On understanding the essence of Constitution and its place in maintaining the social homeostasis

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Abstract: This article is devoted to consider the existing theories of essence of Constitution and to justify the essence of Constitution to guarantee the important democratic institutions and values enshrined in them. The modern society is considered as a complex social system, where the social stability and social homeostasis must be maintained. The Constitutions declare and guarantee the real existence (social severability) of fundamental rights and freedoms of the person and the citizen, democratic principles and objectives of the state and social structure in the social reality. The author considers the Constitutions as legal acts adopted to ensure the social homeostasis and stability of modern society.

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Introduction

Essence, as a philosophical category, is a sense of the thing, what it is in itself, compared to all the other things [1]. Scientific research on the essence of the Constitution, its social purpose and characteristic signs are held since the advent of Constitutions and up to the present, and, certainly, are rather relevant and complicated.

In the scientific literature there are seven basic approaches to defining the essence of the Constitution [2, 3, 4] :1) technical (normativism) direction; 2) natural law (legal and contractual) concept of the Constitution; 3) sociological (Lassallean) theory of the Constitution; 4) class (Marxist-Leninist) theory of the essence of the Constitution; 5) theological (divine) concept of the essence of the Constitution; 6) Institutionalism direction in determining the essence of the Constitution; 7) social and genetic concept in the study of essence of the Constitution.

Normativism (normative) concept

of law identifies the law in general and the Constitution in particular with the establishments (instructions), approved by the state authority, in the basis of this theory the ideas about the normalization as a fundamental sign of law are laid. The foreign lawyers: H. Kelsen, R. Iering, L.Djugi, and R.Shtammer, contributed to the development of such legal thought at the end of XIX - early XX century.

"According to Kelsen, the real world or the very social life confronts to the law as the proper world. The legal norms owe their origin and development not to the real public relations, but to the technical establishments of the state or some kind of "sovereign prime norm." The presence of this basic norm determines a pyramidal law construction, wherein each norm derives its legal force in the norm occupying a higher stage of the pyramid compared with it. In the understanding of G.Kelzen, "the Law (and the State) is regulatory set and maintained law order" [5].

By the early 80-ies of the XIX century those scientific ideas were developed by the Russian school of legal positivism, represented by "the names of such famous lawyers as S.V. Pahman, A.H. Golmsten, D.I. Azarevich, N.D. Sergeevsky, N.M. Korkunov, N.I. Palienko, and G.F. Shershenevich".

The legal phenomena were studied from the standpoint of dogmatic method, "the Russian lawyers-positivists treated the Law in the full separation from the economic basis, and therefore could not determine its true essence. They have announced that the formal signs of law and not its constantly changing content shall be the subject of study". [6]

Constitution in accordance with the normative concept of law is represented as the fundamental law (legal document), which defines the mechanism of state authority (basis of the organization and functions of government), human rights and freedoms, provided by the force of state compulsion and possessing the supreme legal force (i.e. occupying the first place in the hierarchy of laws).

The vulnerability of technical approach lies in its increased attention to the formal side of law and ignoring the natural and moral principles in Law, in the fact it reflects only the instrumental role of the Constitution, doesn't let answer the questions about the causes and (or) changes in specific Constitution.

Natural Law School

is based on the thesis that the Law has a natural origin, human rights and freedoms belong to him from birth, the objectives of the State in accordance with this approach, are the recognition

and attainment of this right. Representatives of this school of law are H. Gratz, Spinoza, T. Hobbes, J. Locke, J.J. Rousseau, D. Diderot, Ch. Montesquieu [7], P. Holbach, A. Radishchev and others.

