General Principles of Law In an Age of Constitutional Identity

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PROBLEM OF GENERAL PRINCIPLES OF LAW IN CONSTITUTIONAL ADJUDICATION

Attention to the phenomenon of general principles of law in an age of constitutional identity may prove to be unacceptable idealism. Recourse to this topic in order to analyze the practice of constitutional adjudication in Russia also is fraught with accusations of a now unfashionable cosmopolitanism. However, an analysis of judicial doctrines juxtaposed to the sense of constitutional identity promotes a healthy academic discussion of key problems of constitutionalism.

In and of itself the question of principles of law was elaborated more in the Soviet theory of law.[1] Attention simultaneously to the said group of principles with rare exception[2] clearly did not correspond to their role in constitutional justice. And the very category of "general principles of law" was not typical for Russian jurisprudence. Recourse of the Constitutional Court of the Russian Federation to general principles of law[3] or to general-legal principles[4] cannot be considered to be an ordinary phenomenon in the law enforcement process from the standpoint of the socialist tradition. In the transitional period, Russian constitutional adjudication was in this respect in the vanguard of the

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[1] See N. G. Aleksandrov, «Социалистические принципы советского права» [Socialist Principles of Soviet Law], Советское государство и право [Soviet State and Law], no. 11 (1957), pp. 16-29; E. A. Lukasheva, «Принципы социалистического права» [Principles of Socialist Law], ibid., no. 6 (1970), pp. 21-23.

[2] V. M. Vediakhin and A. F. Galuzin, «Конституционный Суд Российской Федерации об общеправовых принципах» [Constitutional Court of the Russian Federation on General-Legal Principles], Русский юридический журнал [Russian Legal Journal], no. 1 (2009), pp. 180-186; G. A. Gadzhiev, «»Принципы конституционного права, общие принципы права и конституционные принципы [Principles of Constitutional Law, General Principles of Law, and Constitutional Principles], Конституция и законодательство [The Constitution and Legislation] (Moscow, 2003), pp. 37-44; I. A. Umnova, «О тенденции расширения судебной практики применения норм Конституции РФ в единстве с общими принципами права» [On the Trend of Expanding Judicial Practice of the Application of Norms of the Constitution of the Russian Federation in Unity with General Principles of Law], Конституционное и муниципальное право [Constitutional and Municipal Law], no. 6 (2015), pp. 3-6.

[3] See, for example, Decree of the Constitutional Court of the Russian Federation, 6 February 2018, No. 6-П. СЗ РФ (2018), no. 8, item 1272.

[4] See, for example, Decree of the Constitutional Court of the Russian Federation, 9 November 2018, No. 39-П, СЗ РФ (2018), no. 47, item 7316.

development of law. Here new methods of judicial technique were applied not typical of the previous legal culture. Together with reference to its prior case-law, the Constitutional Court of the Russian Federation "cultivated" principles unknown to Soviet legislation or ordinary law enforcement of legal certainty, proportionality, legitimate expectations, non-discrimination, and others.

These ideas can be derived with difficulty directly from the constitutional text. For example, to seek the principle of certainty in the 1993 Constitution of the Russian Federation (Article 19) can be done only by a chain of arguments. With similar success one may extract it from the rule-of-law State or from the concept of law as a whole. Such unwritten constitutional formulas differ from principles of socialist legality or socialist justness incomprehensible to the Russian jurist in that they have acquire a profoundly instrumental role as grounds for the constitutional review of legislation. Transferred to the practical plane, general principles of law also differ from basic principles of Soviet legislation, just as industrial design differs from socialist realism. And it is not so much a matter of preferences in taste. The difference lies in the functional purpose of both phenomena. The role which socialist realism played in the Soviet system is evident. The purpose of the present article is to clarify the legal nature of general principles of law and their significance in constitutional adjudication.

The reference in the title of this article to a concept now fashionable does not indicate the wish of the author to analyze constitutional identity in detail, to which Russian specialists already have devoted much attention.[5] This is not a new conception. It and related doctrines (cultural relativism[6] and margin of appreciation[7] in international human rights law, originalism in American constitutionalism,[8] constitutional patriotism,[9] and others) are reminiscent of the lengthy dispute between the Westerners and the Slavophiles.

[5] P. D. Blokhin, «Судебная доктрина конституционной идентичности: генезис, проблемы, перспективы» [Judicial Doctrine of Constitutional Identity: Genesis, Problems, Perspectives], Сравнительное конституционное обозрение [Comparative Constitutional Survey], no. 6 (2018), pp. 62-81; G. A. Gadzhiev, «О судебной доктрине конституционной идентичности» [On the Judicial Doctrine of Constitutional Identity], Судья [Judge], no. 12 (2017), pp. 31-34; S. A. Gracheva, «Развитие концепта конституционной идентичности в связи с поиском подходов к разрешению конвенционно-конституционных идентичности России» [Development of the Concept of Constitutional Identity in Connection with the Quest for Approaches to Resolving Conventional-Constitutional Collisions and Conflicts], Журнал российского права [Journal of Russian Law], no. 9 (2018), pp. 52-64; I. N. Glebov and M. V. Cheishvili, «Глобализация и конституционная идентичности России» [Globalization and Constitutional Identity of Russia], Вестник Московского университета МВД России [Herald of the Moscow University of the Ministry of Internal Affairs of Russia], no. 4 (2004), p. 50-53; A. A. Dzhagarian, «Российский конституционадизм: в поисках идентичности» [Russian Constitutionalism: In Searches of Identity], Сравнительное конституционное обозрение [Comparative Constitutional Survey], no. 6 (2018), pp. 82-100; V. D. Zorkin, Конституционная идентичность России: доктрина и практика [Constitutional Identity of Russia: Doctrine and Practice], Журнал конституционного правосудия [Journal of Constitutional Justice], no. 4 (2017), pp. 1-12.

[6] See J. Donnelly, "Cultural Relativism and Universal Human Rights", *Human Rights Quarterly*, VI (1984), pp. 400-419; F. R. Teson, "International Human Rights and Cultural Relativism", *Virginia Journal of International Law*, XXV (1985) pp. 869-898.

[7] A. Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford, 2012).

[8] Z. G. Goldobina, «Активизм и оригинализм в деятельности Верховного Суда и политико-правовой доктрине США» [Activism and Originalism in the Activity of the Supreme Court and Politico-Legal Doctrine of the United States], Российский юридический журнал [Russian Legal Journal], no.3 (2006), pp. 81-88; A. Scalia, "Originalism: The Lesser Evil", *University of Cincinnati Law Review*, LVII (1988), pp. 849-866.

[9] I. N. Barits, Конституцонные патриотизм: четыре европеские реинкарнации и российская версия [Constitutional Patriotism : Four European Reincarnations and Russian Theory] (Moscow, 2018); F. I.

Under contemporary conditions similar doctrines have found fertile ground against the background of anti-western and isolationist conceptions traditional for socialist jurisprudence. Therefore, the principal thesis of the present writer lies in the inadmissibility behind the façade of fashionable doctrine of distorting the true sense of constitutionalism and justifying expanding influence of public authority in the sphere of individual freedoms. Ultimately, general principles of law in constitutional adjudication act as a means of judicial control over legislation (Article 125, Constitution) capable of excessively infringing upon the highest value of the person, his dignity, and inalienable basic rights (Articles 2, 17(2), 21(1), and 55(2), Constitution). Unlike these prescriptions clearly expressed in the constitutional text, the doctrine of constitutional identity has no express textual normative foundation. It is vital to recall that this was nothing more than the fruit of a distinctive "spiritualism" when the Constitutional Court of the Russian Federation relied not so much directly on constitutional norms as it derives new meanings from the "spirit" of abstract constitutional provisions. Therein is a certain sensitivity of the said doctrine in comparison with the literal liberal meaning of the constitutional legislator who sought to avert the recent arbitrariness of the socialist State. Such an historical interpretation of socio-political conditions in elaborating the constitutional text are topical for an understanding of general principles of law today.

This work does not claim to undertake an exhaustive dogmatic analysis of general principles of law. The depth of this issue we leave to the philosophy of law. But even at the level of terminology, Russian legal theorists are rather original and often go beyond the framework of universal legal discourse. The term "general principles of law", or in German "allgemeine Rechtsgrundsätze", or in French "es principles généraux de droit" is widely used in foreign doctrinal writings. In Russian jurisprudence the category "general-legal principles" is most often used, which is unknown abroad and is not out of place as a synonym for the concept being analyzed here.

The nature of general principles of law is important from an applied point of view. In constitutional adjudication one may dispense with the anthological definition of these principles in the earlier practice of the Constitutional Court of the Russian Federation. According to a Decree of 27 January 1993, No. 1-П, general-legal principles, to which are relegated justness, legal equality, guarantee of constitutional rights by the State, compensation by the State for harm caused to the individual,

> possess a high degree of normative generality, predetermine the content of constitutional human rights, branch rights of citizens, bear a universal character, and in this connection exert a regulatory impact on all spheres of social relations. The generally binding character of such principles lies in their priority over other legal provisions and in the extension of their operation to all subjects of law.[10]

This definition enables one to single out a number of indicia inherent in general principles of law (abstract character, universal and inter-branch sphere of operation, generally binding character, subject-matter and personal priority). These indicia differentiate general principles of law from other legal phenomena. Some of these indicia

Michelman, "Morality, Identity, and 'Constitutional Patriotism'", *Ratio Juris*, XIV, no. 3 (2001), pp. 253-271.

[10] Decree of the Constitutional Court of the Russian Federation, 27 January 1993, No. 1-П. Вестник Конституционного Суда РФ [Herald of the Constitutional Court of the Russian Federation], No. 2-3 (1993).

will be analyzed in greater detail herein. A uniform understanding of these indicia is important for the parties to a constitutional court proceeding. In cases concerning the defense of constitutional rights the general principles of law undoubtedly are relegated to issues of applicable law and have key significance in the process of legal argumentation.

PROPORTIONALITY AS GENERAL PRINCIPLE OF LAW

The principal theses of the pe example of proportionality.[11] This principle does not have a proper textual foundation in the 1993 Russian Constitution. The use in Article 55(3) of the term "measure" cannot serve as an adequate normative substantiation. Only indirectly can this principle be discovered in branch legislation. Nonetheless, proportionality is widely used in the practice of the Russian Constitutional Court. In 2018 the Constitutional Court referred to the principle of proportionality in 29 of its 47 decrees, whereas as the doctrine of constitutional-legal identity in 2018 is encountered only in one decree.[12] An international conference held on 14 May 2019 at the Constitutional Court placed the phenomena here considered in the name ("Constitutional Identity and Universal Values: The Art of Proportionality").[13]

Although most often proportionality in the practice of the judicial guardian of the Russian Basic Law is called a constitutional principle, in a significant number of its decisions this idea is relegated to the group of general-legal principles. In the Decree, for example, of 15 July 199, No. 11-П, it is emphasized that "in the choice of enforcement measures the legislator is confined by the requirements of justness, proportionality, and other constitutional and general principles of law".[14] With regard to the defense of constitutional rights, the need to comply with "general principles of law such as justness, equality, and proportionality which should be followed when introducing particular limitations on rights and freedoms" is especially noted.[15]

Proportionality is defined in an analogous manner in foreign doctrine and judicial practice as a general principle of law. In the view of the German professor, Klaus Stern, proportionality is among the general principles of law.[16] This doctrinal approach is confirmed by the practice of the Constitutional Court of the Federal Republic of Germany. In a decision of 5 August 1966, this court referred directly to the "general-legal principle of proportionality".[17] Proportionality should be relegated to the general principles of law and their legal nature analyzed. To begin, we turn to legal Latin.

[11] For the approaches of the present writer, see Dolzhikov, «Принцип соразмерности конституционно-судебной защиты основных прав в РФ» [Principle of Proportionality of Constitutional-Judicial Defense of Fundamental Rights in the Russian Federation], in T. Ia. Khabrieva (ed.), Эффективность законодательства и современные юридические технологии [Effectiveness of Legislation and Contemporary Legal Technologies] (Moscow, 2009), pp. 68-72.

[12] Decree of the Constitutional Court of the Russian Federation, 6 December 2018, No. 344-П, СЗ РФ (2018), no. 51, item 8095.

[13] Available online.

[14] СЗ РФ (1999), no. 30, item 3988.

[15] Decree of the Constitutional Court of the Russian Federation, 27 May 2008, No. 8-П, СЗ РФ (2008), no. 24, item 2892.

[16] See Klaus Stern, "Zur Entstehung und Ableitung des Übermassverbotes", in Peter Badura and Rupert Scholz (eds.), *Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche zum 65. Geburtstag* (Munich, 1993), p. 169.

[17] Teilurteil des Ersten Senats vom 5. August 1966, 1 BvR 586/62, 610/63 und 512/64 [Spiegel] // BVerfGE. Bd. 29, pp. 162, 186.

LEGAL LATIN IN CONSTITUTIONAL ADJUDICATION

General principles of law in the practice of constitutional adjudication may be indirectly cognized through the use of Latin legal expressions. The question of the realization of Roman law was investigated in detail in Russian prerevolutionary[18] and contemporary jurisprudence.[19] Unlike Common Law countries, in so doing attention was not devoted in continental doctrine to the use of Roman law (Latin) in judicial acts.[20]

Deserving of attention is the fact that the use among legal practitioners of Latin by general courts is actively being discussed and even sharply criticized in connection with the requirement to conduct a court proceeding in the Russian language.[21] The participants in the discussion, however, believe the use of Latin to be admissible in the doctrine and practice of the Constitutional Court of the Russian Federation.[22] On the whole, though, the topic of using legal Latin in constitutional justice has not yet become the subject-matter of autonomous study.

