LECTURE

CONSTITUTIONAL LAW: NOTION AND SOURCES

By Boris Strashun

Author

Doctor of science (Law), Institute of State and Law, Academy of Sciences of the USSR, 1978
Professor, Kutafin Moscow State Law University
E-mail: 29-29@mail.ru

Abstract

This paper consists of two main parts. The first one gives an understanding of the term "Constitutional Law" and its different meanings: as a system of legal regulations, legal studies, and an academic discipline. It's worth mentioning that some scholars define Constitutional Law as a Political Law. This is also correct, even if nowadays, some constitutions tend to include certain issues that seem to be absolutely irrelevant; for example, the ones concerning the institutions of marriage and family. This results from the fact that a constitution-maker considers those issues to have a political meaning. Regarding methods of legal regulation, they are not much different from the ones used in other branches of law, which are: obliging, permitting (authorizing), and prohibiting. At the same time, the author also mentions the method of general principles declaring. Constitutional Law as legal studies is a result of its norms and social relations research, which elaborates recommendations for lawmakers and relevant state bodies concerning the proper development and interpretation of Constitutional Law norms. Most of the law universities in Russia include Constitutional Law of the Russian Federation and Foreign Countries, as well as Comparative Constitutional Law, as a part of scholar program. The second part of this paper defines the sources of Constitutional Law. There are also some ideas of constitutionalism.

Keywords

Constitution, constitutionalism, Constitutional Law

§ 1. The Term "Constitutional Law" and "State Law". Object, Subject and Methods. Scholarship and Studies

1. First of all, Constitutional Law is a *system of legal norms*. Most of the scholars consider that system to be a branch of law, which is not absolutely correct. Constitutional Law is more the basis of law than a branch of law. What's more, Constitutional Law contains essential principles of different law branches (Criminal Law, Civil Law, etc.).

Until the end of the last century, Constitutional Law had the name of "State Law" in Russia. It's worth mentioning that the term "State Law" includes all kinds of norms, which regulate organization and activity of a state, i.e. Administrative Law and Process, Judicial Law and Process. Constitutional Law is considered to be a fundamental part of Public Law. Sometimes it may seem difficult to differentiate Public Law from Private Law for the reason of the interlacing of Economics and Ecological Law and the influence of the European Union and International Law.[1]

The Constitutional Law of Russia, as well as that of the countries with the Anglo-Saxon and Roman systems, includes all the norms that have constitutional meaning, regardless of the source that contains them.

The term "Constitutional Law" originates its name from the name of basic law, the Constitution, which appeared in the time of Ancient Rome. This term used to mean "order", "structure". The system of law norms that is nowadays called Constitutional Law used to regulate only a structure of public authority in Ancient Rome.

In modern times, there are just a few countries that still use the term "State Law". Most of the modern states define a system of fundamental legal norms as Constitutional Law.

It's worth mentioning that Constitutional Law appeared in a relatively peaceful way in just a few countries. In most of the cases, it emerged as a result of revolution or other kind of violence. But anyway Constitutional Law became firmly established upon finding a *compromise between contradictory social interests*. This is very important for society in general because it has a risk of

[1] H Maurer, I Staatsrecht, *Grundlagen. Verfassungsorgane. Staatsfunktionen. 6, überarb und ergänzte Auflage* (2010) München: C.H. Beck 8.

self-destruction without that compromise. What's more, this concept is exactly what the *social and political nature of Constitutional Law* means.

The object of Constitutional Law should, first of all, include political relations, i.e. relations concerning the organization and functioning of political authority, especially public authority. Constitutional Law sometimes can be defined as Political Law, which is also correct, even if nowadays, some constitutions tend to in-clude certain issues that seem to be absolutely irrelevant for politics; for example, the ones concerning the institutions of marriage and family. In particular, the Constitution of the Federal Republic of Brazil contains a lot of similar provisions, so it means that constitution makers consider them to be politically important in this case.

The subject of Constitutional Law is formed by the norms regulating social relations, which have to be reflected in the Constitution.

