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The Constitutional Conceptual Landscape and Its Values

Constitutional law conceptual space is part of conceptual space. The ontological structure of constitutional law consists of three layers — legal principles, positive constitutional law, traditions and practice. The third layer contains inter alia constitutional law ethics. Constitutional law conceptualism is a kind of legal positivism. Constitutional law conceptualism presupposes some limited influence in law and non exaggeration of significance of conceptual reality represented in signs and symbols as the text of the RF Constitution.

Key words: legal space, constitutional law ontology, axiology of constitutional principles, traditions and constitutional law ethics, internalist and externalist approaches

1. Does constitutional law have its own values and, if the answer is yes, what are these values? How do constitutional values correspond with moral values? These seem to be simple enough questions. Article 2 of the RF Constitution contains a provision that states that the individual — alongside his rights and freedoms — comprises the highest of values. But the individual and his rights and freedoms constitute only the highest of all constitutional values, suggesting that there are other constitutional values, which exist within an objective and hierarchical system of constitutional values. For example, section 3 of article 55 of the RF Constitution sets out that individual rights and freedoms (which comprise the highest of values) may be curtailed in order to protect the following: the foundation of the constitutional system; the morality, health, rights and legal interests of other individuals; the security of the country; or the security of the government. All abovementioned objectives comprise constitutional values. Constitutional principles that comprise the foundational order of the constitution (chapter 1 of the RF Constitution) are particularly important values. The system of moral values is characterised by constitutional values when viewed through the prism of article 55 of the Constitution.

But only two aspects from a variety of constitutional values can be considered to be objective value systems. Fundamental human and civil rights and constitutional principles differ from aesthetic, moral and religious values in the fact that, collectively, they are enshrined into law and comprise the most important part of the intellectual landscape — the constitutional legal conceptual space.

2. In order to capture the substance and meaning of this concept, it is necessary to ontologically analyse what comprises the legal reality as a domain of legal science and in what ways legal reality corresponds with the material world or existence. Existence, as is

well known, is one of the fundamental philosophical categories. It is something that exists in reality; it is something that is. Past, present and future existence, as the sum of its parts, comprises reality[1].

Peter Berger and Thomas Luckmann noted that reality is the quality that allows phenomena to exist, independent of our will. Allowing for a multiplicity of realities, the authors specifically single out everyday reality, regarding it as the most superior type of reality. In comparison to everyday reality, other realities become the finalities of meaning, the enclaves within the framework of the superior reality, marked by characteristic meanings and perceptions[2]. B. Kistyakovskii, the famous Russian philosopher, discussed the same ontological ideas when he wrote that surrounding life is not just a uniform reality, but rather one that represents **several different realities**. The reality of physical objects (the material world) is one reality, while the spiritual reality of literary and artistic work is another. These different realities are closely tied together and depend on each other.

Returning to the purely empirical understanding of reality and the meaning of legal reality as a whole, B. Kistyakovskii posits that legal reality is psychological, on the one hand, and spiritual, on the other. It is not in any way physical. Legal reality is related to socio-governmental organisation, comprising both legal relationships and the institutions that administer them. Law, like any other cultural value, is a human creation — one, which in the process of objectification of the human spirit, resulted in a material manifestation. B. Kistyakovskii's concluding thoughts on the topic of legal reality are as follows: "If, after everything that has been said, we compare legal reality with the realities of various cultural goods, we will foremost have to acknowledge the **singularity of legal reality**. It should be considered as occupying a space halfway between the reality of art and sculpture, on the one hand, and literary and musical creations, on the other. Still, legal reality should be considered more closely to resemble the reality of the former than the latter."[3]

B. Kistyakovskii remarked that the question of legal reality was extraordinarily complex and difficult. In essence, it is a methodological question of scientific cognition of law. In contrast to material reality, which we experience directly and intensely with the aid of emotions, legal reality, according to Kistyakovskii, is a different type of reality. Nikolai N. Alekseev, a member of the Moscow school of legal philosophy (founded in the early 20th century), considered whether positive law could be part of reality (in the Hegelian ontological sense). Without explicitly stating the idea, Alekseev came close to defining legal reality by suggesting that, on the one hand, it exists in opposition to empirical reality, but, on the other, remains a "fact", a reality, albeit not a "transcendent", ideal or symbolic reality. This anticipates the understanding of legal reality as a type of virtual reality.

Mathematical formulae are "factual" in the same sense, in that they represent the conceptual space of mathematics. Notes and music form a similar special concept.