The following legal maxims in Latin are encountered in the practice of the Constitutional Court of the Russian Federation: *audi alteram partem* (listen to both sides);[23] *pacta sunt servanda* (contracts or treaties should be complied with);[24] *lex posterior derogat priori* (the law latest in time governs);[25] *lex specialis derogat generali* (the special law prevails over the general);[26] *res judicata* (the matter is decided),[27] and others. General principles of law can never be reduced solely to legal Latin: such principles also are encountered in a constitutional court proceeding without being linked to a dormant language. The Constitutional Court of the Russian Federation applies without reference to Latin the general-legal principle of good

[18] N. L. Diuvernua, Значение римского права для русских юристов [Significance of Roman Law for Russian Jurists] (Iaroslavl, 1872); N. Krylov, Об историческом значении римского права в области наук юридических [On the Historical Significance of Roman Law in the Domain of the Legal Sciences] (Moscow, 1838); S. Muromtsev, Рецепция римского права на Западе [Reception of Roman Law in the West] (Moscow, 1886).

[19] L. L. Kofanov, «Формирование системы римского права: к вопросу о причинах многовековой рецепции» [Forming of the System of Roman Law: On the Question of the Reasons for Many Centuries of Reception], Древнее право [Ancient Law], no. 1 (1999), pp. 56-62.

[20] W. H. Bryson, "The Use of Roman Law in Virginia Courts", *American Journal of Legal History*, XXVIII (1984), pp. 135-146; A. J. Hartnick, "The Use of Latin in Law Today", *New York State Bar Journal*, LXVI (1994), p. 39; P. R. Macleod, "Latin in Legal Writing: An Inquiry into the Use of Latin in the Modern Legal World", *Boston College Law Review*, XXXIX (1997), pp. 235-251.

[21] See Article 30(1), Federal Constitutional Law of 21 July 1994, as amended, "On the Constitutional Court of the Russian Federation"; Article 12(1), Code of Arbitrazh Procedure of the Russian Federation; Article 9(1), Code of Civil Procedure of the Russian Federation; and Article 18(1), Code of Criminal Procedure of the Russian Federation, all translated in W. E. Butler, *Russia & The Republics: Legal Materials* (loose-leaf service, 2006-). Also see Article 12(1), Code on Administrative Procedure of the Russian Federation.

[22] See G. Ismagilova, «Ratio Scripta в Андроповском суде. Почему судья из Ставропольского края активно использует латынь в своих решениях» [Ratio Scripta in the Andropov Court. Why Judges from Stavropol Territory Actively Use Latin in Their Decisions] (available online).

[23] Decree of the Constitutional Court of the Russian Federation, 12 March 2001, No. 4-П, СЗ РФ (2001), no. 12, item 1138.

[24] Decree of the Constitutional Court of the Russian Federation, 14 May 2012, No. 11-П, СЗ РФ (2012), no. 21, item 2697.

[25] Decree of the Constitutional Court of the Russian Federation, 29 June 2004, No. 13-П, СЗ РФ (2004), no. 27, item 2804.

[26] Decree of the Constitutional Court of the Russian Federation, 13 April 2017, No. 11-П, СЗ РФ (2017), no. 17, item 2655.

[27] Decree of the Constitutional Court of the Russian Federation, 5 December 2007, No. 2-П, СЗ РФ (2007), no. 7, item 932.

faith,[28] although *bona fides* also is recognized as an important part of the heritage of Roman law.[29]

The principle of proportionality was not a sign of Roman law, although the idea itself and the individual elements thereof in the contemporary understanding may be discovered in individual Latin expressions. The view of Franz Wieacker deserves attention here. In the opinion of this eminent German legal historian, in ancient Rome

> "this principle in its general features, as it will remain in the future, is drawn from three groups of sources (Quellströme): above all from the ancient idea of the limitation of rendering justice (*iustitia vindicativa*) and the proportional rendering for offenses (proportionality 1); then from the postulate of the distribution of justice (*iustitia distributiva*) (proportionality 2); and, finally, from the idea (from ancient days active and today virtually all powerful) that law should serve the well-being of individuals or society and the use of legal remedies by way of their advisability arising from this limitation, and also by means of a proportional relation of means and end (proportionality 3)".[30]

One observes a close linkage of proportionality with individual forms of justice which may be discovered now too in any legal order.

Often Latin legal expressions are linked with general principles of law in the dissenting opinions of judges of the Constitutional Court of the Russian Federation. It is appropriate to acknowledge the use of the Latin phrase *a fortiori* by Judge Viktor Osipovich Luchin in a dispute concerning the powers to remove the Procurator General of the Russian Federation during a criminal investigation. In his dissenting opinion, not have agreed with relegating this question to the competence of the Head of State, the judge emphasized that

> the Soviet of the Federation, unlike the President, is endowed by the Constitution with a power key to the performance of official functions by the Procurator General – the appointment and relieving from the post occupied. The confirmation of the Constitutional Court [otherwise] … does not take into account the generally-recognized principle (legal axiom) of interpretation of the law in the sphere of public powers – '*a fortiory*' (who is empowered or obliged to the greater than is empowered or obliged to the lesser).[31]

This opinion, on one hand, is rather persuasive, for in a situation when constitutional norms do not directly regulate the question in dispute, the reference to a principle known since the times of Roman law no doubt adds weight to the legal argumentation. Following such maxims reminds one of the legal heritage which unites Russia with other European States. The general principles of law reflect the laws of development of law-making and the application of law so clearly expressed in Roman law.

[28] Decree of the Constitutional Court of the Russian Federation, 13 February 2018, No. 8-П, СЗ РФ (2018), no. 9, item 1435.

[29] D. V. Dozhdev, «Добросовестность (bona fides) как правовой принцип» [Good Faith (bona fides) as a Legal Principle] (available online).

[30] F. Wieacker, "Geschichtliche Wurzeln des Prinzips der verhaltnismassigen Rechtsanwendung", M. Lutter (ed.), *Festschrift für Robert Fischer* (Berlin/New York, 1979), p. 874-875.

[31] Dissenting Opinion of Judge of the Constitutional Court of the Russian Federation, V. O. Luchin, to the Decree of the Constitutional Court of the Russian Federation, 1 December 1999, No. 17-П, Вестник Конституционного Суда Российской Федерации [Herald of the Constitutional Court of the Russian Federation], no. 6 (1999).

On the other hand, Judge Luchin was not entirely correct in the ending of the Latin term (*a fortiory* instead of *a fortiori*).[32] This mistake does not substantively reduce the value of the Latinism used in substantiation of the dissenting opinion. The application of general principles of law requires knowledge of Latin and raises the problem of the admissible modernization of Roman law. Moreover, the Russian jurist identifying the Latin expression with a legal axiom does not resolve the problem of their source. The reason is unclear for limiting the sphere of operation of this principle to public relations. The influence of Latin and Roman law is most evident in the harmonization of civil legislation.[33] Finally, the definition by Judge Luchin of the said Latinism as a generally-recognized principle draws attention to the place of this phenomenon in international law.

GENERAL PRINCIPLES OF LAW AND INTERNATIONAL LAW

Although this article is confined to national justice, an analysis of general principles of law is inconceivable without recourse to international law. The international legal system acted as an obvious source for the penetration of general principles of law into the practice of the Constitutional Court of the Russian Federation, especially at the beginning stages. The principle of proportionality, inter alia, was borrowed from the practice of the European Court for Human Rights (ECHR),[34] which is demonstrated by the similar terminology (proportionality, fair balance of interests, and so on). In international law the principles here considered are most profoundly thought out,[35] including several monographs[36] and fundamental scholarly articles.[37] Their topicality is shown by the International Law Commission beginning to approach the codification of general principles of law.[38]
At first glance, the attention to this topic in international law is to be explained by normative reasons. The category "general principles of law" received textual consolidation in the Statute of the Permanent Court of International Justice of the League of Nations on 16 December 1920 as a course of applicable law. According to Article 38(3) of the Statute, this international

[32] See B. S. Nikiforov, *Латинская юридическая фразеология* [Latin Legal Phraseology] (Moscow, 1979), p. 16.

[33] E. A. Sukhanov, «*Влияние римского права на новый Гражданский кодекс Российской Федерации*» [Influence of Roman Law on the New Civil Code of the Russian Federation], *Древнее право* [Ancient Law], no. 1 (1999), pp. 7-17.

[34] For details, see Dolzhikov, «Применение принципа соразмерности ограничения основных прав Европейским Судом по правам человека при рассмотрении «российских дел» [Application of the Principle of Proportionality of Limitation of Fundamental Rights by European Court of Human Rights When Considering "Russian Cases"], in D. V. Krasikov (ed.), Практика Европейского Суда по правам человека и российская правовая система [Practice of European Court of Human Rights and the Russian Legal System] (Saratov, 2006), p. 46-67.

[35] At present the authoritative bibliographical data base of the Max Planck Institute of Comparative Public Law and International Law at Heidelberg in Germany contains more than 100 publications in various languages on general aspects of this topic.

[36] See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953); L. Pineschi (ed.), *General Principles of Law: The Role of the Judiciary* (2015); Ch. T. Kotuby and L. A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (2017).

[37] See V.-D. Degan, "General Principles of Law", *Finnish Yearbook of International Law*, III (1992), pp. 1-102; W. Friedmann, "The Uses of 'General Principles' in the Development of International Law", *American Journal of International Law*, LVII (1963), pp. 279-299; J. G. Lammers, "General Principles of Law Recognized by Civilized Nations", in F. Kalshoven, P. J. Kuyper, and J. G. Lammers (eds.), *Essays on the Development of the International Legal Order* (Alphen aan den Rijn, 1980), pp. 53-75.

[38] First Report on General Principles of Law, prepared by the Special Rapporteur, Marcelo Vasquez-Bermudez, International Law Commission, 5 April 2019. A/CN.4/732 (available online).

organ applies, *inter alia*, "general principles of law recognized by civilized nations".[39] The text of this norm was reproduced in Article 38(1)(c) of the Statute of the International Court of Justice of 26 June 1945 (hereinafter: Statute)[40] with a sole addition. The existing version requires the Court to settle disputes on the basis of international law.

Although this amendment is linked with the desire to limit the freedom of the Court in choosing applicable sources, the initial understanding of general principles of law was connected with filling in gaps in the absence of treaty or customary norms. It was assumed that international judges would turn to some comparative-legal study in order to avoid the situation of *non liquet*.[41]

A similar understanding of general principles of law is confirmed by the historical interpretation of the Statute (Article 38), including the preparatory materials. In the view of the Belgian jurist Edouard Descamps (1847-1933), the concept of general principles of law had in view the "rules of objective justice, in any event, insofar as they have unequivocal confirmation in competing doctrines of legal advisors of States and the public consciousness of civilized nations".[42] Sir Robert Phillimore (1810-1885) suggested that general principles of law be understood as those which "were recognized by all countries *in foro domestio*, including individual procedural principles, the principle of good faith (*bona fide*), the principle *res judicata*, and so on".[43]

Being one of the three principal sources (together with treaty and custom), general principles of law were rarely used at the same time by international courts with a reference to Article 38 of the Statute. The attention to general principles of law in international doctrine may be explained by conceptual reasons. This phenomenon (together with universal treaties and customary norms), with all the differences in the cultures of individual States, enabled one to separate out a certain core of fundamental principles and values in the international legal system. The oblivion of general international law is fraught with serious negative consequences. ;The view of Alfred Verdross (1890-1980) is illustrative; in the postwar period he drew attention to the role of "coincident legal principles" of various peoples in order to determine the essence of international law. According to the accurate observation of the Austrian jurist,

> the significance of these legal principles for international law may be negatively confirmed by the fact that the international community survives grave disturbances when any people or group of peoples attempts to separate itself from the general legal principle of mankind … the international community is stronger when a large number of concepts have identical meaning. On the contrary, the international community would fall apart as general values cease to be applied in general.[44]

This conclusion explains the difficulty of understanding these principles in Soviet jurisprudence, which has persisted down to the present.

[39] Available online.
[40] Available online.
[41] See Julius Stone, "Non Liquet and the Function of Law in the International Community", *British Year Book of International Law*, XXXV (1959), pp. 124-161.
[42] League of Nations, *Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice. Procès-verbaux of the Proceedings of the Committee, June 16th-July24th 1920, with Annexes*, intro. Jorg Kammerhofer (Clark, New Jersey, 2005), p. 324.
[43] Ibid., p. 335.
[44] A. Verdross, Международное право [International Law] (Moscow, 1959), pp. 31-32.

In Russian international law the understanding of this phenomenon is confused. The identification of general principles of law with the basic premises of national legal orders, as follows from the preparatory materials for Article 38 of the Statute, were not recognized by Soviet scholars. This approach may be explained by ideological considerations. In the view of Grigorii Ivanovich Tunkin (1906-1993),

> … normative principles which would be common to the two opposed systems of law, socialist and bourgeois, do not exist. The principles of these legal systems, even in those instances when externally they appear to be identical, are fundamentally distinct by virtue of their class nature, role in society, and purposes.[45]

Within a bipolar system, it is difficult to imagine a single system of base legal principles for cardinally differing legal orders.

The existence of these principles as a separate source of law was simply ignored by Soviet scholars also because this was contrary to a voluntarist understanding of international law. The position of Tunkin on the problem of sources of general international law is an example. Not long before his death in 1993, this Soviet international lawyer put a strategically important question on forming the doctrine of the supremacy of law as the foundation of universal measures of this legal system,[46] but nevertheless completely ignored the role of the said principles in the creation of general international law. In this very article there is a reference to the view of Manuel Diez de Velasco (1926-2009), that "practically all general international law consists of customary norms and general principles of law" and that "conventional international law has no universal character".[47] It is important to note that together with an academic career this Spanish international lawyer was a judge on the Constitutional Court of Spain from 1980 to 1986 and the Court of the European Communities from 1988 to 1994, and therefore had an impression of the practice of applying these principles in constitutional and international court proceedings.