One of the most important Russian Constitutionalists and Legal Scholars, O.E. Kutafin, stated as follows:

> The most important subject within Constitutional Law is a group of social relations, which form a ground for the state organization.
>
> Another group of social relations is formed by the relations that have a basic level of significance for those spheres through which they have come into existence. Such relations are not obligatory and they can become elements of Constitutional Law, just in case where there is a state interest[2].

Art. 10 of the Russian Federation Constitution of 1993, declares: "State power in the Russian Federation comes into effect on the grounds of division between legislative, executive, and judicial powers. The respective authorities of the legislative, executive, and judicial powers are independent".

So, state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive, and judicial powers. The respective authori-tative bodies of the legislative, executive, and judicial powers shall be independent. Certain provisions of the Constitution, as well as other laws, specify the limits of every branch of power independence, in addition to the forms of their interaction.

---

[2] Kutafin O.E. Predmet konstitutsionnogo prava. M.: Norma, 2001 (OE Kutafin, *The Subject of Constitutional Law* (Norma 2001)).

Certain provisions of the Constitution, as well as other laws, describe and specify the limits of every branch of power independence, in addition to the forms of their interaction.

Regarding the other group of relations (non-obligatory ones), Art. 200 of the Brazilian Constitution, is a very good example of those relations that define the competence of the Common Health System.

It's worth mentioning the opinion of the French Professor J.-P. Jacqué on the subject: "As its subject, Constitutional Law defines political relationships with the state power as the most important component."[3]

Like many other branches of law, Constitutional Law uses three methods for legal regulation: *obliging, permitting (authorizing)* and *prohibiting*. For example, according to § 2 of Art. 17 of the Brazilian Constitution, political parties are *obliged* to register their statutes with the Superior Electoral Tribunal; according to § 3 of that article, they are *permitted* to have free access to radio and television; and § 4 of the same Article *prohibits* them to involve any military organization.

At the same time, Constitutional Law implements the method of *general principles declaring*. For example, Art. 1 of the Polish Constitution of 1997 declares: "the Republic of Poland shall be the common good of all of its citizens". The *method of definitions* (normative determinations) is also rather common for Constitutional Law. Art. 20 of the German Fundamental Act of 1949, declares: "the Federal Republic of Germany is a democratic and social state".

2. Constitutional Law as legal studies is the result of the research of relevant norms and relations. It elaborates recommendations for lawmakers (other relevant state bodies) concerning the proper development and interpretation of Constitutional Law norms. But the lawmakers are not always eager to follow those recommendations. The problem is that sometimes, a theory is too far-removed from the reality of practice. But it is more common that legislative, administrative and even judicial practice steps aside from the norms of Constitutional Law, either because of misunderstandings of law norms idea, or because of some sort

---

3 J.P. Jacqué, *Konstitutsionnoe Pravo i politicheskiye instituty*. Uchebnoe posobiye / Perevod s fr. Maklakova V.V. M.: Yurist, 2002 (J.P. Jacqué, *Constitutional Law and Political Institutions. Tutorial* (Translated from French by V Maklakov, Lawyer 2002)).

of evil intent. Unfortunately, this kind of phenomenon became more and more common in the last decades.

3. Scholar program of Russian law universities includes Constitutional Law of the Russian Federation, Constitutional (State) Law of Foreign Countries and Comparative Constitutional Law. Constitutional Law of the Russian Federation among others includes Municipal Law, Electoral Law and Constitutional Judiciary. An academic program and educational materials on Russian Constitutional Law are structured according to the structure of the Russian Federation Constitution.

Foreign textbooks are different. First of all, they often contain a brief presentation of a general theory of Constitutional Law, or even of a State, subsequently presenting parts that characterize Constitutional Law institutes. The typical example of a Constitutional Law textbook is the one written by Karel Klima, the Czech Professor of Law.[4] The first part of it includes general provisions, which characterize the nature of the European Constitution. The subsequent part is devoted to the history and provisions of the Czech Constitution. Finally, it contains a part that deals with Constitutional Court Practice.