From the standpoint of natural law school the Constitution is represented as "a set of rules of natural law, public, discussed and secured by the State and secured by the force of state compulsion; wherein the adoption of the Constitution, Constitutional reforms are possible only if there is a social contract, the agreement on the concept of natural law deposited in the Constitutional text. According to the interpretation of the essence of the Constitution as a social contract all members of society due to the adoption of the Constitution as would have entered into a contract, embodied in the Constitution, about on what basis such society was established, by what rules it lives. According to those concepts, the Constitution is the expression of popular sovereignty and the manifestation of its single will." [2]

The influence of thoughts representatives' of the natural contractual theory law in the definition of Constitution is extremely progressive. The advantages of the theory are the recognition of inalienable human rights and freedoms, the assumption that the laws (Constitution) may not always meet the natural law (i.e. the standards of fairness), thus, we substantiate the necessity to bring the laws into conformity with such moral values as justice and freedom.

Sociological concept

based on studies of the social and political essence of the Constitution, it represents as the recorded political constellations existing at the time of its adoption. According to this theory every part in the society (social stratum, class, national or territorial community) seeks to protect or express its interests and, namely, the expression of those interests is reflected in the Constitution.

The basis of this understanding of the Constitution was laid by the German philosopher and lawyer - Ferdinand Lassalle. In 1862, in his famous speech "On the essence of the Constitution" [8] F. Lassalle said that the Constitutional issues are the issues of force rather than right, "... the actual Constitution of the country exudes only in the country's existing real actual force relations" that, in fact, reflects the correlation of forces in the country". [9]

"This is Lassalle and his followers proclaimed the legal way to convert the society as the only possible one". "Lassalle wanted to create and created within the labor movement, principally focused on the legal existence in the framework of bourgeois legality" [10].

Since the proponents of social approach consider the Constitution as the correlation of forces recorded on the paper, respectively, you can conclude that such quality in the Constitution as immunity is absent, because in case of violation of forces correlation, there is no way to keep it.

In a consequence the sociological concept of Lassalle has received its development in the works of proponents of Marxist-Leninist theory, who understood the essence of the Constitution, as an expression of the ruling class's will, and not the entire population, the reflection of forces correlation in the class struggle. This approach is based on the views of K. Marx, F. Engels, and V.I. Lenin, whose doctrine took the final shape in the Soviet Union whose doctrine took the final shape in the Soviet Union in the 30 years of XX century in the Short History Course of the CPSU (b). K. Marx and F. Engels represented the production relations as the primary element, a basis, on which the society was built, and in turn they determined the existence of classes (they have appeared on the basis of the division of labor and private property), while the state and the law (correspondingly, the Constitution) are a consequence of such relations development. "In this respect the essence of law is not just the will of the ruling class, but the will made into a law, norm, and rule. Thus, the Law is the system of rules of conduct, and not just the will by itself" [11].

From the viewpoint of the representatives of this theory the Constitution, is an instrument to consolidate the political dominance by the class and a product of the class struggle (economic, political and ideological).

Theological approach

It is based on the assertion that the Constitution is a product of divine orders (Divine will) to people.

Such an understanding of the phenomenon of the Constitution is based on the postulates and ideas of religious law, presupposed the interpretation of any problems (events) from the position of reflection the manifestation of the essence of God.

The religious law includes: church law, canon law, Muslim law, Hindu law, Judaic law. The religious legal systems don't represent a unified legal family and vary considerably in the content and form, but these systems always represent the combination of law and religion, and as a primary source they consider not the secular state authority and the will of the deity, the holy texts are recognized as sources of law (in the formal sense), their interpretation by the theological doctrine, church acts, religious and legal customs. After a period of bourgeois revolutions the canon law is no longer relevant. After a period of bourgeois revolutions the canon law has lost its

relevance due to the separation of State church, while Muslim law keep it.

In Syria, Iraq, Egypt, Iran, Afghanistan and Azerbaijan the Muslim law is an integral part of their religion - Islam, includes the theology (prescriptions, dogmas of cult) and Sharia (arabic "path to follow"), which owes its origin to the supreme unique deity Allah. For example, the particularly important the Islamic law put "to the principle of monotheism (tawhid), according to which everything in the universe and in people's lives (including the organization of the government and regulation of public relations) submits to the will of Allah, expressed, primarily, in the Muslim law" [12].