The ignoring by Soviet doctrine of the role of general principles of law in forming universal norms of international law (together with custom and multilateral treaties) may be explained by the failure to accept those sources of law in whose forming the consensus of States was not manifest or was weakly reflected. The use of general principles of law enables judges often to ensure the progressive development of law, avoiding the will of State agencies and other "political" actors. Well-known for his theory of the concordant wills of States, Tunkin simply could not allow the existence of sources in which the consensus was not expressed on the principal subjects of international law.

The failure of Tunkin to accept general principles of law, he having worked for a long time in the USSR Ministry of Foreign Affairs (1939 to 1965), was affected by the fact that the socialist legal tradition was categorically incompatible with judicial control with the assistance of general principles of law, given possible legislative and administrative arbitrariness. The most liberal comparatists did not regard Soviet law even as a legal order in the proper sense of the word. The Canadian professor, H. Patrick Glenn (1940-2014) identified Soviet law with an "oxymoron" … (a brutal, hypocritical, and overweening)

[45] G. I. Tunkin, *Theory of International Law*, transl. W. E. Butler (2d ed.; London, 2003), p. 217.
[46] Tunkin, "Is General International Law Customary Only", *European Journal of International Law*, IV (1993), pp. 534-541.
[47] Ibid., p. 535, fn. 5.

exercise of political power".[48] This definition together with the argument on the non-legal character of Soviet legislation, contains an assertion concerning the denial of the idea of proportionality, including a number of its structural elements. Brutality or cruelty do not correspond to the requirement of necessity or less restrictive means. Hypocrisy assumes the State pursues concealed aims against the background of officially declared high public aspirations. Finally, the thesis of overweening exercise by the State authorities is contrary to the very essence of proportionality. This assessment of Soviet law is excessively radical and was subjected to criticism on the part of comparatists who are engaged with post-Soviet law more profoundly.[49]

The more moderate view of Olimpiad Solomonovich Ioffe (1920-2005) deserves attention; he brilliantly understood the essence of Soviet law and was capable, being in emigration from 1981, of giving an independent assessment. A professor at Leningrad University before emigrating, he noted that whereas:

> the Common Law in the United States of America may be called a system of legal constitutionalism, but continental law in Western Germany receives the name of the system of a rule-of-law State (Rechtsstaat), socialist law in the USSR, on the contrary, represents a system of legal limitations established by the State which in and of itself is not legally limited.[50]

In the absence of an independent judiciary capable of actually limiting the arbitrariness of agencies of power, general principles of law are merely inconceivable for legal doctrine. Soviet jurists most often identified them with international custom.[51] Accordingly, one should compare these two sources of law.

(a). General Principles of Law and International Custom.

General principles of law are closely linked with international custom. In the majority of instances, Russian international lawyers do not draw a distinction between these sources. The view of Igor Ivanovich Lukashuk (1926-2007) is illustrative, that "general principles of law do not represent any sort of special source of international law. They are included in international law and possess the status of customary norms as a result of the recognition thereof as such".[52] With this assertion one may agree only in part. Indeed, the principles here considered may acquire the form of custom, and likewise be consolidated in treaties and other sources of international law. Fixation of the content of a concrete principle in another form does not change the nature of the basic phenomenon.

In order to demarcate these two sources of international law, one may briefly characterize the indicia of a custom. According to Article 38(1)(b) of the Statute on the

[48] H. P. Glenn, "Legal Traditions and *Legal Traditions*", *The Journal of Comparative Law*, II (2007), p. 81.
[49] W. E. Butler, "Russia, *Legal Traditions of the World*, and Legal Change", *The Journal of Comparative Law*, I (2006), pp. 142-146; Butler, «Россия, правовые традиции мира и изменение права» [Russia, Legal Traditions of the World, and Change of Law], in D. V. Dozhdev (eds.), Ежегодник сравнительного права 2011 [Yearbook of Comparative Law 2011] (Moscow, 2011), pp. 6-11.
[50] O. S. Ioffe and P. B. Maggs, *Soviet Law in Theory and Practice* (New York, 1983), p. 2.
[51] V. M. Koretskii, Общие принципы права в международном праве [General Principles of Law in International Law], ed. S. B. Krylov (Kyiv, 1957), p. 45.
[52] I. I. Lukashuk, Нормы международного права в правовой системе России [Norms of International Law in the Legal System of Russia] (Moscow, 1997), p. 9.

ICJ, custom is defined as "evidence of a general practice accepted as law". In accordance with the Judgment of the ICJ of 3 June 1985, one may establish an international custom by looking for "primarily in the actual practice and *opinio juris* of States".[53] It is thus required to prove two elements of a custom: (1) the objective (universal practice of States), and (2) subjective (*opinio juris* or conviction of this practice being legally binding).

At first glance, customs and general principles of law are indeed similar, including the necessity of their recognition. But one may see several key differences. The principle *pacta sunt servanda* illustrates the difference between the two sources. Initially, this was a general principle of law which emanated by analogy from national private law and proved to be essential for the treaty regulation of inter-State relations. Here primarily decentralized norm-creation dominated by subjects equal among themselves. To a great extent, therefore, the principle over time became an international custom. This fact is confirmed by the practice of mutual fulfillment of international agreements to be concluded and the conviction of States that this practice is binding on them.

Pacta sunt servanda did not cease to be a universal general principle of the national private law of contract. The nature of this principle analogously does not change in the event of documentary formalization in international treaties. Having received universal treaty recognition in Article 2(2) of the United Nations Charter[54] and Article 26 of the 1969 Vienna Convention on the Law of Treaties,[55] the principle of the good-faith fulfillment of international obligations acquired an additional characteristic of a rule *erga omnes* (imperative norm of general international law).

From these positions one may discover this at once in several legal forms as one of the main principles of contemporary international law (there is no analogue in the foundations of the constitutional system). In national constitutional justice, depending on the context, this principle may act in one (guiding principle of Russian treaty law)[56] or another manifestation (generally-recognized principle of international law as a whole[57] and branch principle of the law of treaties).[58] Similar considerations may be applied when analyzing the principle of proportionality, which passed from an original principle of administrative and constitutional law of individual States to a principle which is widespread in the principal branches of contemporary international law or in general is considered to be a structural element of a global constitutionalism in formation.[59]

Yet another distinction between these two sources is that when applying a general principle of law, a judicial agency may settle a dispute contrary to the will of political actors, filling in lacunae in legal regulation. For example, in the Advisory Opinion of 28

[53] Judgment of the International Court of Justice, 3 June 1985, "Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), International Court of Justice Reports (1985), p. 29.

[54] "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter". (available online).

[55] "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". (available online).

[56] Decree of the Constitutional Court of the Russian Federation, 14 May 2012, No. 11-П, СЗ РФ (2012), no. 21, item 2697.

[57] Decree of the Constitutional Court of the Russian Federation, 14 July 2015, No. 21-П, СЗ РФ (2015), no. 30, item 4658.

[58] Decree of the Constitutional Court of the Russian Federation, 27 March 2012, No. 8-П, СЗ РФ (2012), no. 15, item 1810.

[59] See A. S. Sweet and J. Mathews, "Proportionality Balancing and Global Constitutionalism", *Columbia Journal of Transnational Law*, XLVII (2008), pp. 72-164.

May 1951, the ICJ emphasized that the treaty prohibition against genocide relates to a number of "principles which have been recognized by civilized nations as binding on States, even without any conventional obligation".[60] The use of such principles does not require the establishment of consensus of States and undoubtedly raises the freedom of judicial discretion. Actually, a judge, having taken advantage of such a distinctive source of international law, exercises if not law-making activity, then at least the active development of existing legal rules. An international custom in a great degree depends upon the will of States, including necessary evidence of both its elements (universal practice and *opinio juris*).

(b) General Principles of Law and Generally-Recognized Principles of International Law.

In Russia the distinction between general principles of law and custom is to some extent complicated by the 1993 Constitution of the Russian Federation, which in Article 15(4) determines the list of sources of international law. The category used by it together with the concept of the treaty, "generally-recognized principles and norms of international law", contains a certain ambiguity. In the process of interpretation this category may be identical also with the content (norms and principles) and with the form of international law. The last variant of interpretation is more logical; otherwise the constitution would mix the "fly" (treaties as a form of law) with the "cutlets" (norms and principles as the content of law). To be sure, for international lawyers the concept of generally-recognized principles and norms of international law causes no special difficulties. They simply identify them with custom.[61]

But for representatives of the Russian theory of law, this constitutional formulation is complex to understand. They often confuse content and form (sources) of international law. For example, the Head of the Chair of the Theory and History of State and Law, V. N. Kartashov (Iaroslavl) in a work devoted to generally-recognized principles of international law openly acknowledged that in the "jumble" of international acts "even an experienced legal theoretician or international lawyer could not analyze", not to mention Russian judges and other participants of a court proceeding. Therefore, the phrase "accepted and recognized by the international community of States as a whole" seems, to put it gently, not successful".[62] The legal theorist mixed general principles of law with generally-recognized principles of international law, not mentioning custom as a source of the last. In the end he draws the conclusion that the most civilized means of "introducing" these principles into national law is the international treaty.[63] The explanation for confusing three sources of international law is a stable positivism, which aspires to reduce the vast diversity of legal phenomena to solely written sources.

Similar approaches are partly found in the practice of Russian constitutional justice, where the term "international custom" has not been used even once or, for example, the

[60] Advisory Opinion of International Court of Justice of 28 May 1951 "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide", International Court of Justice Reports (1951), p. 23.
[61] B. L. Zimnenko, *International Law and the Russian Legal System*, transl. W. E. Butler (2007), pp. 170-202.
[62] V. N. Kartashov, «О сущности и некоторых видах общепризнанных принципов международного права» [On the Essence and Certain Types of Generally-Recognized Principles of International Law], Международное публичное и частное право [International Public and Private Law], no. 1 (2010), p. 19.
[63] Ibid., p. 21.

interpretation of this source by the ICJ. Instead, the Constitutional Court of the Russian Federation extensively uses the concept of generally-recognized principles and norms of international law. However, this phenomenon also is not linked with international custom. There have been cases in constitutional judicial practice where international custom was actually applied intuitively.[64] The unconscious use of this source cannot be regarded as strange. For example, when entering a premise a male who removes his hat does not in his mind speak to himself about the fact of observing some usage. But the unconscious use of international customs in a constitutional proceeding hardly meets the requirement of legal certainty, in connection with which it would be desirable for the Constitutional Court to insert clarity with respect to a major source of contemporary international law.

Russian international lawyers believe that the concept of generally-recognized norms of international law was borrowed from German constitutionalism in the era of the Weimar Republic.[65] According to Article 4 of the Constitution of 12 August 1919, it was proclaimed that "generally-recognized norms of international law" (Die allgemein anerkannten Regeln des Völkerrechts) operate as a binding integral part of German Imperial law".[66] Proceeding from the hypothesis of borrowing foreign experience, we turn to an interpretation of the Basic Law of the Federal Republic of Germany (Article 25) of 8 May 1949, which provides: "General norms of international law shall be an integral part of federal law. They have primary over laws and directly give rise to rights and duties for the inhabitants of federal territory". In comparison with the Weimar Constitution, this concept points to the universality of the rule, but does not link it with recognition, although such a translation into the Russian language is encountered.[67]

The concept of general norms of international law found official interpretation in the practice of the Federal Constitutional Court of Germany. According to a decision of 14 May 1968, this concept represents "above all the universally applied international customary law, augmented by general principles of law … These norms only sometimes are evident, and in the majority of instances their existence and sphere of operation … must be ascertained from the outset".[68] In essence, the guardian of the German Basic Law identifies the concept of general international law with two sources: custom and general principles of law. By analogy, one may conclude that in Russian constitutional justice the relative uncertainty of the concept provided by Article 15(4) of the Constitution of the Russian Federation may also perform a positive role, and therefore in the constitutional category "generally-recognized principles and norms of international law" one may provisionally include together with custom also general principles of law.

[64] Ruling of the Constitutional Court of the Russian Federation, 19 November 2009, No. 1344-O-P, СЗ РФ (2009), no. 48, item 5867.

[65] A. N. Talalaev, «Общепризнанные принципы и нормы международного права (конституционное закрепление термина)» [Generally-Recognized Principles and Norms of International Law (Constitutional Consolidation of the Term)], Вестник Московского университета. Серия 11: Право [Herald of Moscow University. Series 11: Law], no. 3 (1997), p. 67.

[66] Reichsgesetzblatt (1919), p. 1383 (available online).

[67] See V. V. Maklakov (comp.), Конституции зарубежных государств [Constitutions of Foreign States] (Moscow, 2012), p. 176.

[68] Beschluss des Zweiten Senats vom 14. Mai 1968, 2 BvR 544/63 [Kriegsfolgelasten II], Entscheidungen des Bundesverfassungsgerichts, XXIII (1968), p. 317.

(c) Proportionality as International Custom and General Principle of Law.

Such an interpretation of Article 15(4) of the Constitution of the Russian Federation with respect to proportionality enables one to consider it to be a form at once of two sources – general principle of law and custom (generally-recognized principle of international law). One may show that such a duality of form of the principle here considered lacks any sense. However, this is not so.