There is a different approach in "Constitutional and Administrative Law" by the Principal Lecturer of Law at De Montfort University, N. Parpworth.[5] The textbook, first of all, contains the essential principles of the Constitution, followed by its structure, and thereafter, by sources of Public Law. It also includes the judicial review of administrative actions, alternative means of compensation, and finally, provisions on civil liberties. Another British textbook, which has the same title, written by Professor J. Alder,[6] includes general principles (political values: liberalism, republicanism in spite of the monarchic form of government, equality, democracy; sources of the Constitution; historical outline; an overview of the main constitutional institutions; the territory and regions; the rule of law; the separation of powers; parliamentary supremacy; the European Union), followed by government institutions (Parliament, the Crown, ministers, and departments), Administrative Law (the grounds for

4 K Klíma , *Ústavní právo*. 4. vyd. Plzeň: Aleš Čeněk, 2010.

5 N Parpworth, *Constitutional & Administrative Law*. (4-th edn, Oxford University Press 2006).

6 J Alder, *Constitutional and Administrative Law* (Palgrave Macmillan 2009).

judicial review, such as illegality and *ultra vires*, beyond *ultra vires*, and judicial review remedies; human rights; exceptional powers, such as a security, state secrecy, and emergencies).

Another example is "Constitutional Law," written by Brazilian Professor A. de Moraes.[7] It includes the following parts: a general definition of Constitutional Law, the constitution-making power, fundamental rights and guarantees, constitutional rights protection, social rights, political rights, political and administrative organization (i.e. organization of the territory), Public Administration, the organization of Powers and of the Public Prosecutor's Office, the legislative procedure, the control of constitutionality, the defense of the State, and democratic institutions.

Therefore, sometimes, it might be hard to differentiate between Constitutional Law and Administrative Law, and even Judicial Law, in some cases. It might depend on the constitution maker's intention.

§ 2. The Sources of Constitutional (State) Law. Constitution as the Primary Source. Constitutionalism. Other Sources

1. *The primary source of Constitutional (State) Law, by its nature, is the Constitution*. Constitutions usually have a written form and consist either of a single document (in most of states) or of several documents. For example, the French Declaration of Rights of Man and Citizen (1789), the Preamble of the former Constitution (1946), and the Charter of Environment (2004) are all those documents that have equal legal force with the French Constitution of 1958 and are the integral parts of the French material Constitution. The Swedish Constitution consists of the following acts: the Instrument of Government (1974), Act of Succession (1810), the Freedom of Press Act (1949) and the Fundamental Law on Freedom of Expression (1991). But, as stated above, constitutions exist as a single document in most of the modern States.

It is worth mentioning a manuscript of a Russian lawyer, published not long ago, which states: "... A Constitution, in its way, is a social contract between

---

7 A Moraes, *Direito Constitucional.* (5ª ed., revista e ampliada, Atlas 1999).

different social and political forces of a society – the rulers and the ones being ruled. It must be clear for citizens."[8]

Some states have so-called unwritten constitutions. The best example is *Great Britain, where* there is no single *constitutional* document. The main source of the British Constitution (but not the only one) is the Statute Law. It consists of several laws, which are adopted by Parliament and have the equal legal force. Constitutional norms are also created by doctrine and courts' practice. The author doesn't think it's a good method.

However, J. Alder mentions in his text-book:

> Those familiar with written constitutions sometimes suggest that the UK does not have a constitution. This is, at least historically wrong in that the term 'constitution', although originally meaning a government enactment, was used in Britain in its modern sense at least by the seventeenth century. More importantly, the substantive content of a constitution can be the same whether or not it is written down. ... Dicey (1915) pointed out that a written constitution can be torn up whereas the unwritten constitution of the UK is embedded in the structure of the law as a whole (Chapter 7). ... The language of a written constitution may be very vague, leaving plenty of room for disagreement. For example, the US constitution has been interpreted at different times as both justifying and outlawing slavery."[9]

Written constitutions usually consist of a preamble, sections, chapters, or other sorts of parts. As a general rule, the main structural units are articles, which may consist of numbered or non-numbered parts. Some articles of the Brazilian Constitution, for example, have paragraphs. Some constitutions may have paragraphs instead of articles (for example, in Finland).