According to Alekseev, all of this comprises a "particular type of reality", a "special world".

Legal reality transforms the external world. As a result of juridical perception of reality, a certain type of thinking arises — juridical thinking reflects the outside world as if through

[1] *Ikonnikova T.I., Lyashenko V.P.* Legal Philosophy. Moscow, 2007. P. 119.

[2] *Berger P., Luckmann T.* The Social Construction of Reality. A Treatise of the Sociology of Knowledge. Moscow, 1995.

[3] *Kistyakovskii B.* Social Sciences and Law: An Essay on Methodology of Social Sciences and the Universal Theory of Law. In: Philosophy and Sociology of Law. St. Petersburg, 1998. P. 184.

a distorted mirror. Law is an extremely distorted mirror image of reality, as it inevitably employs a different type of fiction. This reasoning highlights the author's passion for phenomenology and, specifically, the influence of its founder, Edmund Husserl. According to Alekseev, law and order, just like moral order, "is a fiction in its own right". In other words, fundamental moral and legal concepts are varieties of practical fictions[4].

So, what is the idea behind our understanding of legal conceptual space? We consider it to be one of the categories of juridical ontology.

Factual reality is material, tangible, and visible. Hedge walls serve as an example of the material world, signifying that at least some part of the material world demonstrates to everyone that another part of that world is owned by legal subjects. It is possible to hypothesise a situation where, for a moment, all laws are repealed. But even in a situation where legal space has ceased to exist, aspects of material reality — as conveyed by walls and hedges — remain. Property rights, acts of registering one's property, are real, but only within the conceptual space of legal reality. Imagine a modern summer home somewhere in the vicinity of St. Petersburg. To the average observer, it appears as a fairly expensive building, which could be valued at approximately one million dollars. A lawyer would see this building from a completely different perspective, if s/he possesses information that the house was built without permission or if there are existing problems with registration. The price of the building, or its liquidity, sharply plummets. Lawyers, unlike the average man or woman, perceive two different realities — the normal world and the world of legal realties. Law students grasp legal reality with the aid of legal spectacles, so to speak, which enable them to perceive the real world in a different way.

Hernando de Soto writes that the understanding of the right to property comprises part of the legal conceptual space. It is the recorded entitlement to property that comprises its value, its capital. Such value exists as a result of the property's existence in property records, the deposit that was set out in the agreement and other similar legal documents, which economically fixate the most important characteristics of the assets, contrasting them to the visible quality of the actual object.[5] When a person turns his attention to the property rights of a house, including the availability of the respective governmental registration, from the actual house itself, he transports himself to a different conceptual space, which is "inhabited" by legal subjects and objects. This comprises the legal conceptual space (LCS). The fact that property rights are part of legal reality is confirmed each time a property (a house) transfers hands. It is impossible to establish ownership simply by looking at a house. In the material world, nothing changes when the owner of the property changes. The house remains the same, whether it is rented out or used as a security. The property right to a house does not comprise the house itself, but part of its legal conceptualisation. Most properties that are simultaneously "reflected" in the legal conceptual space enjoy an increase in their valuation. The myth of King Midas, who turned everything he touched to gold, serves as an excellent example of a perfect legal system, where registration mechanisms function properly. A house may be used for living in, or for provision of security to obtain credit, or as a means to procure investment resources. All of these improve its value. Aristotle offered an ingenious idea when he said that our abilities to utilise objects grow exponentially when we allow our thinking to concentrate on their hidden potentials!

[4] *Alekseev N.N.* The Foundations of Philosophy of Law. St. Petersburg, 1999. P. 21.

[5] *De Soto H.* The Mystery of Capital. Moscow, 2001. P. 56.

Images of real objects and subjects exist in the legal conceptual space. By all appearances, it is a type of virtual reality. In such a reality, images do not differ from the "originals", or images of objects in the external world. The concept of "virtual reality" first appeared as a specialised philosophical term in the 1980s, when the post-classical understanding of the object of inquiry was supplemented with the understanding of the reality of existence of objects, which assumes that a variety of heterogeneous objects can belong to the same reality. For example, in physics, the material substance and the energy field belong to the same physical reality.