One may see in the principle of proportionality other significant differences between custom and general principles of law. Customs may form not only principles, but partly also concrete norms. Such more concrete customary rules are in branches of international law in greater number, especially the law of the sea, air law, and outer space law. General principles of law by definition represent an abstract rule.

In addition, the two types of sources here considered differ in their subject-matter sphere of operation. General principles in national law have a rather universal scale of operation. Although proportionality emerged from the outset in public law, this principle also is reflected in private law and mixed branches of legislation. Classical international customs extend to inter-State relations. Proportionality acquires this quality as a result of being borrowed in the form of the requirement concerning proportionality being used when States resort to force.[69] By reason of such distinction, custom and general principles of law are of interest as a systematization of functions performed by proportionality in contemporary international law. Anne Peters suggests to single out three theories of proportionality in international law.[70] The horizontal or inter-State theory of this principle regulated behavior between States. The diagonal theory concerns the mutual relations of individuals with the State when the national public interest conflicts with private interest (in the form of a fundamental right). Finally, a vertical theory relates to the domain of the global constitutionalism in formation (World Trade Organization, law of the European Union). In the first and second theories, proportionality performs as a custom, regulating relations of equal subjects. But in the third theory proportionality performs a function similar to municipal constitutional and administrative law, which consists of elevating the global public interest and the particular interests of individual States. In this theory, proportionality is again transformed into a general principle of law in connection with the emergence of supranationality. This multiplicity of forms of proportionality is determined by the fact that this principle serves as its own kind of means of legal technique and lacks subject-matter content.

The qualification of proportionality not only as a general principle of law, but as a generally-recognized principle of international law, creates additional difficulties, but has an incontestable virtue. The issue concerning the place of international customs within the system of constitutional rights is interesting, as is the preferential sphere of operation of proportionality in Chapter 2 of the 1993 Russian Constitution.

Within the system of sources of Chapter 2, proportionality as a generally-recognized principle must be placed even earlier than the norms of the Constitution by virtue of the literal interpretation of Article 17(1). Such an interpretation was once widely shared among international lawyers. Lukashuk, for example, assumed, not without grounds, that

[69] J. G. Garden, *Necessity, Proportionality, and the Use of Force by States* (Cambridge, 2004).
[70] See A. Peters, "Principle of Proportionality as a Global Constitutional Principle" (available on line).

"generally-recognized principles and norms are placed ahead of the Constitution".[71] This conclusion followed from a textual and systemic interpretation of this constitutional norm, which must be interpreted as *lex specialis* with regard to the general norm of Article 15(4) of the Constitution of the Russian Federation. The drafters hardly placed the norms of the constitution after the principles of international law accidentally. When discussing the abstract conflict of constitutional prescriptions with international custom, such logic is not very persuasive.

When having recourse to concrete situations, the conclusions are not so obvious. For example, in the event of the legislative concretization of one of the constitutional rights provided by Chapter 2 of the 1993 Constitution of the Russian Federation, theoretically a legislative decision might be adopted which is contrary to an international customary norm (for example, slavery is introduced with a reference to the cultural peculiarities of individual Russian regions or obligatory subbotniks taking into account Soviet traditions). Or directly in the constitutional text of Chapter 5 of the 1993 Constitution a provision is included establishing immunity for certain officials of agencies of executive power involved in the commission of war crimes or crimes against humanity. Similar legislative or direct constitutional amendments should not be precluded from constitutional judicial control. Ignoring imperative norms of general international law with a reference to the supremacy of the national constitution or the implied sense thereof would be a mistake.

On the whole, this line of consideration adds little to characterizing proportionality as a general principle of law in practice, but removes the problem of lack of confidence in it on the part of adherents of legal positivism. An international customs is unfoundedly considered together with treaties to be a part of positive international law. Against this background, we dwell on the interlinkage of the type of law-comprehension with the nature of general principles of law.

GENERAL PRINCIPLES OF LAW AND LAW-COMPREHENSION

A natural-law conception may be regarded as the intellectual foundation for the application of general principles of law by courts. In international law and the national legal order of many States jus-naturalism historically was a widespread type of law-comprehension. For example, in the award of an international arbitration tribunal of 28 August 1951 it was expressly noted that the "application of principles rooted in sound reason and usual practice of the majority of a civilized nation are a kind of 'contemporary natural law'".[72] René David (1906-1990) adhered to a similar view. In his view, general principles reflect that "there is a subordination of law to the commands of justice, such as it is conceived at a given moment in a given period …".[73] Jus-naturalism does not now play a material role in judicial practice. But its theoretical significance or claim cannot be denied completely.

[71] Lukashuk, «Взаимодействие международного и внутригосударственного права в условиях глобализации» [Interaction of International and Municipal Law under Conditions of Globalization], Журнал российского права [Journal of Russian Law], no. 3 (2002), p. 127.

[72] See Petroleum Development Ltd. v. Sheikh of Abu Dhabi, Award, 28 August 1951, *International Law Reports*, XVIII (1951), No. 37, p. 149 (available online).

[73] R. David and John E. C. Brierley, *Major Legal Systems in the World Today* (Birmingham, Alabama, 1988), p. 150.

From the standpoint of positivism itself, the concept of general principles of law is inconceivable. Hans Kelsen (1881-1973) believed that on the whole "it was doubtful in general that such a concept as 'general principles of law recognized by civilized nations' exists".[74] Kelsen emphasized the fundamental contradictions between States in the political and economic spheres, suggesting that extending them to the sphere of law would be excessive. However, Kelsen acknowledged that the norm itself consolidating the possibility of applying general principles of law "absolutely gives to a court significantly greater freedom of action to resolve all questions just as any indefinite formula".[75] Here the proponent of pure reason actually accepted that the hypothetical application of these principles gives a significant discretion to justice.

In connection with the difference of impressions of competing types of law-comprehension with respect to general principles of law, the moderate view of Lassa Oppenheim (1858-1919) is of interest. In his view, consolidation of general principles of law in Article 38 of the Statute of the ICJ

> testified to a reasonable rejection of the positivist view, according to which treaties are customs are the sole sources of international law, from which it followed that in the absence of such, international courts are powerless to render decisions. The matter comes down to the acceptance of the view … which giving its due and imparting in general to the decisive significance of the will of States as creators of international law, without separating international law from the legal experience and practice of mankind as a whole. The indirect result of the operation of this Article should be the termination of a dispute between the positivist and naturalist schools.[76]

One may find an effort at such a synthesis of the basic types of law-comprehension when applying the principle of equity, connected with proportionality and a means of judicial balancing, in an international court proceeding. The Judgment of the ICJ of 24 February 1982 emphasized that:

> Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term 'equity' has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice … The [Court] is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.[77]

[74] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (New York, 1951), p. 533.
[75] Ibid.
[76] L. Oppenheim, *International Law* (reprint ed.; 19?), I, para. 19.
[77] Judgment of the International Court of Justice, 24 February 1982, "Continental Shelf (Tunisia/Libyan Arab Jamahiriya", International Court of Justice Reports (1982), p. 60, para. 71.

Equity and other general principles of law by virtue of their abstractness enable judges to avoid excessive formalism, including gaps and contradictions in law. Simultaneously in the process of eliminating inevitable legal defects, general principles of law are capable of laying down certain frameworks for judicial discretion.

This understanding of the principles here considered is applicable to constitutional justice which, undoubtedly, should harmonize the difference in approaches to law-comprehension. Irrespective of the difference in the methodological approaches, the principles here considered, and likewise international custom, are relegated to unwritten international law.[78] We turn to the unwritten character of general principles of law in greater detail.

GENERAL PRINCIPLES OF LAW AND UNWRITTEN LAW

In Russian jurisprudence, general principles of law are seldom qualified as unwritten rules of behavior. Specialist in other social sciences often are engaged with this problem.[79] At the same time, the relegating to unwritten law most precisely determines the essence of the principles here considered. The unwritten character enables the majority of general principles of law to be used in a constitutional court proceeding without the direct normative consolidation thereof. The possibility of the use in a constitutional court proceeding of principles not having a textual foundation in the 1993 Constitution of the Russian Federation often casts doubt on them. In the view of some writers, the Constitutional Court of the Russian Federation cannot fill gaps without reliance on respective constitutional norms. As regards proportionality, this assumes that the "criteria of lawfulness of the limitation of human rights should not be injected by the court from own practice or the practice of European justice, but should be drawn from the text of the Constitution of the Russian Federation".[80] The absence in the text of the Russian Constitution of the term "proportionality" determines the attention to unwritten law as a whole.

The perception of *lex non scripta*, although known since the times of Roman law, is difficult in the Russian legal order. References to custom are not encountered often in Russian judicial practice, for example. At present, the Russian Constitutional Court has not formulated its attitude towards the doctrinal disputes concerning constitutional customs.[81] And constitutional law scholars themselves are inclined to consider custom as a "source of constitutional law in those instances when its application is sanctioned by the State".[82] To put it simply, by virtue of preserved positivism, only a rule which is recognized by

[78] N. Petersen, "Der Wandel des ungeschriebenen Völkerrechts im Zuge der Konstitutionalisierung", *Archiv des Völkerrechts*, XLVI (2008), pp. 502-523.

[79] V. V. Bocharov, Неписаный закон. Антропология права [Unwritten Law. Anthropology of Law] (Spb. 2013).

[80] T. V. Barsukova, «Соразмерность как правовое явление» [Proportionality as a Legal Phenomenon], Актуальные проблемы деятельности подразделений УИС [Topical Problems of Activity of Subdivisions of the Criminal Execution Service] (Voronezh, 2012), p. 330.

[81] See A. A. Belkin, «Обычаи и обыкновения в государственном праве» [Customs and Usages in State Law], Правоведение [Jurisprudence], no. 1 (1998), pp. 34-39; E. V. Kolesnikov, «Обычай как источник советского государственного права» [Custom as a Source of Soviet State Law], Правоведение [Jurisprudence], no. 4 (1989), pp. 19-25.

[82] O. E. Kutafin, Предмет конституционного права [Subject-Matter of Constitutional Law] (Moscow, 2001), p. 295.

agencies of power is considered to be a custom. This, naturally, complicates the application of general principles of law as a special source.

Unwritten law is more common in civil law, including by virtue of express legislative recognition of custom in Article 5 of the Civil Code of the Russian Federation.[83] Possibly therefore Gadis Abdullaevich Gadzhiev, who specialized from the outset in private law, is more liberal in evaluating unwritten law. In the view of this judge on the Constitutional Court of the Russian Federation, "if a law is incomprehensible, ambiguous, either unwritten law will operate or a subordinate act preserving old legal approaches".[84] Indeed, any formal legal text is not capable of resolving the vast diversity of situations and instances which arise in real life. In practice, law-making agencies objectively are late in properly reacting to changes that occur in society. Judges sometimes simply are forced to use the most generalized notions of the lawful and proper so as to avoid gaps in normative material and not permit a refusal of justice.

In accordance with a more restrained approach, general principles of law are considered to be the result of a formalized procedure of systemic interpretation of constitutional norms. Illustrative in his respect is the view of judges of the Constitutional Court of the Russian Federation, K. V. Aranovskii and S. D. Kniazev. In one of their joint publications the thesis is advanced that it is not necessary to define the Constitution as a written act.[85] In another study they conclude that

> The Constitutional Court relies when administering a court proceeding not only on principles expressly consolidated in the text of the Constitution …, but also, which deserves special attention, on principles drawn by it from a systemic analysis of interlinked constitutional provisions. Among the last should be mentioned … the principle of proportionality.[86]

These judges thereby allow the use in a constitutional court proceeding of textually unnamed principles, but suggest their normative basis be seen in one of the generally-accepted means of interpretation of constitutional norms. To be sure, systemic interpretation of a constitutional text is more typical for Russian jurisprudence. Therefore, the use thereof seems more preferable in the domain of public law, where unwritten law still remains *terra incognita*.

The complexity in the application by Russian judges of legal maxims not expressly consolidated in legislation may be explained by the preservation of the socialist legal tradition. According to an evaluation of judges of the High Administrative Court of the Czech Republic, Zdeněk Kühn,

[83] W. E. Butler (transl. & ed.), *Civil Code of the Russian Federation* (2016), p. 4.

[84] G. A. Gadzhiev, «Принцип правовой определенности и роль судов в его обеспечении» [Principle of Legal Certainty and the Role of Courts in the Ensuring Thereof], Сравнительное конституционное обозрение [Comparative Constitutional Survey], no. 4 (2012), p. 19.

[85] K. Aranovskii and S. Kniazev, «Роль Конституции в политико-правовом обустройстве России: исходные обстоятельства и современные ожидания» [Role of the Constitution in the Politico-Legal System of Russia: Basic Circumstances and Contemporary Expectations], Сравнительное конституционное обозрение [Comparative Constitutional Survey], no. 3 (2013), p. 51.

[86] Aranovskii and Kniazev, «Ненапрасное конституционное правосудие» [Unmistaken Constitutional Justice], Судья [Judge], no. 12 (2017), p. 42.

> Principles, if not expressly consolidated in the preambles of socialist constitutions or codes, or, at least, do not arise from laws, were not part of socialist law … There were no unwritten principles of law. Even if such principles existed, they never became binding within the system of written socialist law.[87]

Such principles were rather an element of ideology or propaganda. Moreover, legally binding requirements for agencies of power could not be drawn from these principles that would limit their discretion. They could not be enforced in a judicial procedure.

With regard to a constitutional court proceeding, the general principles of law could not require, as also customary norms, written formalization. From this standpoint, the content and form of general principles of law coincide. This may explain the difficulties in understanding general principles of law as an autonomous phenomenon in post-Soviet jurisprudence. For the majority of Russian jurists by reason of the preference given to positivism, any legal principle is identical to the content, but not to the form, of law.