Although a constitution is the supreme law of a state, and even of a society, *it doesn't mean that any constitution is always realized in full.* It relegates control to the *powers that is* – to the head of State, to the government, even to the

---

8 Lisitsyn-Svetlanov A.G. Predisloviye. Konstitutsiya v XXI veke: sravnitel'no-pravovoe issledovanie / Pod. obshch. red. V.E. Chirkin. M.: Norma, Infra-M, 2011 (A.G. Lisitsyn-Svetlanov 'Preface', *The Constitution in the 21st Century: Comparative Law research* (V Chirkin ed., Norma, Infra-M 2011)).

9 Alder (n 6) 8.

parliamentary majority – and, therefore, operates as a social compromise that is expressed when it is more or less convenient to all sides. But a correlation of forces is changeable, and when there is no possibility to change the Constitution the balance of social interests is violated from above and from below. Then the Constitution becomes more or less fictitious. In addition a social conflict becomes possible, which sometimes happens.

In order to evade an easy adaptation of the Constitution to the current interests of the ruling political force, the constitution-making power aims at a certain *rigidness of the Constitution*. For example, the Russian Constitution of 1993, in its Chapter 9, contains a special defense mechanism for three Chapters – for Chapter 1 (grounds of the constitutional order), for Chapter 2 (rights and freedoms), and for Chapter 9 itself (constitutional amendments and review of the Constitution). To make changes in those Chapters, a convocative decision of the Federal Assembly has to be adopted by a majority of at least 3/5 votes of all members. The Constitu-tional Assembly convocation should be put into effect according to the federal constitutional law, which is not adopted yet, since there is no any common consent on its contents within the society. The Constitutional Assembly either has to confirm the efficacy of the valid Constitution or develop a new Constitution, adopting it by 2/3 votes of all members or submitting it to national voting. In case of submission, participation of more than a half of all voters and an expression of will from more than a half of them is required.

The other chapters of the Constitution have to be adopted by 3/4 of all Federation Council members and 2/3 of all the State Duma members, and approved by 2/3 of all federal unit legislatures. The implementation of amendments in 2008 and 2014 showed it as not complicated process under the current conditions.

Going back to the topic of amending, the Fundamental Act for Germany can be amended by a decision of 2/3 of all deputies of the Bundestag (the parliament) and 2/3 of all members of the Bundesrat (the chamber representing governments of the federal units). Nevertheless, such rigidness does not prevent the amending of the Fundamental Law nearly every year.

In India and in some other countries, seeking some similarity to the system of the USA, an amendment is not included in the text of the Constitution, but receives an ordinal number and is added to the Constitution after the end of its text. If a part of the constitutional text is abrogated, it is excluded from

the Constitution or is formally left with an indication that it is replaced by an amendment. In Brazil, amendments with consecutive numbers change the text of the Constitution and are incorporated into it.

In France, Italy, and some other countries, the Constitution is amended by constitutional laws, which include amendments to the constitutional text. In Italy, constitutional laws may also have another subject; for example, adopting the statutes of five regions with a special status. In Russia, federal constitutional laws don't amend the text of the Constitution and must comply with it. In France, if a law is adopted by a referendum, it has the legal force of the Constitution and its constitutionality wouldn't be examined by the Constitutional Council.

Many constitutions prohibit amending or abolishing of definite norms. Art. 89 of the French Constitution prohibits its review, if that review involves a territory violation of the Republic or government form changes. Part 3 of Art.79 of the German Fundamental Law prohibits any amendments, which can affect: a division of the State into federal units; their principal participation in the legislation; the duty of the State power to respect and defend human dignity and the people's adherence to inviolable and inalienable human rights; the absoluteness of directly acting upon human rights as part of the legislation; executive power and justice; the democratic, social, and federal character of the State; belonging of the State power to the people; the restrictions of the legislation by the constitutional order and of the executive power by the statute and the law; and the right of the Germans to resist any attempts to remove the constitutional order.

The *legal protection of a constitution* (constitutional control or supervision) is realized in many countries nowadays, either by any court of general jurisdiction (the USA), or only by the Supreme Court (India, Japan), or by the Constitutional Court or Tribunal (Russia, Spain, Italy), or by the Constitutional Council (France, Kazakhstan). The idea of the Constitutional legal protection is to stop the legal effect of any normative or administrative act that doesn't comply with one of the constitutional norms. That can mean an abrogation, invalidation, a checking of an act, or a deprivation of its legal force. That should be a result of either a court decision, or a legislative or administrative decision.