Some Constitutions of Muslim states point to the belonging of power to God over the man and the world. (For example, Article 56 of the Iranian Constitution reads as: "Absolute power over the man and the world belongs to Allah. Namely Allah gave a man the right to control his own destiny in a society. No one can deprive a man of this divine right or to give someone the right to control the social fates of people in the interests of one person or a particular group of persons..."). From the viewpoint of Muslim law the principle of monotheism permeates all state structure, its bodies are the personification of orders of Islam, and people exercise such divine right, entrusted to the people by Allah, to create their own social destiny.

The advantages of theological approach to understanding the essence of the Constitution are the revealing of close dependence in the implementation of the Constitutional provision from the religious consciousness. Precisely within this theory it became possible to explain the high efficiency of the regulatory impact of the Constitution on the behavior of Muslims, because the Islamic law provisions were regarded as the religious behests in everyday life.

Institutionalism direction in determining the essence of the Constitution (the concept of institutionalism) refers to the flow of sociological legal concepts, whose foundations were laid by Maurice Oriu, and described more fully in the works of his follower J. Renard "Theory of the Institution. Essay in the Legal Ontology" and "Philosophy of the Institution". [13]

The representatives of this theory assume that the legal relationships balance the conflicting interests of various social groups, and thus a universal system of legal balance is creating.

"Initially, the directing idea of such Institution, according to M. Oriu, receives the normative expression in the volitional acts of the ruling parties. This is so-called the first layer, or a temporary state of law, which coercive power is provided by the authority of political power. The existence of such type of legal rules ("right of discipline") is explained by the necessity of compulsory regulation of relations within the social groups. Proceeding from this, each community or group establish and produce their own regulatory prescriptions that define the nature of relationships between its members".

However, he thought that the "right to of discipline" is imperfect and does not possess a genuine legal nature, because it's merely a subjective expression of idea directing of such institution. To become a real law, the legal regulations have to be approved, and you shall get the agreement in the form of accession to the regulations in force from the subjects, i.e. sanctioned by the very fact of their "long, no way disturbed existence." Only in this case, they are moving from the temporary state, with characteristic preliminary performance of power imperatives into the state of "established", statutory law (droit statutaire)" [14].

According to this theory, the Constitution is represented as an idea, detached from a particular person - the creator, integrated across the means and methods that are able to extend and consolidate its ongoing implementation and development, and which has the authoritativeness and the regulatory nature.

Social and genetic approach

was proposed by Zh.I. Ovsepyan and is based on disclosing of such essential function of the Constitution as the limitation of state authority [2].

This integrated approach assumes that the law, which the State doesn't only restrict, but also organizes so the authority in the Constitutional State stops being dominated by humans, and is converted into the power of law (supremacy of law), shall be contrasted to the high powered state, and the totality of such restrictions is the Constitution of this country. The basis of the approach is the study of Constitutions in the context of their genesis (occurrence) by the example of the bourgeois revolutions period in comparison with the current Constitutions. Zh.I. Ovsepyan justly notes that "the most essential thing in the nature of first Constitutions, established by the world practice, is that they proclaimed the sovereignty of law, subordination of state authority to the law; they determined the legal boundaries (limits) of the state authority. As well, this is the essence of the modern Constitutions— to establish the rules according to which the power of law is more powerful than the power of any political institution. State authority must be carried out within the legal framework, the arbitrariness in the exercise of state authority is unacceptable". [2]

The essence of Constitutions is "such laws are aimed at preventing the monopolization of

absolutism in power, exercise its dispersal, division, and deconcentration and vest authority to each of the government branches, which enable them to conduct the mutual control of each other; to restrain the attempts of bodies (officials) of the adjacent government branches to abuse their powers; to clamp down on the attempts of authorized partners to coup d'etat, assignment (capture) the plenitude of the power". [2]