The uniqueness of the principles here considered combining the form and content in law is linked with the reflection therein of the laws of societal development of creating and realization of legal norms. They represent a reasonable thing in and of themselves corresponding to the rules of formal logic. To be sure, the legislator or courts may in their activity not comply with such principles as *lex posterior* or *lex specialis*. But, by analogy with the possible violation of the laws of nature, authoritative agencies are hardly capable of "turning the river backwards" without risking environmental catastrophe. With regard to the principle of proportionality, parliament, having approved an arbitrary or too burdensome a law for citizens, and also the law-enforcer adopting an excessively severe administrative or judicial decision in concrete conditions, does not augment harmony in the legal order. Law will not develop stably in contradiction with rather logical requirements arising from proportionality as a general principle of law.

EVIDENCE OF GENERAL PRINCIPLES OF LAW

The failure to adopt general principles of law because of the preserved dominance of positivism complicates the necessity for evidence of these sources of law. The Constitutional Court of the Russian Federation rather freely approaches his question of applicable law. References are encountered in its decisions to international treaties which have not entered into force (for example, the European Social Charter),[88] or have a different territorial sphere (for example, the Protocol to the American Convention on Human Rights on Repeal of the Death Penalty),[89] or acts of international organizations without substantiating their legal force (for example, the 1948 Universal Declaration of Human Rights),[90] and so on. Therefore, the need for additional evidence of a general principle of law may even be shown by excessive formalism.

[87] Z. Kühn, "World Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement", *American Journal of Comparative Law*, LII (2004), p. 541.

[88] Decree of the Constitutional Court of the Russian Federation, 15 March 2005, No. 3-П, СЗ РФ (2005), no. 13, item 1209.

[89] Ruling of the Constitutional Court of the Russian Federation, 19 November 2009, No. 1344-О-Р, СЗ РФ (2009), no. 48, item 5867.

[90] Decree of the Constitutional Court of the Russian Federation, 11 April 2019, No. 17-П, СЗ РФ (2019), no. 16, item 2026.

Analogously, international courts also do not always establish the concrete general principle of law in the dispute being decided. Nonetheless, the very process of evidence of the principles here considered has been investigated in the doctrine of international law. For example, in a work on the use of these specific sources of law in an international arbitration, it was suggested that three basic problems be resolved: (1) determine the sphere of research, limiting the number of legal systems; (2) single out the critical mass of these systems proving the universality of the principle; (3) establish the compatibility of the dispute to be resolved.[91] If such approaches are applied to constitutional justice, one may single out three stages of evidence of general principles of law, including limiting the sphere of comparative-legal study, establishment of the universality of the principle and its compatibility to the character of disputes to be settled by way of a constitutional court proceeding. Singling out these stages is provisional and pursues analytical purposes. However, during the argumentation by one of the parties to the constitutional court proceeding of its position with reference to a general principle of law, it is essential to prove the existence thereof. By virtue of the procedural rule *jura novit curia*, the Constitutional Court of the Russian Federation has discretion with regard to determining the applicable sources of law. Although in instances of the use of foreign law, which is inevitable when establishing the principles here considered, the burden of proof frequently is placed also on the parties to the court proceeding.[92] Therefore, the algorithm suggested may be of interest to all participants of a constitutional court proceeding.

(a) Comparative-Legal Investigation in Constitutional Court Proceeding and Limits Thereof.

The first stage of the evidentiary process is the establishment of the limits of the comparative-legal study of national legal orders where concrete general principles of law are widespread.

Despite the existing tradition of the study and teaching of constitutional (State) law of foreign countries, comparative-legal materials in Russian constitutional jurisprudence remain an unusual phenomenon.[93] In and of itself the borrowing of foreign law is among the most controversial questions of constitutional justice. As such judicial method was described by one of the most conservative judges of the United States Supreme Court, Antonin Gregory Scalia (1936-2016), "the Court's discussion of these foreign views … is

[91] M. D. Nolan and F. G. Sourgens, "Issues of Proof of General Principles of Law in International Arbitration", *World Arbitration and Mediation Review*, III (2009), p. 513.

[92] See S. Ferreri, "Complexity of Transnational Sources", in K. B. Brown and D. V. Snyder (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (Dordrecht, 2012), p. 47.

[93] See I. A. Alebastrova, «Отражение зарубежной судебной практики в правовых позициях Конституционного Суда Российской Федерации» [Reflection of Foreign Judicial Practice in Legal Positions of the Constitutional Court of the Russian Federation], in Интернационализация конституционного права: современные тенденции [Internationalization of Constitutional Law: Contemporary Trends] (Moscow, 2016), pp. 123-130; N. V. Varlamova, «Обращение к иностранной практике в деятельности органов судебной власти: подходы и проблемы» [Recourse to Foreign Practice in the Activity of Agencies of Judicial Power: Approaches and Problems], Труды Института государства и права Российской академии наук [Proceedings of the Institute of State and Law of the Russian Academy of Sciences], no. 3 (2013), pp. 108-130; A. A. Troitskaia and T. M. Khramova, «Использование органами конституционного контроля зарубежного опыта» [Use by Agencies of Constitutional Control of Foreign Experience], Государство и право [State and Law], no. 8 (2016), pp. 5-22.

meaningless dicta. Dangerous dicta, however, since 'this Court should not impose foreign moods, fads, or fashions on Americans'".[94]

Against this background one may consider to be completely revolutionary the examples which emerged with the direct use of the practice of foreign States[95] by the Constitutional Court of the Russian Federation, including the citation of decisions of foreign agencies of constitutional adjudication.[96] In the last case such a liberal approach to the applicable law proved to be necessary in the resolution of a complex and untypical deviation in the constitutional court proceeding from international obligations in the field of human rights. Paradoxically, in this case the Constitutional Court of the Russian Federation, on one hand, formulated a municipal obstacle to the implementation of international law, and, on the other, opened "Pandora's Box" with regard to borrowing foreign sources in a constitutional court proceeding. Accordingly, the question of the possibility and limits of borrowing foreign constitutional experience acquired not only a theoretical, but a deeply applied significance. Therefore, when identifying general principles of law, it is appropriate to ascertain the relevance of the principal legal systems for a Russian constitutional court proceeding.

(i) Developed Legal Systems and the Problem of the Civilizedness of Nations.

When analyzing general principles of law it is believed that legal orders cannot be divided by degree of development. In practice, the concept of civilized States is encountered even in Russian constitutional court proceedings. The Constitutional Court of the Russian Federation referred to "the principle of inviolability of ownership being recognized in civilized States".[97] With regard to general principles of law, however, such formulations are now considered to be politically incorrect. The term "civilized nations" in Article 38 of the Statute of the ICJ, preserved since this norm was drafted in 1920, is deemed to be a legacy of the colonial system. An indication to recognizing general principles only of civilized nations reflects the classical Eurocentric international law. It did not recognize "uncivilized peoples" as fully-fledged subjects of the legal community. Moreover, in 1971 Guatemala and Mexico even undertook an unsuccessful effort to exclude mention of civilized nations from Article 38 of the Statute. According to the position of Mexico, this formulation, although a secondary issue, represented a "verbal survival of the old colonialism". Instead the category should be used of the "international community" or other similar expression which was not discriminatory or insulting for States.[98] In the view of a number of specialists, by virtue of the inappropriate formulation, the ICJ, in using general principles of law, rarely refers to concrete legal systems.[99]

[94] Lawrence v. Texas, 539 U. S. 538, 598 (2003).
[95] Decree of the Constitutional Court of the Russian Federation, 22 April 2013, No. 8-П, СЗ РФ (2013), no. 18, item 2292.
[96] Decree of the Constitutional Court of the Russian Federation, 14 July 2015, No. 21-П, СЗ РФ (2015), no. 30, item 4658.
[97] Decree of the Constitutional Court of the Russian Federation, 16 July 2008, No. 9-П, СЗ РФ (2008), no. 30(2), item 3695.
[98] Report of the Secretary-General of 15 September 1971, A/8382, "Review of the Role of the International Court of Justice" (available online).
[99] G. Gaja, "General Principles of Law", Max Planck Encyclopedia of Public International Law (2013) (available online).

Against this background, it is appropriate to draw attention to the contemporary definition of general principles of law as sources of international human rights law. The definition elaborated by the United Nations High Commissioner for Human Rights jointly with the International Bar Association seems appropriate: "A general principle of law, as a source of international human rights law, is a legal proposition so fundamental that it can be found in all major legal systems throughout the world".[100] Taking into account the number of cases relating to the defense of fundamental human rights in constitutional justice, such a definition is relevant for the topic here considered. Therefore, the adjective "civilized" in relation to this sphere means the dissemination of general principles of law in the major legal systems.

The interlinkage of general principles of law with the development of the legal order reflects their important quality. The election procedure for judges of the ICJ provides a requirement: "the representation of the main forms of civilization and of the principal legal systems of the world should be assured" (Article 9, Statute). If by analogy with the economy an indicator is created for the development of a legal system (something similar to the gross national product), among the criteria there must be general principles of law. The development of legal systems in States occurs gradually. Only at a certain stage of evolution of any legal system, initially in legal practice and then in legislation are fundamental postulates formalized which may be relegated to the group of principles. The history of the law of many countries shows such a sequence. Initially judicial and other practice, and then legislation. This moment is important in understanding the distinctive features of the use of general principles in constitutional justice.

When encountering problems or complex legal problems, constitutional justice ensures the so-called migration of constitutional ideas.[101] International law for a long time acted as an intermediate link in such migration. Such principles initially were borrowed by international judges or arbitrators from national legal systems, and subsequently exerted a reverse influence on municipal legislation and practice. As Rainer Arnold wrote, this principle influenced the law of the Council of Europe, performing a:

> triumphant procession about Europe, whereas ten years ago it was unfamiliar to the constitutions of many European States. After the Court of the European Communities began to use this principle in Luxembourg and then in the judicial practice of the European Court in Strasbourg, it acquired an all-European scale.[102]

Under conditions of global constitutionalism, the development of information technologies, and the openness of the major legal orders, such migration of ideas occurs more intensively and fruitfully. As a result of migration, the principles actually become general for legal systems with a completely different degree of development.

When using the comparative-legal method in constitutional jurisprudence, not only a limitation of the subject-matter of research is undertaken, but also undoubtedly the self-

[100] *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (New York, 2002), p. 11.

[101] S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge, 2006).

[102] R. Arnold, «Европейская Конвенция о защите прав человека и основных свобод и ее влияние на государства Центральной и Восточной Европы» [The European Convention on the Protection of Human Rights and Fundamental Freedoms and its Influence on States of Central and Eastern Europe], Россия и Совет Европы: перспективы взаимодействия [Russia and the Council of Europe: Perspectives of Interaction] (Moscow, 2001), p. 63.

identification of judges occurs with respect to the major legal systems and even individual States. The reflections are interesting of the Judge of the Constitutional Court of the South African Republic, Johann Kriegler, in whose opinion:

> Comparative study is always useful, particularly where courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted *their* precedential provision … But that is a far cry from blithe adoption of alien concepts or inapposite precedents.[103]

Consequently, a comparative-legal study should take into account the concrete legal system or otherwise – national identity.

General principles of law, as the title of the present work indicates, are relevant to constitutional identity. These are two binary opposites. In the first instance, one has in view legal values general for developed States. In the second instance, one refers to particular identities of national legal orders, underlying which is a special culture and tradition.

(ii) General Principles of Law and the European Legal Tradition.

Having been borrowed from socio-psychological knowledge, identity represent self-determination with respect to other subjects. Unlike previous claims to the uniqueness of socialist law as a third legal tradition, with regard to the majority of grounds the Russian national legal order is associated with European law. To be sure, the geopolitical position of Russia, located territorially on two continents, determines the popularity of the ideas of the Slavophiles concerning the special path of Russia. Then, it would seem, the Russian legal order found it appropriate to identify as Eurasian law. However, as with other variants, a middle path was chosen in resolving issues of principle, and this combination proved to be illusory or exceedingly dangerous. Thus, from an attempt to combine a liberal and leftist ideology, fascism was engendered, including the so-called "Third Position".
The Eurasian idea was transformed into an extremely rightist politico-legal orientation, by way of analogy. The conclusions are interesting of Prince Nikolai Sergeevich Trubetskoi (1890-1938), who at the end of his life was fascinated by the attractiveness of this idea. In the words of one of the ideologues of Eurasianism,

> We proved to be wonderful diagnosticians, not bad predictors, but very poor ideologues – in the sense that our predictions, having come true, proved to be nightmares. We predicted the arising of a new Eurasian culture. Now this culture actually exists, but is proving to be a complete nightmare, and we are in terror of it, and we are terrified by its neglect of certain traditions of European culture …[104]

[103] Judgment of the South African Constitutional Court, 27 March 1996, No. CCT 23/95, "Harold Bernstein and Others v. L. von Wielligh Bester NO and Others", *South African Law Reports*, II (1996), p. 751.
[104] See the Letter from N. S. Trubetskoi to P. N. Savitskii, 8-10 December 1930, published by O. A. Kaznina in Славоведение [Slavic Studies], no. 4 (1995), p. 93.

(iii) Universality of Principles of Law.