The difference between control and supervision is determined diversely. Mostly, the control assumes the power of a controlling body to abrogate an act of a controlled body, while the supervision entails maximum checking of a

supervised body act. If required, the supervised body either has to amend the act or abrogate it and issue a new one. Sometimes, the control may refer to an incidental intervention and the supervision as a constant observance. So long as there is no settled meaning for both terms, we use the term "constitutional control" in a wide sense, including the meaning of "supervision."

Constitutions usually determine the scope of persons who have a right to initiate a procedure of the constitutional control. That scope tends, more often than not, to include those individuals who have the right to *constitutional complaint*.

3. The term "constitutionalism" originates from the term "constitution". Constitutionalism appeared in Western Europe as an idea of a state-due organization, proposing the limitation of a Public Power by guaranteeing human rights and freedoms, and by non-admission of any concentration of power in the hands of one branch of power (*separation of powers* principle).

American Professor A. Dick Howard proposed the following fundamental values of constitutionalism:[10]

a) Consent of people guaranteed by representative bodies, free organization of political parties, free access to voting, and free discussion of political issues;
b) Limited government, secured by separation of powers;
c) Open society, illustrated, in particular, by the judgment of the USA Supreme Court, according to which there exists a deep national adherence to the principles of free, healthy, and widely open discussions on social problems;
d) Inviolability of the person, including privacy and autonomy; these rights may be either absolute or limited;
e) Norms of law (first of all, the ones that are applied to human beings) and due process of law, supposing justice, expressed in equality and fairness;
f) Succession (stability), coupled with the adaptation of constitutions to new conditions, either by changing their texts or through judicial interpretation.

---

[10] Khovard D. Konstitutsionalism // Progress-Univers. 1992. S. 53-65 (D Khovard, *Constitualism* (Progress-Universe 1992) 53.

Professor R. Bellamy (Great Britain) specifies two kinds of constitutionalism – legal and political ones:

a) Legal constitutionalism is formed by law norms (first of all, constitutional ones), regulating the organization of public power institutions so that they could guarantee the rights and freedoms of a human being and citizen, but could not concentrate power and violate, with impunity, these rights and freedoms. As a general rule, legal constitutionalism supposes the existence of a constitution with supreme legal force, and that of the superintending control, which, in this case, is the court;

b) Political constitutionalism supposes functioning of the public power in interest of the whole society, a possibility of influence on it (including the participation of all adults in it), mentally sane and law-abiding (lawful) citizens, equal attitude to them, and respect of their justified interests on all sides, i.e. a real democracy[11].

The author would like to mention another kind of constitutionalism, which is an imitated one. It has the necessary institutions of law (constitutions, elections, representative bodies, local self-government, and others), but their real meaning in a society life is either lacking or completely absent. Such constitutionalism may be observed in the majority of contemporary States, including Russia. It would be incorrect to look at this constitutionalism with contempt: as a progressive development of societies, this constitutionalism may turn into a real one, because its infrastructure already exists.

There is an opinion that only 23 European States have a functioning democracy. They have a tradition of judicial independence, protection of rights, and a stable system of law. Only three of the mentioned states have a strong system of constitutional judicial review. In four of them, the majority is verified by the Upper House of the Parliament[12].

It's worth mentioning that there are some scholars (for example, Professor R. Bellamy) who think that legal constitutionalism's admission of judicial review of laws does not warrant any preference over democratic political

---

[11] R Bellamy, *Political Constitutionalism: a Republican Defense of the Constitutionality of Democracy* (Cambridge University Press 2007) 1.

[12] ibid 2.

constitutionalism. In their opinion, conflicts in the society have to be settled in a political way because courts suffer from many vices for which parliaments are blamed. The reference to the law doesn't help because laws are sometimes arbitrary and do not guarantee an equal attitude towards citizens. They believe that people need to be self-governed, just to settle those conflicts.