Legal conceptual space has developed over a lengthy period of time. Nineteenth century legal science, which reflected the philosophy of Savigny, has probably had the greatest influence on the development of the legal conceptual space in modern times. Within this school of legal thought, there was an aspiration for utmost autonomy of the legal conceptual space, its enclosure form other academic disciplines. This represented a typically conceptual jurisprudence, in the words of R. Ihering, or "jurisprudence of concepts". Jurists created an autonomous, enclosed world of legal concepts and believed that law could be free from subjective interpretations of legal practitioners, because the legal conceptual space allowed the opportunity to achieve a solution to a legal problem in all possible cases by means of employing objective methods (such as analogies in law) within the confines of the enclosed logical systems of legal norms.

Legal conceptual space has historically originated from the efforts of legal academics, who, to a certain extent, had mythologised real life. The appearance of the concept of "persona" as a legal subject in Roman law symbolised the beginning of legal mythology. Savigny wrote that law could be perceived as human life itself, as perceived from a **particular point of view**! He also frequently repeated that law is a world of human interactions, **transformed** into legal form.[6]

Thus, legal conceptual space is a legalised reality, the reality of legal thinking. Law is the legal representation of the world, which establishes the proper, ideal behaviour of a person.

G. Radbruch believed that law could be defined as the totality of prescriptions, which regulate the interactions of individuals in society. Being a follower of Kant, he did not arrive at this definition inductively, or from the generalisation of individual legal phenomena. He created this definition deductively from the idea of law. According to Radbruch, the concept of law contains a variety of individual legal concepts, which, just like law itself, are a prori in their nature. They are firstly academic tools — not results — that aggregate legal phenomena and are considered to be necessary categories of legal thinking. We are talking about legal concepts that comprise the foundation of the legal conceptual space, such as the concept of legal norms (and its constituent parts), subject of regulation, set of facts, legal origins, lawful and unlawful behaviour.

Thus, legal thinking has specific characteristics: 1) it mythologises reality, 2) it operates based on a priori conceptualisation, 3) it is evaluative, as the streamlining of human interactions occurs by means of separating legal substance from legal indifference.[7]

Describing legal conceptual space is as difficult as trying to describe the space occupied by the universe. Its formation begins with the appearance of autonomous, purely legal con-

[6] See: *von Savigny F.* History of Roman Law during the Middle Ages. In: The German Historical School of Law. Chelyabinsk, 2010.

[7] *Rabdruch G.* P. 47.

cepts. A law subject — persona in the Roman conceptualisation — is not a real person with specific biological characteristics, but is rather a legal being.

Thus, in the course of protracted historical development, a universe of legal concepts was created. These concepts are the same "final conceptual domains" described by sociologists P. Berger and T. Luckmann. Roman lawyers, mediaeval analysts of Roman law (glossators) and German pandectists have also contributed greatly to the foundation of legal concepts. From our perspective, the zenith of this intellectual paradigm is Hans Kelsen's "pure theory of law", which considered the assertion that it is fundamentally important to emphasise the difference between "real" and "proper", between reality and norms, between facts and values.[8] H. Kelsen discovered two new characteristics of legal conceptual space — norm hierarchy and their reality. Norm hierarchy is described by Kelsen as *norm interaction* and their effects on each other. The legal *system* is a dynamic system and, as such, each norm has a role in influencing norms which occupy lower levels of the hierarchy. The hierarchy of norms, comprising several levels — with the most abstract ideas at the top and the most concrete ones at the bottom — can be uncovered when analysing legal structures. The hierarchy of norms is based on the understanding of reality of legal norms, which, in turn, determines the *unity* of the legal system. From the perspective of pure theory of law, the only purpose in utilising the hierarchy of norms is to understand the interdependency of interactions between legal norms. According to Kelsen, the reality of a norm should be determined within a concrete legal system using structural considerations, whereby higher level norms predetermine the realities of lower level norms and, consequently, guarantee the application of norms within the system. In essence, the understanding of norm reality in pure theory of law differs from a general understanding of norm reality when we contemplate legal outcomes. Pure theory of law assumes the presence of a *fundamental* norm (Grundnorm), which represents a hypothetical norm, whose existence is the logical precondition for all others. This norm allows all other norms to obtain their role in reality. The main presumption of any legal system — "legal norms must be observed" — is a fairly close attempt at the fundamental norm. As such, the point of the fundamental norm doesn't come from its contents, but rather from the fact that it determines the structure of the legal system and the criteria that sets out the realities of legal norms.[9]

These characteristics of legal reality comprised the foundations of Kelsen's theory of judicial constitutional review. It is not a coincidence that Hans Kelsen is considered the father of European constitutional courts.