Doubts often are expressed in Russian legal doctrine as to the universal character of legal principles. Valentin Timofeevich Tomin in 1996 advanced the view that the general recognition of principles of law is theoretically not a strict and practically a dangerous term, more a definition of *belles lettres* than science. In his view as a specialist in criminal procedure, "much of that which was generally-recognized for Clinton, was simply unacceptable for Suharto, Saddam Hussein, or Yasir Arafat".[105] In the course of more than twenty years, the self-determination of Russia between roughly western and eastern approaches to recognition of the principles of law seem unexpected. Of the two proposed alternatives, the Russian legal order may be associated with liberal democracy in the person of the United States, which clearly is unpopular in the present political situation. The second alternative also is not very attractive in the long term, having regard to the fate of certain of the said heads of State. Although by virtue of the predominance of Muslims in individual republics of the Russian Federation (Tatarstan, Bashkortostan, Dagestan, Chechnya, and others), one cannot exclude the need to take into account, for example, principles of Muslim law, including by proceeding from the subject-matter of the dispute in the Constitutional Court of the Russian Federation. It is entirely possible that a similar comparative analysis would be appropriate in a case concerning the prohibition of the issuance to relatives of the bodies of persons killed in the course of suppressing a terrorist attack.[106] The most obvious approach, however, to limiting a comparative-legal study in a constitutional court proceeding would be to turn to continental law.

(iv) General Principles of Law and Continental Law.

After the dissolution of the socialist camp, Russian law has significantly larger general features with the Romano-Germanic legal tradition.[107] Therefore, a comparative-legal study for evidence of the existence of general principles of law in a constitutional court proceeding should begin with that legal family.

Testimony concerning the influence of German legal dogmatic on the practice of the Constitutional Court of the Russian Federation is of interest in this connection. According to Friedrich Christian Schröder, the emergence in the practice of Russian constitutional justice of doctrine concerning the essential core of constitutional rights (Wesengehaltgarantie) is linked with German legal experience. Schröder suggested that "in this formulation especially manifest is the imprint of Judge-Rapporteur T. G. Morshchakova, who repeatedly visited Germany for scientific purposes".[108]

[105] V. T. Tomin, «Права и свободы человека – большой блеф XX века (уголовный процесс России: аспекты взаимодействия с международным правом)» [Human Rights and Freedoms – Great Bluff of the XX Century (Criminal Procedure of Russia: Aspects of Interaction with International Law)], in I. A. Skliarov (ed.), Проблемы теории и истории российского государства и права [Problems of Theory and History of Russian State and Law] (Nizhnii Novgorod, 1996), p. 55.

[106] Decree of the Constitutional Court of the Russian Federation, 28 June 2007, No. 8-П, СЗ РФ (2007), no. 27, item 3346.

[107] See R. David and C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (11th ed.; Paris, 2002).

[108] F. C. Schröder, «Российская конституционная юрисдикция на практике» [Russian Constitutional Jurisdiction in Practice], Право и политика [Law and Policy], no. 9 (2001), p. 114.

Also deserving attention is the view of Gadzhiev concerning German influence on the development of Russian constitutional justice. Describing the drafting of the second Law on the Constitutional Court of the Russian Federation during the suspension of its activity from 1993 to 1995, the judge pointed to the study of the experience of other countries: "There were many trips, communion with foreign colleagues – especially strongly the Germans helped us in this period".[109]

Turning to proportionality, we should note that in foreign[110] and Russian[111] doctrine the German roots thereof are often acknowledged. Proportionality as an autonomous legal principle was unknown in Russian law until it began to be used by the Constitutional Court of the Russian Federation. It was hardly invented by Russian judges. In this instance one may assume borrowing from international or foreign sources. Until now, the Constitutional Court of the Russian Federation has not used direct references in its decisions which would enable the source of such borrowing to be determined. In may orient oneself in this respect by existing examples of general approaches to the use of comparative-legal material. Thus, in the aforesaid Decree of 15 July 2015, No. 21-П, references were given to decisions of constitutional courts and courts equated thereto in the Federal Republic of Germany, Italy, Austria, and United Kingdom. Borrowing generated no objections of principle from the constitutional experience of the first three States relegated to the continental legal family. However, with regard to the last reference, a question arose concerning the admissibility of studying the Anglo-Saxon legal family in order to establish general principles of law.

(v) General Principles of Law in the Anglo-Saxon Legal Tradition.

Enthusiasm is fashionable now in the professional legal community for principles and doctrines which emanated from the Common Law, and inevitably one finds this in the practice of constitutional justice. The dissemination of the English language and its dominance in academic communications pay a significant role in this process. At the same time, one cannot fail to see a key distinction in the use of general principles of law between continental and Anglo-Saxon law. This thought was expressed precisely by Lord David Lloyd Jones in an address to the Conseil d'état of France on 16 February 2018 on the topic of "General Principles of Law in International Law and Common Law". In his view as a judge of the Supreme Court of the United Kingdom, in and of itself the phenomenon of such principles may be said to be as follows:

> All this is very different from the common law approach. In the common law tradition, judges are typically more comfortable dealing with cases on their individual facts, and arriving at conclusions in accordance with the doctrine of

[109] G. A. Gadzhiev, «К заявлениям и жалобам мы не относимся как к опытам над людьми» [To Applications and Appeals We Do Not Relate as to Experiences with People], Право.ru [Pravo.ru], 1 December 2011 (available online).

[110] See M. C. Jakobs, "Der Grundsatz des Verhältnismässigkeit", *Deutsches Verwaltungsblatt*, no. 15 (1985), p. 97.

[111] See A. G. Rumiantsev, «Verhältnismässigkeit – Proportionality – Соразмерность», Сравнительное конституционное обозрение [Comparative Constitutional Survey], no. 5 (2014), p. 156; A. Trotskaia, «Пределы прав и абсолютные права: за рамками принципа пропорциональности. Теоретические вопросы и практика Конституционного Суда РФ» [Limits of Rights and Absolute Rights: Beyond the Framework of the Principle of Proportionality? Theoretical Questions and Practice of the Constitutional Court of the Russian Federation], Сравнительное конституционное обозрение [Comparative Constitutional Survey], no. 2 (2015), p. 46.

> judicial precedent, rather than resorting to overreaching principles of law as a starting point. It is, perhaps, a matter of the direction of travel. Common law judges tend to start with the specific rather than the general.[112]

Hence the use of the principles of law here considered in Anglo-Saxon law differed from the standpoint of legal methodology. It is inductive in comparison with continental law, where most often deduction is used (from general norms to judicial resolution of a special instance).

An important legal consequence arises from this. The application of general principles of law by an Anglo-Saxon judge always has a significant number of nuances and is sensitive to the concrete factual circumstances of a case. Therefore, the formulation general principles of law is divorced from a similar factual context and may prove to be irrelevant for Russian socio-political conditions. For example, the doctrine of "unreasonableness" traditional for the common law, being party an analogue of the principle of proportionality, assumes significant respect for courts by the legislative and even executive agencies of power. Such respect is based first of all on the influential legal doctrine of Albert Venn Dicey (1835-1922) on parliamentary sovereignty[113] and ultimately the stability of such political institutions, taking into account the democratic traditions rooted in the public consciousness.

At the same time, the good intentions of Russian proponents of judicial precedent[114] embed this institution in a separately taken system of arbitrazh courts which lead to a directly opposite result. The analogous borrowing of principles directly from common law, at least, elementarily require attention to the context of this legal family. Otherwise, when transplanting legal material the Russian legal system will be reminiscent of a "patchwork quilt".

Russian constitutional justice avidly borrowed the conservative doctrine of judicial deference to legislative organs.[115] The Constitutional Doctrine of the Russian Federation repeatedly has referred to the presumption of the good faith of the legislator[116] and the constitutionality of a law.[117] A more profound glance, however, at this doctrine draws attention to the problem of the intensity of judicial control over compliance with the principle of proportionality.[118] Therefore, a complex analysis of this principle requires an analysis of those factors which, taking concrete facts into account, raises the carefulness of judicial review of a legislative or other decision.

The thesis advanced recently that the Russian State Duma is not a place for discussion hardly enables the applicable principles of Anglo-Saxon law to be fully considered, taking into account the centuries of discussion[119] of publicly-significant questions. Otherwise,

[112] See the official site of the Supreme Court of the United Kingdom (available online).

[113] A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London, 1885).

[114] See A. A. Ivanov, «Речь о прецеденте» [Address on Precedent], Право: Журнал Высшей школы экономики [Law: Journal of the Higher School of Economy] (no. 2 (2010), pp. 3-11.

[115] R. A. Edwards, "Judicial Deference under the Human Rights Act", *Modern Law Review*, LXV (2002), pp. 859-882.

[116] Decree of the Constitutional Court of the Russian Federation, 2 April 2002, No. 7-П, СЗ РФ (2002), no. 14, item 1374.

[117] Decree of the Constitutional Court of the Russian Federation, 17 March 2010, No. 6-П, СЗ РФ (2010), no. 14, item 1733.

[118] J. Rivers, "Proportionality and Variable Intensity of Review", *Cambridge Law Journal*, LXV (2006), pp. 174-207.

[119] The well-known phrase of the Speaker, B. V. Gryzlov, is as follows: "The State Duma is not a platform

the Russian Constitutional Court should take into account "legislative" facts testifying to a low quality of discussion when adopting the legislative decisions most significant for Russian society. For example, a Ruling proceeding from approaches to general principles of law the Court possibly would follow a more detailed analysis of available scientific data relating to a draft pension reform under a perception by the Court of the presumption of the good faith of the legislator.[120]

Of course, one may cite the formula on Article 3(2) of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation": "The Constitutional Court of the Russian Federation shall decide exclusively questions of law". However, in this procedural formula it is important that the said "legislative" fact is not capable of become the subject-matter of consideration of any other court in the Russian Federation (Article 3(3)). An evaluation of the quality of the preparatory materials of a draft law being evaluated seems to be an integral element of the historical interpretation of legislative provisions appealed in a constitutional court proceeding. The borrowing of general principles of law from the major legal families of the world requires taking into account in greater detail the socio-political context and more carefully establishing the factual circumstances of a concrete constitutional dispute.

(b) Critical Mass and the Problem of Universality of Principles of Law.

At the second stage of qualifying the principle as being a general principle of law it is essential to ascertain the existence thereof in a significant number of national legal orders. In other words, for evidence of a general principle of law, its dissemination in States must achieve a certain critical mass. A characteristic of the principles considered as general principles of law assumes their universal territorial sphere of operation.

In the contemporary informational era, having regard to intensive migration of legal ideas, such principles, although they initially appeared only in individual States, may rapidly crystallize as legal phenomena. Therefore, the procedure for evidence of general principles of law may not require a comprehensive comparative-legal analysis. This conclusion follows from the practice of international courts. In a judgment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Foreign Yugoslavia since 1991, it was emphasized that:

> … although general principles of law are to be derived from existing legal systems, in particular, national systems of law, it is generally accepted that the distillation of a 'general principle of law recognized by civilized nations' does not require the comprehensive survey of all legal systems of the world as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals ...[121]

where it is necessary to wage political battles, to uphold some political slogans and ideologies". See the verbatim transcript of the Session of the State Duma of the Federal Assembly of the Russian Federation, Fourth Convocation, 29 December 2003 (available online).

120 See the Ruling of the Constitutional Court of the Russian Federation, 2 April 2019, No. 854-O. Available on Consultant Plus.

121 See the Judgement in Prosecutor v. Drazen Erdemovič, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 57 (available online).

Thus, in order to establish the content of general principles of law, a comparative analysis may be required of the most important legal families.

(i) Universality of Principle of Proportionality.

The problem of the universality of the recognition of proportionality arises in the major legal families as a legal principle. Doubts as to the premature relegating of proportionality to universally-recognized principles of law were expressed by the representative of the United States to the United Nations Human Rights Council in 2015. In the view of Keith Harper, the right to private and family life provided by universal international human rights treaties so far have not established the standard of necessity and proportionality. These conceptions arise from a certain regional legal practice, but do not have extensive recognition at the international level and go beyond what the text of the treaty norms requires.[122] Therefor, proportionality as a general principle of law does not possess universality, but rather is merely regional international law. When using this principle in constitutional justice, one may orient oneself by the relevant practice of European States, where this principle is gradually becoming part of general constitutional traditions.

(ii) National Traditions of European States.

This conclusion follows from an analysis of the law of the European Union. Proportionality received express proclamation in the Charter of Fundamental Rights of the European Union of 7 December 2000,[123] which became binding on 12 December 2007;[124] in force the Charter is equivalent to the constitutive treaties (Article 6(1), Lisbon Treaty on the European Union of 13 December 2007).[125] The said principle also is applicable to guaranteed rights (Article 52(1), Charter on Fundamental Rights) and to the competence of organs of the European Union (Article 5(4), Treaty on the European Union).

Moreover, according to the Treaty on the European Union (Article 6), guaranteed rights arising from constitutional traditions common for members form general principles of law of the European Union. Such principles enable the Court of the European Union to fill gaps under conditions of the initial absence of a catalogue of fundamental rights. The Court of the European Union repeatedly has emphasized its duty to "draw inspiration from constitutional traditions common to the member States".[126] One such tradition on the European continent was the idea of proportionality,[127] which in the legal order of the European Union initially emerged as a general principle of law. In the view of Michael Akehurst (1940-1989), proportionality, just as many other general principles of

[122] See K. Harper, "Explanation of Position by the Delegation of the United States of America", 26 March 2015 (available online).
[123] *Official Journal*, XLIII (2000), p. 364/1 (available online).
[124] Ibid., L (2007), p. 303 (available online).
[125] Jakobs, note 110 above, p. 97.
[126] Judgment of the Court of the European Communities, 14 May 1974, Case 4-73, J. Nold, Kohlen- und Baustoffgrosshandlung v Commission of the European Communities, para. 13 (available online).
[127] A. V. Dolzhikov, «Основные права и принцип пропорциональности в праве Европейского Союза» [Fundamental Rights and the Principle of Proportionality in the Law of the European Union], Российский ежегодник международного права 2008 [Russian Yearbook of International Law 2008 (Spb., 2009), pp. 228-233.

law, was borrowed by the Court of the European Union from German law.[128] Therefore, proportionality, albeit not a universal principle, represents part of European legal traditions. Under Russian conditions, from the standpoint of the critical mass it is sufficient to turn to the doctrine and practice of constitutional control agencies of the European States, including Germany, France, and possibly the United Kingdom, and the experience of post-Soviet (former republics of the USSR) and post-socialist countries (Poland, Hungary, Czech Republic, and so on). However, a comparative analysis of the principles of law is not excluded in a constitutional court proceeding comparing the transitional States with Russia, having regard to the compatibility of legal orders and social conditions (South Africa, South Korea, India, Brazil, and others).