Professor R. Bellamy, however, has to admit, that the domination of parties on the political arena leads to a gradual diminishing of democracy. He notes that the democratic mechanism is ill-suited for securing an effective and just government in contemporary, complex, and globalizing societies, where the electorate is too vast and diverse, problems are too technical, and the scale of government is too large for citizens. Under those conditions, constitutionalism could hardly offer the best available instruments for actual democratic decision-making. It becomes global and, as a result, doesn't give an opportunity for people to contribute to the processes that influence their lives. Nevertheless, Professor R. Bellamy supposes that the judicial control of constitutionality remains weakly established, and an unreliable as a method of constitutional values maintaining[13].

Analyzing political and legal situations of European states, the author comes to the conclusion that in those countries, political constitutionalism is being narrowed, while legal constitutionalism remains more or less stable. Now, let us address to the political issues of the USA pretending to be the standard of democracy. As it was mentioned in the mass media, capital punishment, disregards international agreements, racial and gender discrimination, and mass violations of personal freedoms form a list of claims that the UN member-states put forward to the USA (and the list of them is far from completeness). In most of the countries, including the ones recognized as democratic, we can see, regardless of constitutions, the strengthening of executive power based on the prejudice of legislatures. Integration into the European Union, as it is noted in the western literature, has led to a greater alienation of power structures from the population.

It's worth mentioning that many generations of Russian people did not know democracy. Therefore, it would be naive to suppose that in 20, or possibly even in 40, years, Russia will become accustomed to a democratic way of life,

---

13 ibid 260–61.

as current conditions do not promote it. Democracy demands a responsible attitude of a citizen to his/her social affairs. So the author believes that the constitutional imitation phenomenon will exist in Russia until the social psychology of the people improves.

It's hardly expedient to oppose both kinds of constitutionalism (political and legal). It is much better to realize their optimal combination in practice.

In some Moslem states, they have different understanding of Constitutional Law. For example, in Iran, it's the Quran, and not the Constitution, that has the supreme legal force.

An important group of Constitutional Law sources includes *laws with constitutional content* adopted by parliaments or referendums. They may have different legal force in different countries.

Most of the law mentioned above are *simple or ordinary laws* and their legal force is equal to all the other laws. But in some countries, *the legal force of constitutional laws* is higher than simple laws, and may even have the same legal force as a constitution does. In Italy, for example, constitutional laws affirm the charters of five regions with special status.

In the Russian Federation, constitutional laws are issued only at the federal level. *Federal constitutional laws* regulate issues directly foreseen by the Constitution. But there are situations in which the legislator either exceeds the limits of a constitutional norm or, on the contrary, doesn't follow it at all. According to Art. 84 of the Russian Federation Constitution of 1993, the President of the Russian Federation assigns a *referendum* in the order established by a federal constitutional law. That means that a federal constitutional law has to regulate only the order of the assignment of a *referendum* by the President. But the Federal Constitutional Law of June 28, 2008 "On the referendum in the Russian Federation" regulates the whole totality of norms related to carrying out a *referendum*.

Art. 108 (part 1) of the Russian Federation Constitution of 1993 declares: "federal constitutional laws are adopted on the matters foreseen by the Constitution of the Russian Federation". Some scholars consider that this norm is to be interpreted verbally. In such a case, provisions, which are not less important for the regulation of *referendums* than the regulation of the order of their assignment, have to be specified in ordinary laws. This makes the system of

regulation to be unnecessarily complex and uncomfortable for law enforcement, as its unity may thus be violated.

However, according to Art. 128 (part 3) of the Russian Federation Constitution of 1993, an order of forming federal courts and their activities is established by a federal constitutional law. What's more, those laws that regulate constitutional matters must have the form of federal constitutional law, but the reality can be quite different. For example, the Federal Law of March 4, 1998 "On the order of adopting and bringing into effect of amendments to the Constitution of the Russian Federation" is an ordinary federal law. Those laws that themselves maintain amendments, in spite of the complex procedure of adoption (the same applies to the federal constitutional laws procedure), are not called federal laws, but laws of the Russian Federation, and their legal force is in *pari passu* with the chapters 3 – 8 of the Russian Federation Constitution of 1993.

Many Roman countries (such as Italy, France, Spain and Rumania) have *organic laws*, which regulate the status of Public Power. The adoption of such laws is complicated and their legal force is higher than that of simple laws. In Brazil, organic laws are municipal constituent acts and are, in their own way, constitutions of municipalities.