3. In essence, Kelsen substantiated the specific character and necessity of acknowledging the *constitutional-legal conceptual space*, although he himself did not use this concept.

At the basis of this ontological conceptualisation there exists a specific world of basic constitutional legal concepts. Concepts of constitutional law are frequently employed within other branches of law. For example, the word "dwelling" is used in criminal proceedings, and in family and property law. But only within constitutional law does this juridical concept have the widest application, which separates it from similar juridical definitions in other branches of law. "People", "will of the people", "state power", "division of power", "democracy", "republicanism", "freedom", and "justice", among others, comprise some of the most important constitutional legal concepts. Freedom of expression implies not

[8] *Lukashevich V., Shalat O.* "In Search of Purity in Juridical Science (A Short Essay on Hans Kelsen's Philosophy of Law). In: Comparative Constitutional Review. 2008. N 3. P. 178.

[9] *Lukashevich V., Shalat O.* Ibid. P. 180–181.

only the use of words, but also actions and deeds, within the conceptualisation of constitutional law.

Historically, the constitutional aspect of legal conceptual space emerged in the period shortly preceding and during the French Revolution, when philosophers-Encyclopaedists discussed the meaning of freedom, equality, and brotherhood. These ideas became commonly accepted after they had been integrated into colonial American constitutionalism. American society, free from many social prejudices, gave birth to a new, multiclass political elite, which promoted the idea of shared constitutional values. The idea of the constitutional aspect of the legal conceptual space as a unifying concept among civilised nations emerged after the Second World War. It came into existence alongside the greatest consensus on basic human rights and freedoms.

Constitutional values, which we employ to inform our analysis of the constitutional aspect of legal conceptual space, form the foundation of the constitutional aspect of the legal conceptual space. We are convinced that our proposed concept of the "constitutional legal conceptual space" will serve as the basis for developing new research directions within constitutional ontology. The methodological value of the proposed concept derives from the fact that it will facilitate the use of *spatiotemporal thinking*, a method not used in jurisprudence, which could lead to new and unexpected results.

As already noted, reality comprises past, present and future existence. Constitutional legal reality must also be perceived as a trinity of past-present-future. As such, legal conceptual space cannot be bounded by limits of any one government. In essence, this is the specification developed by Georg Jellinek, who proposed that jurisprudence would abase itself if it allowed itself to be bounded by governmental frameworks, which would render it national law[10].

Constitutional values — first of all, constitutional principles and the objective system of basic rights and freedoms — are the property of all mankind, in a sense that they provide shared content of the constitutional legal conceptual space for all civilised beings. It is this underlying concept that motivates the preamble in the Russian Constitution that declares that the Russian people acknowledge themselves to be part of the world community.

At the same time, objective reality constitutes the *notion* that constitutional principles and basic rights are reflected in historical and cultural progress. In employing these exact specificities of a nation's historical fate, we can argue that each state's constitution codifies not only the most important juridical norms, but also socio-cultural traditions and, in that sense, our relationship with the past[11].

On occasion, the relationship with the past begets unexpected perceptions of Russian constitutional values within the context of European constitutionalism. The ironic phrase of Kluchevsky, a Russian historian, regarding the wise Russian reformers springs to mind. As the reformers admire how their reforms have transformed Russian antiquity, they fail to notice how the antiquity imperceptibly transformed the reforms.

Various juridical interpretations of the value of such constitutional principles as economic freedom and social government represent only the tip of the iceberg. Below the surface, there exist different philosophical traditions — two different intellectual paradigms that had formed on the European continent and in England and the United States.

[10] *Jellinek G.* The General Theory of the State. St. Petersburg, 1908. P. 47.

[11] Recall the words from the preamble of the Russian Constitution — "...honouring the memory of our ancestors...”!

It can be posited that these two paradigms differ because they are founded on different philosophical and legal principles. European students of law perceived Immanuel Kant as the indisputable authority on legal philosophy. Kant was less popular in England and the United States, where Jeremy Bentham's utilitarianism enjoyed wider popularity. The value of economic freedom — which constitutes a juridical constitutional concept — forms one of the pillars of utilitarianism. But the best way to achieve economic effectiveness is through economic freedom. Speaking figuratively, economic freedom — as perceived by American lawyers and legal philosophers — comprises the juridical garments of effectiveness. In Europe, legal ethics were always held in high esteem.