(c) Compatibility with Dispute to be Settled.

The last stage of evidence of the existence of a general principle of law is determined by the specific nature of the disputes to be settled by way of a constitutional court proceeding. Having regard to a possible analogy with international justice, the reflections of a former judge on the ICJ, Sir Arnold McNair (1885-1975), merit attention. In his view,

> … the way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock, and barrel', ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law'. … the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.[129]

Therefore, direct borrowing of general principles from foreign law or their indirect use with a reference to international-legal materials requires adaptation to the purposes of constitutional justice.

One may encounter similar conclusions with respect to regional international courts. In explaining the use of comparative-legal materials by the Court of the European Union, Judge Hans Kutscher emphasized that"

> There is complete agreement that when the Court interprets or supplements Community law on a comparative law basis it is not obliged to take the minimum which the national solutions have in common, or their arithmetic mean or the solution produced by a majority of the legal systems as the basis of its decision. The Court has to weigh up and evaluate the particular problem and search for the 'best' or 'most appropriate' solution. The best possible solution is the one which meets the specific objectives and basic principles of the Community … in the most satisfactory way.[130]

[128] M. Akehurst, "The Application of General Principles of Law by the Court of Justice of the European Communities", *British Year Book of International Law*, LII (1982), p. 38.

[129] Advisory Opinion of International Court of Justice, 11 July 1950, "International Status of South-West Africa" (Separate Opinion by Sir Arnold McNair), *International Court of Justice Reports* (1950), p. 148.

[130] H. Kutscher, "Methods of Interpretation as Seen by a Judge at the Court of Justice", Reports. Judicial and Academic Conference, 27-28 September 1976 (Luxembourg, 1976), p. I-29 (available online).

Thus, Russian constitutional justice when undertaking a comparative analysis may require an evaluation of the adequacy of the borrowed principles for national conditions, including the distinctive features of the national constitutional system. General principles of law, having regard to the possibility of borrowing foreign experience, serve as an additional means of legal argumentation in a constitutional court proceeding. Judges may dig in such sources for more extensive and deeper arguments in connection with the existing experience of foreign States. However, in the event of the incompatibility of such principles with national traditions, a negative result is possible.

Popular suits are incompatible with the European model of constitutional judicial control used in Russia; that is, recourse in the defense of rights of an indefinite group of persons along the amparo model in Latin America. The institution of *actio popularis* so far is not recognized by international courts as a general principle of law by analogy. In its Judgment in the South West Africa cases of 18 July 1966, the ICJ did not agree with the argument of the party concerning the admissibility of the

> … equivalent of an '*actio popularis*', or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the 'general principles of law' …[131]

An analogous conclusion follows from the stable practice in Russian constitutional justice. In accordance with the approaches of the Constitutional Court of the Russian Federation,

> merely one abstract interest of a citizen in support of the constitutional legal order by means of eliminating those laws violating, in his view, constitutional rights and freedoms, including in connection with a violation which has occurred, as the applicant believes, of the rights and freedoms of other persons or potential possibility of the application of the respective laws with respect to he himself in the future, in and of itself does not create the prerequisites for deeming to be substantiated the instituting of a constitutional court proceeding called upon to ensure the defense and restoration of violated rights of the applicants.[132]

Thus, in the last stage of evidence of general principles of law, it is essential to evaluate their adequacy for the distinctive features of disputes to be settled by way of a constitutional court proceeding in Russia.

SYSTEM-FORMING CHARACTER

General principles of law have a system-forming character for the international and national legal systems. In constitutional justice, these principles possess an inter-branch operation, acting as the most important means of constitutionalizing legislation and law-enforcement practice. Doctrine sees in general-legal principles "fundamental significance

[131] Judgement of International Court of Justice, 18 July 1966, "South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)", *International Court of Justice Reports* (1966), p. 47.
[132] Ruling of the Constitutional Court of the Russian Federation, 29 September 2015, No. 2002-O. Available on Consultant Plus.

for determining the essence of constitutionalization".[133] Accordingly, general principles of law by virtue of their abstractness and universal spheres of operation are applicable in various branches and institutions of the national legal order.

(a) General-Legal Principles in Private Law.

The principles here considered are obliged to the emergence in international law to a great extent to private law, where this phenomenon was preserved by virtue of the legacy of Roman law. According to the Civil Code of the Russian Federation (Article 6), in the absence of legislative regulation or by agreement of the parties, and also when it is impossible to use analogy of *lex* or custom, the application of law is permitted by analogy; that is, the determination of civil rights and duties is assumed "by proceeding from the general principles and sense of civil legislation (analogy of *jus*) and the requirements of good faith, reasonableness, and justness". The Civil Code considered analogy of *jus* (that is, the application of general rinciples of legislation) as a means for overcoming legal gaps expressly by enumerating three key general principles of law. Proportionality closely intersects with them in content. Good faith assumes the equivalence of a legal community of subjects. Justness is reflected in the proportional distribution of material and intangible benefits (distributive justice) or comes down to the proportionality of the offense with responsibility (retributive justice). Finally, the requirement of reasonableness is considered to be one of the elements of the principle of proportionality. In Russian private law, despite such an interlinkage, the principle of proportionality so far has not received proper elaboration. Even the requirement of a balance of private and public interests is proving to be an innovation in civil legislation.[134]

(b) General Principles of Law in Public Law.

In Russian public law the use of general principles law is not provided for normatively. However, this source of law has received extensive dissemination in doctrine and the practice of a number of European States in order to fill gaps and formalism in administrative law.[135] In the course of one of the last constitutional codifications in the Republic of South Africa an autonomous guaranteed right was directly consolidated to just administrative action. It, in essence, integrated the understanding of general principles of law in Anglo-Saxon and continental public law. According to the 1996 Constitution of South Africa (Article 33), "everyone has the right to administrative action that is lawful, reasonable, and procedurally fair". Such a constitutional right in an administrative and constitutional court proceeding acquires a deeply applied significance because this enables judges to use formal (legality, certainty, *ultra vires*, and so on), material (proportionality, reasonableness,

[133] V. V. Nevinskii, «Конституционализация российского права: сущность, пределы» [Constitutionalization of Russian Law: Essence, Limits], Развитие российского права: новые контексты и поиски решения проблем [Development of Russian Law: New Contexts and Quests for Solving Problems] (Moscow, 2016), I, p. 202.

[134] N. G. Doronin (ed.), Новое в гражданском законодательстве: баланс публичных и частных интересов [New in Civil Legislation: Balance of Public and Private Interests] (Moscow, 2012).

[135] A. L. Kononov, «Об общих принципах права во французской и бельгийской судебной практике по административным делам» [On General Principles of Law in French and Belgian Judicial Practice with Regard to Administrative Cases], Государство и право [State and Law], no. 3 (2001), p. 82-86.

non-discrimination, essential core of right, and so on), and procedural (access to justice, adversariality, *res judicata*, and so on) general principles of law. These principles simultaneously correspond to the three groups of grounds for judicial review over acts of agencies of public power.

The practice of constitutional adjudication serves as the normative foundation for courts of general jurisdiction over the use of formally unwritten principles. The Judicial Division for Civil Cases of the Supreme Court of the Russian Federation, using in essence the principle of *lex posterior*, resolved a contradiction between two laws which determined jurisdiction over appeals relating to the defense of electoral rights. Referring to a Ruling of the Constitutional Court,[136] the Supreme Court of the Russian Federation stressed:

> Taking into account that the Code of Civil Procedure, having relegated cases contesting decisions of territorial electoral commissions to the jurisdiction of a district court, is the later procedural law that that containing procedural norms concerning the jurisdiction of the Federal Law 'On Basic Guarantees of Electoral Rights and Rights to Participate in a Referendum of Citizens of the Russian Federation', the Code of Civil Procedure of the Russian Federation should be applied.[137]

In this instance, the Supreme Court used the decision of the Constitutional Court of the Russian Federation as a formal source for the principle *lex posterior*. It is believed, however, that Russian judges by analogous means may refer to a decision of international courts or to foreign law which contain a reference to some general principle of law.

(c) General Principles of Law in State Law.

The system-forming character of general principles of law in public law determines their application to mutual relations of State agencies. For example, in the domain of the federative system homogeneity (uniformity) is ensured of central and regional legislation. Attention was drawn to this circumstance in the Special Opinion of Judge Gadzhiev, when he emphasized that

> Such constitutional-legal values-principles exist as legal certainty, equality before the law, the principle of legitimate expectation, and others which may not belong exclusively to one level of constitutional control, because they are general-legal values, immanent to any rather developed legal order. Such is the requirement of the homogeneity of the legal system.[138]

From this he drew the fully well-founded conclusion concerning the existence of autonomous objects (regional constitutional norms) and grounds (including general principles of law) of constitutional judicial control at the level of subjects of the Russian Federation. Otherwise, the existence of an autonomous regional constitutional (or charter) justice would make no sense.

[136] Ruling of the Constitutional Court of the Russian Federation, 10 November 2002, No. 321-O. Available on Consultant Plus.

[137] Ruling of the Judicial Division for Civil Cases of the Supreme Court of the Russian Federation, 1 September 2004, No. 19-Г04-6. Available on Consultant Plus.

[138] Decree of the Constitutional Court of the Russian Federation, 2 December 2013, No. 26-П. Available on Consultant Plus.

(d) Inter-Branch Operation of General Principles of Law.

In constitutional justice, general principles of law may acquire inter-branch operation. This quality of the principles here considered is reflected, in particular, in legal responsibility. The Constitutional Court of the Russian Federation repeatedly has emphasized that justice, humanity, and proportionality of responsibility are derivative from general-legal principles and the grounds thereof have universal significance for all types of legal responsibility.[139] In another case, The Russian agency of constitutional adjudication determined that proportionality (together with justice and legality) act as one of the "general principles of legal responsibility".[140] Proportionality in such inter-branch significance also used by ordinary courts. The Decree of the Plenum of the Supreme Court of the Russian Federation of 29 April 1996, as amended 6 February 2007, "On the Judicial Judgment" (point 21) recommends to courts to take into account the requirement of proportionality when determining the amount of contributory compensation for moral harm.[141] In this capacity, general principles of law are applied in the basic branches of the national legal system.

(e) Proportionality as an Integral Principle.

The system-forming character of general principles of law enables attention to be drawn to the role of proportionality in ensuring the consensus of the legal order. In and of themselves, principles have been called upon to harmonize the legal system. One may agree with Roman Zinov'evich Livshits, who, when considering law as a means of social amity, suggested that "principles encompass the entire legal bedrock – ideas, and norms, and relations – and impart thereto a logic, a consistency, a balance".[142] In judicial practice, in the event of a conflict of general principles of law of the same order, proportionality serves as a means of harmonization thereof.

To a great extent, the weighing, acting as a central element of the principle of proportionality, augments the traditional formal-logical method of legal qualification (otherwise the method of subsumption)[143] used in the theory of argumentation, when according to the model of syllogism the general norms are applied to concrete factual circumstances. The departure from the usual legal methodology is determined by the nature of general principles of law and constitutional rights. They become the subject-matter of judicial investigation in the most complex cases. Constitutional rights frequently are in and of themselves identified with principles. In foreign constitutionalism the views on Ronald Dworkin (1931-2013) have proved to be influential; he proposed dividing all legal norms into three groups (rules, policies, and principles).[144] These views develop

[139] Decree of the Constitutional Court of the Russian Federation, 14 June 2018, No. 23-П, СЗ РФ (2018), no. 26, item 3932.

[140] Ruling of the Constitutional Court of the Russian Federation, 2 September 2010, No. 1091-O. Available on Consultant Plus.

[141] Бюллетень Верховного Суда РФ [Bulletin of the Supreme Court of the Russian Federation], no. 7 (1996); no. 5 (2007).

[142] R. Z. Livshits, Теория права [Theory of Law] (Moscow, 1994), p. 196.

[143] See F. Schauer, "Balancing, Subsumption, and the Constraining Role of Legal Text", *Law and Ethics of Human Rights*, IV, no. 1 (2010), pp. 34-45.

[144] R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass., 1977).

the theory of the principles of the German legal philosopher, Robert Alexy, who regards constitutional rights as optimization requirements.[145]

General principles are distinguished from more concrete legal rules of behavior, which means they have a specific feature in the mechanism of effectuation. A customary norm requires strict compliance. The rule is applied according to the principle "all or nothing". Principles, unlike rules, often are in conflict with one another and require optimization in the process of law enforcement. Therefore, proportionality among general principles performs an instrumental role, resolving conflicts between conflicting principles.

It is believed that within general principles of law there is no hierarchy, and likewise constitutional rights may not be co-subordinated in legal weight among themselves. Therefore, instead of subsumption or otherwise – categorization,[146] the agency of constitutional adjudication must use the method of balancing by establishing the relative weight between the conflicting principles or rights, taking into account the concrete facts of the case.