However, those major indicators characterizing the essence of the Constitution — declaration of law priority over the state; the concept of division of the authorities, in terms of social and genetic approach, have the derivative nature with respect to the popular sovereignty and the inalienable rights and freedoms of the individual. An undoubted advantage of this theory is the ability to identify the various conceptual approaches and the delineation of essence (objective) of the Constitution with respect to the state and to the individual. From the standpoint of this theory, the essence of the Constitution with respect to the state authorities is to establish the limits (restrictions) for the exercise of power, but with respect to the individuals its essence is directly opposed, because the Constitution doesn't restrict a man by establishment of responsibilities, and proclaims his rights and freedoms. "The reason for the different conceptual approaches in the Constitutional regulation can be explained by the fact that in the State-legal relations the State and the individual are not equal partners". [2]

Understanding the essence of the Constitution is largely clarified in the course of historical analysis of its social mission. It is well known that the appearance of Constitutions in their modern sense, took place in the XVIII century in the period of bourgeois-democratic revolutions. The Constitutional provisions limited the "absolute power" of the monarch and his entourage, guaranteed the democratic principles of the state and society functioning (separation of powers, people power, periodic elections, legal equality, etc.). They were objectively placed above the power of the king, feudal lords, as it embodies the will of the whole society, the whole nation. The Constitutional and legal regulations guaranteed to every individual that the fundamental provisions written on paper will be actually implemented in practice in the social reality. The reality of Constitutions is their most important property expressing the social purpose of these basic laws. It's no accident in the Art. 16 of the famous French Declaration of human and citizen rights and freedoms issued in 1789, states: "Any society in which there is no clear guarantees of rights and there is no separation of powers, has no Constitution" (highlighted by the author).

Within the social and political contradictions unfolding inside the civilized communities, each of the social groups, in pursuit of their interests, is forced to fulfill certain obligations to others at the same time, too. By putting to the forefront its needs, it can't ignore the needs of counterparties, because its own welfare depends largely on how it will be treated by its opposite. Thereby the dynamically equilibrium relations through the diverse and vibrant functional connections are formed, the conditions for achieving the social homeostasis are created.

Homeostasis (Greek "homois" – similar, equal and "stasis" – motionless, state) — is a type of dynamic balance, typical for the complex self-regulating systems and consisting in the maintenance of essential parameters within the acceptable range to preserve the system [15]. Originally, the term homeostasis was used for the biological systems (for example, ensuring the constancy of temperature and blood pressure in humans and animals). In the mid-20th century, since the work of British researcher of complex systems W.R. Ashby [16, 17, 18], the active transferring of term homeostasis from the Biology to Sociology and other sciences took place.

Its use in the humanities and even legal knowledge has, of course, the conditional character, but it is possible for several reasons.

Mainly, the Legal Sciences use the research methods based on the principles of formal logic. Their essence is to determine the internal consistency of separate parts of a regulatory act to its general content, as well as in compliance with the hierarchy within the legal system, subordination of the lower acts to the parent, and eventually – to the country's Constitution. As far as the understanding of homeostasis in respect to the legal matter, we are talking about two points: Firstly, on the conformability of the regulatory act (mostly - the Constitution or laws) to the needs of life, social being, i.e. on the external conformability to the legal norm; secondly, on guaranteeing the most important democratic institutions and values in the Constitutions and thereby ensuring the social homeostasis by them. For example, the Article 2 of the current Constitution of the Italian Republic affirms that: "The Republic shall recognize and guarantee the inviolable human rights of both the individual and in the social groups."