This is related to Emile Durkheim's idea that division of labour leads to social solidarity.[12]

In essence, division of labour is not important only in the economic sense. It is also important in a moral, ethical sense since solidarity fits within the ethical category.

Solidarity assumes that all members of society unconditionally accept a set minimum of common values, which, according to Durkheim, make up a "collective consciousness". These values do not need to be devised, as they are not Kant's a priori values. They must only be collectively selected from the *values* that already function within the social consciousness and socio-cultural traditions.

This is precisely the approach that humanity undertook when it created the Universal Declaration of Human Rights.

As a result, collective values were born — constitutional values that exist alongside individual, and nationally individual, values. Conflict between these sets of values is one of the main dialectical contradictions that puts the Russian legal system in motion.

The concept of a welfare state, the idea of government regulation of economic relations, and the consolidation of trust in economic institutions are all concepts that function on the basis of their ethical foundation, formulating what could tentatively be called constitutional legal ethics. The American Constitution sets out provisions regarding contractual freedom and protection of private property, but it says nothing regarding a welfare state or solidarity.

The question of "regulation/deregulation" in economic relations provides further ground for disagreement between European (dirigisme) and American (free markets) views. From our perspective, this difference has an effect in the constitutional sphere in the sense that the issue of relating different constitutional principles with each other is resolved in different ways. As is well known, the most important constitutional norms are those that comprise constitutional principles (in the Russian Constitution, these are contained in the norms in the first chapter).[13] These norms include provisions that set out the terms for a legal and welfare state, that describe the separation of powers, economic freedom, republicanism, and justice, etc. At first glance, it appears as if the constitutional principles are immutable and are, in some sense, metaphysical. In reality, however, they possess a necessary juridical flexibility, as they are subject to dialectical alteration when the conceptualisation of these principles changes.

[12] *Durkheim E.* Sociology and Its Scientific Domain. Moscow. 1995. P. 326.

[13] *Zagrebelskii G.* (see: *Zagrebelskii G.* Interpretation of Laws: Stability or Transformation? In Comparative Constitutional Review. 2004. N 3. P. 80–82) demonstrated the distinction between constitutional norms that underlie principles and constitutional norms that contain regular governmental laws. It is the norms that underlie constitutional principles that "actually perform a constitutional function by formulating the universal conditions for public life."

The Constitutional Court frequently encounters conflicts in interpretations of various constitutional principles. In fact, some of the constitutional principles are frequently internally contradictory (suffice it to mention the constitutional principle of justice, which is mentioned in the sixth paragraph of the Constitutional preamble).

The contradictory nature of constitutional principles reflects not only the contradictory nature of human aspirations, but also the multiple contradictions comprising modern public life.

The search for balance in harmonising constitutional principles is the task of the Constitutional Court, which produces the rules to counterpoise constitutional principles, taking into account the fact that they are all equally valuable and that no hierarchy exists between them.

The concept of equilibration, including the balancing of constitutional principles, is founded in rationalism, which means that a) all constitutional principles must co-exist with each other; b) the best system of co-existence allows the interpretation of any constitutional principle to increase its regulatory effect in relation to other constitutional principle(s) when a new conceptualisation becomes available; c) there exists the possibility of not only balancing out two constitutional principles, but also the opportunity to strengthen the meaning of one of them during a given period of time.

The equilibration of constitutional principles is a search for rational proportionality. The principle of proportionality, one of the constitutional values, becomes the universal method for solving juridical issues in constitutional law.

From our perspective, the idea of equipotency of constitutional principles is based on the philosophical legal interpretations of American scholars, who believe that each constitutional principle represents a particular interest of a large social group. At the same time, from the perspective of constitutional law, these interests and their representative constitutional principles comprise equivalent entities, as one of the features of the constitutional law axiology is the fact that no hierarchy can exist between different constitutional principles.

From the point of view of constitutional law ontology, an interesting phenomenon arises, with equally valuable constitutional principles "accommodating" a multiplicity of the most important social interests. This is one of the most enigmatic spheres of constitutional law! The specific juridical form of constitutional principles — the foundation of constitutional law — contains information regarding the most important social interests, which exist in social reality. Within the conceptual space of constitutional law, constitutional principles are unique symbols that represent the most important juridical information, which, in essence, sets out their legal value.

The purpose of constitutional principles becomes clearer in the legal conceptual space. They are needed to establish basic consensuses in society, where contradictory social interests always exist.

