thus, the Russian Constitutional Court has a large number of cases related to tax issues. In such cases, it is difficult for the court to assess the constitutionality of a rule without researching its specific content or revealing its meaning. And this, in turn, cannot be done without resorting to economic analysis.

For example, how to assess whether the newly introduced tax blocks the constitutional right to free enterprise? Obviously, it is necessary to investigate whether such a tax is excessively high or not, and such reasoning is, in fact, already an economic analysis. Judges objectively lack the tools of such analysis, both because of the lack of a well-researched doctrine and because of the personal characteristics of the judges themselves. Perhaps these circumstances stipulate the cautious approach of the Russian Constitutional Court to interference in the economic decisions of the legislator.

For example, Gadziev has repeatedly stressed that the Constitutional Court adheres to the doctrine of neutrality of the Constitution regarding the decision-making of economic decisions by the authorities [6, 4 p.].

Nevertheless, with the caution of the judges' statements, their stressed accuracy in assessing economic decisions, there is reason to believe that the full "economic neutrality" of the Constitutional Court is not possible.

In the past few years, the Constitutional Court has had to deal with a great number of cases that raised the constitutionality of the sanctions under the Code on Administrative Offences. One of the most extensive judicial acts adopted in this regard is Ordinance No.4-P of February 25, 2014.

As part of the case, the court held that the legislator should provide mechanisms in establishing administrative responsibility to ensure "the adequacy of the administrative coercion of all circumstances essential to the individualization of responsibility and punishment for an administrative offence" (para. 2 of the Ordinance).

Revealing this statement, the court points out that the purpose of administrative responsibility - to punish those responsible for the offence - should not lead to excessive restriction of property rights and interests of the violator. The criteria to assist in the imposition of adequate punishment are the nature of the administrative offence, the circumstances of its commission and the consequences, the degree of guilt, as well as the property and financial situation of the offender (paragraph 4.1 of the Ordinance).

The position of the Constitutional Court effectively encourages both the legislator and the ordinary courts to implement the economic analysis of the law. When assigning an administrative sanction, the court must choose a penalty that will make the commission of the offence economically unprofitable, but at the same time, not to block the possibility of the offender's development (investing in assets, ingesting labor, etc.).

Thus, economic analysis at the level of the Courts is inevitable. Although the Constitutional Court of the Russian Federation does not use the term "economic analysis" directly and adheres to the doctrine of "economic neutrality", it often delves into the economic essence of the public relations it is considering. Moreover, it directs ordinary courts to carry out economic analysis in resolving cases.

Science, if it wants to remain adequate to reality, must also develop in this direction. It seems inevitable that European jurisprudence must use such developed in the United States areas as "economic analysis of law," "law and economics" and others.

More broadly, the complex social life requires a revision of the model of legal thinking, the most appropriate name of which is constitutionalizing.

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