It's worth mentioning that Art. 59 of the Brazilian Constitution contains a list of acts that have to be adopted by the National Congress. There are: amendments to the Constitution; supplementary laws; ordinary laws; delegated laws (they are adopted by the President upon the permission of the National Congress); provisional measures, which the President issues in urgent cases for immediate presentation to the National Congress; legislative decrees; and resolutions.

Court *judgments* are also very important as Constitutional Law sources, especially in Anglo-Saxon countries, where those acts sometimes have a character of obligatory precedent. It's a legal position, which is usually included in the motivating parts of judicial judgments or in the conclusions of superior courts on the issue of interpreting law norms. More often than not, legal positions on the problems of Constitutional Law are contained in acts of constitutional courts or tribunals, or those of constitutional councils. They sometimes have the legal force of the Constitution and sometimes, they make up for its evident deficiencies. A good example is the judgment of the

Russian Constitutional Court of October 31, 1995, which foresaw the order of amendments to Chapters 3–8 of the Constitution, and later took the form of an ordinary federal law.

There are some Russian scholars who share the well-known position of Montesquieu, according to which a judge is not a lawmaker, but only "the mouthpiece" of a law. The State's practice overturns that position, because even a judicial interpretation of constitutions and laws is impossible without the establishment of norms. It is not merely by chance that court judgments have the legal force of a law, while decisions of constitutional courts – and other courts with equal authority – sometimes have the legal force of the Constitution (at least via the interpretation of constitutional norms).

3. *Treaties* are considered to be a source of Constitutional Law in most of the modern states. First of all, it is about all kinds of *international treaties*, which can be different: agreements, conventions, pacts, and so on. Sometimes, a constitution only recognizes the superiority of ratified treaties, while ratification is made by parliaments (their chambers) or by heads of states upon the consent of parliaments (chambers). As a general rule, the principle of superiority mentioned above is not applied to constitutions, which are supreme legal acts. As a rule, the legislator isn't obliged to bring a national law into line with an international treaty: in case of any contradictions between national and international norms, international ones should apply.

As a matter of fact, there are other approaches. The Constitution of the Slovak Republic of 1992[14] (point "a" of part 1 and part 3 of Art. 125) states that the Constitutional Court passes judgments about the conformity of laws with the Constitution, constitutional laws, and international treaties, to which the National Council (the parliament) gave its consent. In case of a lack of conformity, verified by a judgment of the Constitutional Court, a law or its provision should no longer be valid.

Intra-state treaties can also be considered as Constitutional Law sources. For example, according to Art. 145 (part 2) of the Spanish Constitution of 1978, statutes of autonomous communities (the biggest territorial units of Spain) may contain provisions, requisites, and conditions of their mutual

[14] Č. 460/1992 Zbierki zákonov. The last amendments: 2012 Z.z 232.

agreements for the purposes of administration and services. They have to inform the Parliament of those agreements, which sometimes requires the approval of General Cortes.

4. *The acts of the bodies of the European Union* also serve as Constitutional Law sources for the European states, even when those acts are not international treaties, but have a supranational character and regulate constitutional relations. The best example is a *judgment of the European Human Rights Court*, established by the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, which was adopted by almost all European States. In Russia, like in many other states, there is no international treaties' priority over the Constitution, so when there is a contradiction with judgments of the Russian Constitutional Court, it is in relation to those of the Human Rights Court.

5. It's very common for Constitutional Law sources to serve constitutional *customs* (in the United Kingdom of Great Britain and Northern Ireland, they are called *constitutional agreements*), although they have legal force.

Yugoslavian Professor M. Jovičić divided constitutional customs into three groups[15]. The first group presents constitutional customs generated by the Constitution. As a matter of fact, there are customs related to its interpretation and realization (*secundum constitutionem*). The second group is formed by the use of customs in making up for Constitutional deficiency (*praeter constitutionem*). And the third group includes customs that contradict the Constitution (*contra constitutionem*); this group exists outside of the legal field for political reasons. As a matter of fact, they are not the sources of Constitutional Law, but on the contrary, are about its direct violation. M. Jovičić, following prominent French scholars, held that all constitutional customs had no legal character and couldn't be sources of Constitutional Law[16]. The author believes that opinion is very disputable.