The search for balance between equally valuable yet simultaneously antinomian constitutional principles is, in a sense, the marking of the end of contradictory points of view. As such, this search aids the harmonisation of public life. It is essential, however, to address the ontological law of nature as the binarity of constitutional principles. The foundation of the constitutional system guarantees the constitutional principle of economic freedom. With the aid of this constitutional principle, the interests of economically energetic members of society, such as entrepreneurs, employers, and property owners, are protected. For those citizens who require social support from the government, there exists the constitutional principle of

the social welfare government. According to V. Nersesyants, the juridical principle of economic freedom is the necessary means for the provision of freedom in society.[14]

Another set of constitutional principles that can be used to demonstrate binarity include the constitutional principles of freedom of expression and freedom of choice. Equally contradictory are the constitutional principles, which, on the one hand, guarantee the right to privacy and, on the other hand, defend the freedom of the press. A similar pairing arises from the protection of the rights of women and the protection of interests of a child and the issue of abortion. There are many more examples, which include the issues of euthanasia and artificial insemination. Possibly, the binarity of constitutional principles, as the ontology of natural law, comprises the manifestation of formal equality, which, according to V. Nersesyants, is necessary to provide freedom in society.

The tradition of considering constitutional norms in relation to the rights of individuals and the tradition of examining constitutional principles as interdependent, rather than discrete, entities are American, not European, in their nature. In his essay, "The Path of The Law", the great American jurist, Oliver Wendell Holmes, wrote: "the judges themselves have failed adequately to recognise their duty of *weighing* considerations of social advantage".[15]

Thus, constitutionally legal principles exist interdependently, rather than separately, in the legal conceptual space. Even so, "paired" constitutional principles frequently collide with each other and these collisions create the dynamic of the whole space — the constitutional legal reality. This reality can be compared to a child's kaleidoscope, which, at the slightest turn of a hand, creates a different mosaic. The binarity of constitutional principles aids the ability of constitutional law to demonstrate its social value, which comprises the stabilisation of social life, expansion of world space and harmony.

4. Constitutional law cannot determine the direction of social life development. Thus, article 38 (part 1) of the Russian Constitution sets out that the family is protected by the government. But then a question arises: what kind of family? Does a traditional family, and only that type of family, constitute a constitutional value? Or do common law marriages also fall under the notion of an evolving family?[16] For this reason, constitutional principles should not serve as iron ties that restrict the development of social life. The system of constitutional values, which, first of all, comprises constitutional principles, should not set out an a priori entity. Within its principles, the constitution contains only those elements that serve as the glass in the kaleidoscope, allowing for creation of new societal mosaics.

In essence, we have two types of argument — external and internal. Juridical positivism calls for a strict and exclusive adherence to positive law norms and excludes the possibility of applying other arguments, be they sociological, economic, moral, or historical, when addressing the issue of suitability of court decisions, which acknowledge new human rights. This is known as the internal approach, which separates the legal space from others, including economic and moral considerations. From this perspective, the politics of law comprises something external to the idea of law and, hence, it is the domain of politicians.

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[14] *Nersesyants V.* Philosophy of Law. Moscow. 2006. P. 39. As noted by Nersesyants, freedom turns into lawlessness when it is not integrated into a universal norm (a norm that sets out mutual and equal limitations on individual freedoms of all members of society).

[15] *Holmes O.* The Path of the Law. Boston Law School Magazine. 1897. N 1 (4). P. 9.

[16] See *Tolstaya A.* Common Law Marriage: Perspective of Legal Development. Law. 2005. N 10; *Kostrova N.* How to Protect the Rights of Family and Children: Problems in Improving Family Law. Law. 2010. N 8.

The external type of argument lets us avoid the extremes and excessive formalism of legal conceptualisation. This field of juridical scholarship employs open methods of argumentation, using sociological and statistical data, economic considerations, and, of course, moral arguments.

Andras Sajo believes that juridical science and legal practice must develop a theory that would, to a certain extent, integrate new social facts and social values.[17] In line with that thinking, we suggest that constitutionalists adopt the ontological method as the method for assessing historical space. The application of this method will serve as the methodological basis for new relationships between national courts and European supranational courts and, foremost, the European Court of Human rights. Therefore, it is necessary to address existing differences when it comes to evaluating constitutional values at the national and European levels.

The stable socio-cultural model — the codification of connections to the past in the Constitution — is not a phenomenon exclusive to Russia. Germany witnessed the formation of its own "stable national culture"[18], which led to disharmony with European constitutional values.