The Russian society today, more than ever, needs the stability and confidence in tomorrow. Without providing such confidence, it's not necessary to speak of the effect from

any transformations carried out nowadays, including in the legal sector. The Constitution is intended to be the most important instrument to support the democratic institutions and values in the society, and thereby to ensure the social stability, social homeostasis. In the Constitution of the Russian Federation (the RF Constitution) for more than twenty times the term "is guaranteed" is used. For example, in Article 12 of the RF Constitution the local government is recognized and guaranteed as an integral part of the Constitutional order of the country.

The used in the Constitutions term "is guaranteed" means that the civilization values proclaimed in the Constitutional provisions should not remain only on a paper, and shall fully come to life, be realized in the social reality due to the purposeful domineering activities of state bodies. In other words, the state is obliged to create the necessary social conditions and prerequisites, under which the local authorities will be able to function effectively and to solve tasks assigned to them. At the same time it is also a kind of a legal imperative aimed to limit the state authority, which is always trying to increase its influence at the local level, in the sphere of local government.

The Constitutions, in their modern sense, have become one of the most important regulatory guaranteeing mechanisms that ensure the homeostatic state of civilization system due to the purposeful introduction of a special kind of relations in it. It didn't just attach the certain social relations in the rules of law, but also guaranteed that those relations (structure of the state authority, periodic elections, rights and freedoms of citizens, etc.) will really exist in the social reality. Thus, in Article 4 of the U.S. Constitution: "The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

If before, until the Constitutions, the law established only a legal possibility of entities to commit the behavior established in the rules of law (for example, there was a legal possibility to purchase any items, but not always there was a real possibility for lack of the necessary amount of money), the constitutional standards became to guarantee not only the legal but also the actual possibility of commit the behavior enshrined in them (real opportunity to participate in elections, equality of citizens, presumption of innocence, etc.). Such relations require the state and the individual to be ready to compromise and conventions, as well the mutual responsibility for the fulfillment of commitments and concluded agreements. The dynamics of social balance implies that the State and the individual don't act as antagonists, but as subjects, who respect the rights and freedoms of each other. For example, in Art.45 of the current Constitution of the People's Republic of China states: "Citizens of the People's Republic of China have the right to material assistance from the state and society when they are old, ill or disabled. The State shall develop the social insurance, social compassionate benefit and health care services needed to realize the right of citizens.

The State and society shall ensure disabled persons from among servicemen, shall provide the material assistance to families of fallen heroes, and shall provide benefits to the families of servicemen.

State and society shall help blind, deaf, dumb, and other citizens with disabilities to find a job, obtain funds to life, and get an education". The purpose of this constitutional provision in the PRC guarantees not only the legal, but also the actual (in practice) the opportunity of the citizen to receive the financial assistance.

The guaranteeing nature of the constitutional provision prescription determines some specific features of their structure. Not all of them have a classic three-element structure: hypothesis - disposition - sanction. In some guaranteeing constitutional and legal provisions there is a hypothesis and a disposition, and instead of sanctions there is another structural element called – curation [19] (from the Latin "kura" – care). Curation is part of the rule of the constitutional law, enshrining the guarantee of reality, social enforceability of provisions contained in the disposition of this rule. For example, Art.43 of the RF Constitution secured the Constitutional and legal regulation with the following structure:

hypothesis – each (- if);

disposition - has the right on education (- then);

curation – the accessible and free pre-school, general secondary and vocational education in the state and municipal educational institutions and at enterprises are guaranteed (-therefore it's socially feasible).

If we see the essence of the modern constitutions in ensuring by them the social homeostasis, social stability, guaranteeing existence of democratic institutions and values in the society, then there is need for a scientific assessment of the guarantee level of certain constitutional provisions in different parts of the separate State and in the different States.

For example, a right to education enshrined in many modern constitutions is guaranteed and

implemented to varying degrees in the settlements of African States, where they don't always even have a secondary school and in the capitals of European States. It is interesting to correlate the guarantee level of certain constitutional rights in Russia and other countries around the world. In our opinion, not only the human rights ombudsmen shall deal with it, but also the scientists studying the mechanisms for the implementation of constitutional regulations.

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