Since constitutional customs have no legal force, it would be hardly correct to put them in the same rank with written norms, which imply obligatory application by the courts. Legal positions in judicial and quasi-

---

15 M Jovičić, *O ustavu: Teorijsko-komparativna studija* (Savremena administracja 1977) 256.

16 ibid 268.

judicial judgments, which refer to constitutional customs, may legitimate them, but hardly oblige other courts to recognize them as a legitimate source of law, provided they are not judgments of a constitutional court (constitutional council) or a supreme court of a general jurisdiction with the constitutional control competence.

Unfortunately, customs that contradict the Constitution exist also in Russia. A very good example of this is the presence of widespread corruption, even in structures of Public Power, in spite of the Constitution and the existence of laws.

6. In the United Kingdom, the *doctrine* is considered to be one of Constitutional Law sources, although it isn't judicially defended. As a matter of fact, the doctrine determines what should belong to the material constitution. The doctrine consists of distinguished scholarship and judicial judgment works. They serve as the ideological grounds for judicial decisions.

Conclusion

There is no doubt that constitutions and constitutionalism are essential elements of any modern civilized society. During the last centuries, we can see an expansion of the constitutionalism phenomenon in our world. Unfortunately, we can also observe the opposite process: the violation of constitutional regulations.

It is difficult to foresee the future, but we must consider the existence of states with a forcefully overpowering culture. These states don't share the values of western culture and also have dangerous technical possibilities. Constitutionalism and human rights are not part of that culture. Any attempt of western powers to use those forces for achieving some political goals has inevitable consequences, which contradict to desirable results. We saw these in Libya and in a number of other countries. Constitutionalism needs a powerful system of defense nowadays.

Bibliography

Alder J, *Constitutional and Administrative Law* (Palgrave Macmillan 2009)

Bellamy R, *Political Constitutionalism: a Republican Defense of the Constitutionality of Democracy* (Cambridge University Press 2007)

Jacqué JP, Konstitutsionnoe Pravo i politicheskiye instituty. Uchebnoe posobiye / Perevod s fr. Maklakova V.V. M.: Yurist, 2002 (Jacqué JP, *Constitutional Law and Political Institutions. Tutorial* (Translated from French by VV Maklakov, Lawyer 2002))

Jovičić M, *O ustavu: Teorijsko-komparativna studija* (Savremena administracja 2007)

Klíma K, *Ústavní právo* (4 vyd, Aleš Čeněk 2010)

Khovard D. Konstitutsionalism // Progress-Univers. 1992. S. 53-65 (Khovard D, *Constitualism* (Progress-Universe 1992))

Kutafin O.E. Predmet konstitutsionnogo prava. M.: Norma, 2001 (Kutafin OE, *The Subject of Constitutional Law* (Norma 2001))

Lisitsyn-Svetlanov A.G. Predisloviye. Konstitutsiya v XXI veke: sravnitel'no-pravovoe issledovanie / Pod. obshch. red. V.E. Chirkin. M.: Norma, Infra-M, 2011 (Lisitsyn-Svetlanov AG, 'Preface', *The Constitution in the 21st Century: Comparative Law research* (V Chirkin ed., Norma, Infra-M 2011))

Maklakov V.V. Konstitutsionnoe pravo zarubezhnykh stran. Obshchaya chast'. Uchebnik. Izd. 2. M.: Infotropic, 2012 (Maklakov VV, *Constitutional Law of foreign countries. General Part* (Wolters Kluwer 2006))

Maurer H, Staatsrecht I, *Grundlagen. Verfassungsorgane. Staatsfunktionen*. 6., überarb und ergänzte Auflage (C.H. Beck 2010)

Mogunova M.A. Gosudarstvyennoye Pravo Shvetsii. M.: Norma 2009 (Mogunova MA, *The State Law of Sweden* (Norma 2009))

Moraes A, *Direito Constitucional* (5ª ed., revista e ampliada, São P Atlas 1999)

Parpworth N, *Constitutandional & Administrative Law*. (4-th ed., Oxford University Press 2006)