In September 2011, a new disagreement arose between the German Federal Constitutional Court and the European Court of Human Rights. The European Court of Human Rights ruled in favour of fathers, who had fathered children outside of marriage, to maintain a relationship with their children, overturning the rulings of German courts. German judges take a strong stand when dealing with issues of fatherhood, steadfast in their position of the rights of the family. As such, their laws follow their socio-cultural tradition and protect the family, above all, even if the child has a different biological father. The European Court, however, decided that the German Constitutional Court violated the constitutional rights of the biological father and his right to privacy, which is set out in the European Convention on Human Rights. Previously, these two courts faced off in an uncompromising debate regarding the question of which constitutional value could be considered "more important", that of the inviolability of right to privacy or freedom of the press.[19]

Considering that the constitutional legal conceptual space is a single entity, it is essential to develop relationships between national constitutional courts and the European Court of Human Rights on the basis of mutual compromise. The philosophy, underlying the relationships of national and supranational courts, must be developed with the understanding that no absolute constitutional legal value (or truth) exists. As such, the only possible legal means to establish relationships between these courts is to encourage dialogue.[20] National and European constitutional values that are formed on the basis of the new spatiotemporal thinking must influence and supplement each other in a "peaceful" fashion, for they must exist in a single constitutional legal conceptual space.

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[17] *Sajo A.* Constitutional Values in Theory and Legal Practice: An Introduction. In Constitutional Values in Theory and Legal Practice. Moscow. 2000. P. 8.

[18] *Lubbe-Wolff G.* International Protection of Human Rights and the Principle of Subsidiarity: The case for the "hallway" resolution in the case of legal conflict. Comparative Constitutional Review. 2011. N 2. P. 70.

[19] European Court of Human Rights resolution. Application N59320/00 Von Hannover V. Germany. Judgment of 28 June 2005.

[20] See: *Costa J.P.* Role of National Authorities, Particularly Judicial Authorities, and the Future of the Protection of Human Rights in Europe. Comparative Constitutional Review. 2011. N 1. P. 121.

5. In essence, the ontological category of the constitutional legal conceptual space, which we propose here, can fulfill several functions. In particular, it demonstrates that even in the sphere of constitutional law, juridical positivism, used as a means to solve constitutional problems, has left a noticeable trace. The limitation of conceptualism in constitutional law, in our opinion, is rooted in the fact that it is based on a fallacy, whereby it is assumed that constitutional law has reached such a high stage of development that it has become self-sufficient and, as such, is capable of further evolution on its own. Constitutional law now exists separately from real life, operating under conditional assumptions. Those who rule in reality use the conditional terminology of "nation" and "sovereignty". The real world is being replaced by a fictional world. Constitutionalists dedicate too much attention to the symbolism of conceptual reality, rather than real life. But especially dangerous is the aspiration to create value-neutral constitutional law, using a limited set of legal values.

Why is the individual — and his rights and freedoms — considered the highest value in the Russian Constitution? And do the individual and his rights and freedoms comprise only one value? Or are we talking about an individual's life, whereby an individual comprises one value and his right to life another? And does justice, as the moral foundation, comprise a value in constitutional law? And why is it that a person's mind — or his knowledge — does not comprise an independent value within the constitutional legal conceptual space?

All of these questions signify that the constitutional legal axiology is still being developed. We are in need of further evidence to substantiate the fundamental assumption underlying this axiology that constitutional legal values must be evaluated, especially in applying moral values. The idea of law is founded on the principle of evaluation.

The application of the value approach to constitutional law must not be limited by the assertion that there exists a certain system of constitutional values, or worse — a hierarchy of values — or that there is a rigid and inaccessible legal space for values of constitutional law. Neno Nenovski rightly noted that by systematically applying the value approach to law we are compelled to trespass the rigid delineation of the law itself.[21] A system of constitutional values is influenced by moral and other values. As a result, two contradictory points of view had evolved within legal theory. The first is Hans Kelsen's pure theory of law, which derives its roots from Friedrich von Savigny's school of conceptualism. Kelsen believed that law must be cleansed from the influence of other values, be they political, ideological, moral or religious. Pure law must be constructed exclusively on the basis of jurisprudence. The pure theory of law requires consideration of the law only as structural terminology, maximally avoiding value-laden judgements. This theory was echoed by Herbert Hart in his famous article on positivism and the necessity of separating the law from morality, as the merging of morality and law could have destructive elements for the legal system. The second point of view came from Ronald Dworkin, who believes that it is essential to evaluate constitutional values through the prism of moral values and, foremost, justice.

I believe that the principle of justice exists under joint competence of law and morality. My experience as a justice of the Constitutional Court has allowed me to reach a conclusion that constitutional values are not self-sufficient and, as such, must be evaluated with the help of moral criteria.

[21] *Nenovski N.* Law and Values. Moscow, 1987. P. 25, 29.

Gustav Radbruch wasn't that far off when he argued that veritable values are moral values, as the majority of constitutional values can be related to moral values. The idea of social welfare is related to solidarity. At the very minimum, it implies the solidarity of generations. Even L. Petrazhitskii, in his discussion of various considerations related to public material benefits, addressed the meaning of love to those close to us, to fellow citizens, to our contemporaries. That said, Petrazhitskii conceptualised love as an active force, characterised by a constantly increasing intensity. In his opinion, love can be institutionalised through attitudes, instincts and even institutions. Petrazhitskii believed that a close analysis of the entire "public structure" would lead one to conclude that its entire foundation was nothing but the crystallisation of institutions, which had formed under the long-term influence of love and reason. These two foundational beginnings — love and reason — dissolve into one another. Love and reason exist in constant opposition to egotism, which hinders not only the harmony of human interactions, but also prevents a reasonable construction of social life.

The relationship between constitutional and moral values makes practical sense when addressing subjects familiar to jurists, such as omissions in law and, even, in the Constitution. Can the court ascertain legal oversights, and acknowledge that the law's own underlying principles have been violated in the case of such an oversight?

This question has a negative answer in those countries that, to this day, strongly support Kelsen's positions. In those countries where Kelsen's opinions have been reconsidered, law practitioners recognise that omissions in constitutional law exist, with axiological omissions prevalent in the law when legislation regulates certain relationships in a morally unacceptable manner.

There is a distinct difference between legal axiology and constitutional axiology. Legal axiology is interpreted as a value and an object of evaluation using values, such as justice, equality, freedom.

Constitutional axiology has an applied meaning. The philosophical problems of constitutional law constitute a type of *midrange theory*, rather than the philosophy of law in an authentic sense.

In essence, it is the sum of scholarly knowledge relating philosophy of law to constitutional law.

Constitutional axiology engages with: 1) the definition of what constitutes constitutional values, *deriving their genetic origins*; 2) the establishment of relationships between various constitutional values. As such, economic freedom, as a value, became part of the Constitution due to its role in the economic space, while values like solidarity, social welfare state, and right to a decent life are ethically sourced constitutional values, which comprise the constitutional ethics section in constitutional law. The law of proportionality claims the same origins. It is used as guidance when creating public policy, or systems of reasonable limitations for individual rights and freedoms. Balance comes from finding a happy medium, an ancient ethical category. Carl Schmitt noted correctly that, beginning in the 11th century, various types of balance have come to exist in all spheres of life — trade balance in economics, European balance in foreign policy, cosmic balance of attraction and repulsion, the balance of passions as described by Malebranche and Shaftesbury, and Moser's nutritional balance.[22]

[22] *Schmitt C.* The Intellectual-Historical Condition of Modern Parliamentarism. In: Political Theology. Moscow, 2000. P. 194.

The balance of powers through their separation and the internal balance of a legislative institution are manifestations of the legal principle of proportionality, which formats the constitutional axiology of values.

When considering the idea of spatiotemporal thinking in constitutional law, the constitutional principle of proportionality should be applied to the most difficult issue related to the relationship between traditional and social (category: "past-present") and universal and public (category: "future) in understating constitutional values. And here, we must strive for balance. In search of balance, we must employ not only juridical knowledge, but also sociological and economic knowledge. This knowledge can be applied when corresponding normative regulations, which allow such application, are in existence. The modern model of constitutional court law rests on Kelsen's idea that constitutional courts deal exclusively with questions of law. However, in reality, these courts frequently issue judgements on the basis of moral values — especially justice — and other non-juridical arguments. For us, the most important methodological means to acquire knowledge through the idea of constitutional legal conceptual space are as follows: 1) the Constitution codifies the links and relationships with the past and the future. The Constitution apportions the majority of its weight to universal values, but it includes traditional and social values that have come about as a result of the socio-cultural code; 2) despite the broad application of constitutional universal values, constitutions remain nationally specific, concrete, and reflecting the specificity of its nation.