A similar view is shared by N. S. Bondar, a judge on the Constitutional Court of the Russian Federation; according to him, "with the assistance of constitutional-control activity a kind of increment and actualization occur in the normative content of respective principles and value-legal principles, and also the establishment of their balanced interaction".[147] Hence the interlinkage is evident between the process of harmonization of general-legal principles and proportionality (especially, judicial balancing).

Proportionality is considered to be an integral principle by virtue of its methodological nature. Martin Loughlin linked the phenomenon of constitutionalization with rationalization procedural requirements and the theory of liberal-legalistic constitutionalism. In his view, "constitutionalism may live not only as a symbol, but also as an effective instrument of a legal order, the organization of public power on the basis of rationality and proportionality, creating a mechanism for limited interference in the exercise of the fundamental rights of individuals".[148] With the assistance of the principles here considered the establishment is ensured of limits on the interference of the State in constitutional rights. Accordingly, one may characterize general-legal principles as the grounds for judicial constitutional control.

GROUNDS OF JUDICIAL CONSTITUTIONAL CONTROL

General principles of law are not simply ideas, but lay down legal obligations on the legislator and other agencies of public power in constitutional justice. In this sense they

[145] R. Alexy, "The Construction of Constitutional Rights", *Law and Ethics of Human Rights*, IV (2010), pp. 20-22. Simultaneously, Alexy's approach is criticized as not providing new or original results. The opponents, however, of the conception of constitutional rights as optimized prescriptions do not deny the traditional view distinguishing legal principles from other norms only "to the degree needed for concretization and importance for the legal order". See R. Poscher, «Теория призрака – безрезультатный поиск теорией принципов своего предмета» [Theory of the Ghost – Fruitless Quest of Theories of Principles of the Subject-Matter Thereof], Правоведение [Jurisprudence], no. 5 (20

[146] K. M. Sullivan, "Post-Liberal Judging: The Roles of Categorization and Balancing", *University of Colorado Law Review*, LXIII (1992), pp. 293-317.

[147] N. S. Bondar, Российский судебный конституционализм: введение в методологию исследования [Russian Judicial Constitutionalism: Introduction to the Methodology of Research] (Moscow, 2012), p. 59.

[148] Martin Loughlin, «Что означает конституционализм?» [What Does Constitutionalism Mean?], in E. V. Alferov and I. A. Umnov (eds.), Современный конституционализм: теория, доктрина и практика [Contemporary Constitutionalism: Theory, Doctrine, and Practice] (Moscow, 2013), p. 158.

serve as the normative grounds of judicial constitutional review. The key principles are identified in constitutional practice with criteria enabling the admissibility to be assessed of legislative interference in constitutional law. In recognizing an extensive freedom of discretion for representative agencies of power, the Constitutional Court of the Russian Federation nonetheless emphasized the obligation of the legislator

> to ensure a balance between constitutionally-defended values, public and private interests, while complying in so doing with the principles of justness, equality, and proportionality acting as a constitutional criterion for evaluating the legislative regulation not only of laws and freedoms consolidated expressly in the Constitution of the Russian Federation, but also the rights acquired on the grounds of a law.[149]

It follows that general principles of law defending constitutional rights enable the Constitutional Court of the Russian Federation to undertake the constitutionalization of national law. Under a literal translation of the English terminology, similar principles are called judicial tests.[150] These principles comprise for the Constitutional Court a legal means of verifying laws and other acts by way of a constitutional court proceeding. The principle of proportionality chosen as an example has clearly expressed instrumental properties. Under the example of Joachim Rückert, this illustration is uniquely a "methodological wonder-weapon" (methodische Wunderwaffe).[151]

(a) Institutional Identity of Constitutional Justice.

From these positions, general principles of law act as an additional element of the constitutional identity of constitutional adjudication with other branches and agencies of public power. Without them, the Constitutional Court of the Russian Federation would find it more difficult to perform its purpose as a judicial agency of constitutional review (Article 1, Federal Constitutional Law "On the Constitutional Court of the Russian Federation"). The use of such principles of the Constitution enables it, in defending constitutional supremacy, to guarantee the direct operation and highest legal force of constitutional norms throughout the territory of Russia with respect to other legal acts and authoritative subjects (Article 4(2) and Article 15(1) and (2), 1993 Constitution of Russia; Article 3(1), Federal Constitutional Law "On the Constitutional Court of the Russian Federation"). In the process of review, three elements should exist at a minimum: verification of the legislative provision being contested (first element) from the standpoint of conformity to norms of the Constitution (second element) by means of a determined criterion (third element). General principles of law most often act as the third element.

[149] Ruling of the Constitutional Court of the Russian Federation, 15 May 2012, No. 880-O. Available on Consultant Plus.

[150] M. Lasser, "Lit. Theory Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse", *Harvard Law Review*, CXI (1998), pp. 689-770.

[151] J. Rückert, "Abwägung-die juristische Karriere eines unjuristischen Begriffs oder: Normenstrenge und Abwägung im Funktionswandel", *JuristenZeitung*, LXVI, no. 19 (2011), p. 914.

(b) Abstractness of General Principles of Law.

The capacity to act as grounds of constitutional review to a great extent arises from the abstract character of general principles of law. Content open for interpretation brings these principles closer to the constitutional text itself. General principles of law are considered to be the most idealistic structures of foreign studies as the base for forming global constitutionalism. Jeremy Waldron adheres, for example, to such a view; he advanced the conception of a new law of nations (*jus gentium*):

> But it once had a broader meaning, compromising something like the law of mankind, not just on issues between sovereigns but on legal issues generally – on contract, property, crime, and tort. It was a set of principles that had established itself as a sort of consensus among judges, jurists, and lawmakers around the world.[152]

The present work does not have the purpose of developing futuristic predictions. However, the general principles of law and base elements of constitutionalism have a common legal methodology. Therefore, this group of legal principles turns out to be close in spirit to constitutional justice, including from the standpoint of the legal technique for adopting decisions.

(b) General Principles of Law and Constitutional "Spiritualism".

The abstractness of general principles of law in applied questions of a constitutional court proceeding may prove to be a rather dangerous instrument. In the practice of the Constitutional Court of the Russian Federation one frequently discovers references not only to the letter, but also to the spirit of the 1993 Constitution. On the whole this is a method of conditional "constitutional spiritualism" which has proved to be needed in Russian practice in order to substantiate the need for a evolutionary interpretation of constitutional norms. According to the case on governors No. 2, the Constitution of the Russian Federation and the positions of the Constitutional Court of the Russian Federation interpreting it "may clarify or change so as to adequately elicit the sense of particular constitutional norms, the letter and spirit thereof, taking into account concrete socio-legal conditions for their realization, including changes in the system of legal regulation".[153] Moreover, in one of its recent newspaper articles under the headline "Letter and Spirit of the Constitution", the Chairman of the Constitutional Court of the Russian Federation, V. D. Zorkin, in the context of discussing the possible cardinal constitutional reform suggests the constitutional text be adapted to changing socio-legal realities "within the framework of the doctrine of a 'living constitution' adopted in world constitutional practice".[154] Indeed, this conception is widely shared in common law countries,[155] and western specialists

[152] J. Waldron, "Foreign Law and the Modern Ius Gentium", *Harvard Law Review*, CXIX (2005), p. 132.
[153] Decree of the Constitutional Court of the Russian Federation, 21 December 2005, No. 13-П, СЗ РФ (2005), no. 3, item 336.
[154] V. D. Zorkin, «Буква и дух Конституции» [Letter and Spirit of the Constitution], Российская газета [Russian Newspaper], 10 October 2018.
[155] B. Ackerman, "The Living Constitution", *Harvard Law Review*, CXX (2007), pp. 1737-1812; W. H. Rehnquist, "Notion of a Living Constitution", *Texas Law Review*, IV (1975), pp. 693-706; D. A. Strauss, *The Living Constitution* (Oxford, 2010).

evaluate positively judicial law-making in Russian constitutional justice by means of the use of general principles of law or "constitutional spirit".[156]

The development of law by judges (Richterliche Rechtsfortbildung) is considered to be a methodologically inevitable phenomenon even in countries of continental law.[157] In a decision of 14 February 1973, the Federal Constitutional Court of Germany emphasized specially that "judges according to the Basic Law are not simply directed to apply legislative prescriptions within the limits of their possible literal meaning to concrete instances. Such a permission would assume in principle a gapless positivist legal order in the State which … is virtually unattainable".[158] General principles of law by virtue of their abstractness enable judges to fill gaps, ensure the development of the legal system, and also are capable of creating limits on extensive discretion of judges. This conclusion, to be sure, does not remove the need to elaborate other limits on judicial discretion.

The development of law by judges in agencies of constitutional justice to a great extent depends on the socio-political context in a specific State. Attention should be drawn to under what conditions the "Living Tree Doctrine" initially emerged in Anglo-Saxon law. One of the cases where this doctrine found expression concerned the legal personality of women in the political sphere. The Privy Council of the United Kingdom did not agree with the narrow interpretation by the Supreme Court of Canada of the category "person", which excluded persons of the female sex from the category. Acting as the highest instance, the Privy Council emphasized that:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. 'Like all written constitutions, it has been subject to development through usage and convention … [but their Lordships do not to] consider it their duty to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation …".[159]

As a consequence, the emergence of an abstract constitutional spirit to a great extent depends on the moral choice of judges. Here one may recall the utterance of Leon Petrazycki (1867-1931), who considered Russia to be the "kingdom of intuitive law by preference".[160] But at that time in comparison with European rationalism, the Russian legal system could not be understood partly outside emotional notions. From the standpoint of proportionality, this conclusion being just even for major State decisions which are developing with the use of the said principle, usually are the subject-matter of constitutional examination.

(iv) General Principles of Law and Liberal Values. General principles of law grant to the Constitutional Court of the Russian Federation significant freedom for the discretion of judges and ultimately enable a difficult moral choice to be made. It is important, however,

[156] A. Trochev, "Russia's Constitutional Spirit: Judge-Made Principles in Theory and Practice", in G. Smith and R. Sharlet, *Russia and its Constitution: Promise and Political Reality* (Leiden, 2008), pp. 53-77.

[157] C. Hillgruber, "Richterliche Rechtsfortbildung als Verfassungsproblem", *JuristenZeitung*, LI, no. 3 (1996), pp. 118-125.

[158] Beschluss des Ersten Senats vom 14. Februar 1973, 1 BvR 112/65 [Soraya], *Bundesverfassungsgerichts*, XXXIV (1973), p. 287.

[159] Judicial Committee of the Privy Council, 18 October 1929, "Henrietta Muir Edwards and others (Appeal No.12 of 1928) v The Attorney General of Canada (Canada), *Law Reports: Appeal Cases*, CXXIV (1930), p. 9.

[160] Leon Petrazycki, Теория права и государства в связи с теорией нравственности [Theory of Law and State in Connection with the Theory of Morality] (Spb., 1907), II, p. 618.

that spiritualism not be transformed into populism, when in order to take decisions in a constitutional court proceeding attractive general phrases conceal from the addressees the true motives of the behavior of judges and main meaning of the Russian Constitution. The breadth of judicial activity of the Constitutional Court is justified in connection with the need to undertake review of decisions of other branches of power and ultimately to restrain the inevitable arbitrariness of the State.

Such conclusions confirm the evolution of the idea of proportionality. From the outset, this principle performed a liberal function, representing a constitutional means of limiting State power for the purposes of guaranteeing freedom. This function of proportionality arises from the historical account of classical constitutional acts which came into being in connection with the need to minimize State interference in the spirit of *laissez faire*. Now liberalism is not so popular, but retains its position in constitutionalism. Illustrative in this respect is the title of a recent book from the Oxford University Press.[161] Drawing attention to failures and unpopularity of the liberal approach in post-Soviet countries, the extensive development of populism, and the inclination towards authoritarianism as a simple resolution of complex problems, the two Hungarian scholars stress that "suddenly the *fragility* of constitutional democracy became a clear concern, and its collapse a real-life scenario. The Constitution and democracy are turned against each other where the constitution can be used to forget that it is first and foremost about the prevention of despotism".[162] The initial function of proportionality also consisted of the prevention of despotism and other anti-constitutional manifestations even on the part of democratically-elected agencies of power. This principle, however, may be used not for its purpose or for directly opposed purposes. As a sharp scalpel in the hands of an experienced surgeon saves life, the same medical instrument in the hands of a hardened criminal or illiterate novice may become an implement of a crime.

(c) Additional Legitimacy of Constitutional Justice.

In comparison with legislative bodies, constitutional justice at least possesses less legitimacy at first impression. In a democratic State, the parliament should represent the interests of the majority of social groups and undertake the working out of politically-responsible decisions in a special procedure, including the possible transformation of constitutional norms, having regard to social changes. At the Constitutional Court of the Russian Federation, called upon to interpret provisions open in content of the 1993 Constitution, has in the sense a limited – in comparison with parliament – arsenal of legal means capable of influencing the legitimacy of its decisions.

Recourse to general principles of law as external authority in a certain sense serves as an additional "privilege" in the absence with the court of a direct democratic mandate from the population. In the process of judicial review over decisions of a legislator receiving direct support from the voters, the argumentation of the legal position with support from "external" forces adds a fundamental legitimacy to the Constitutional Court of the Russian Federation in the existing system of separation of powers.

[161] A. Sajó and U. Ritz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford, 2017).
[162] Ibid., p. 2.

CONCLUSIONS

Thus, general principles of law historically crystallized in the activity of courts when gaps were present in legal regulation and recourse was made to rules of foreign or international law. The experience of Roman law testifies to this, where the praetorians encountered gaps in connection with the expansion of the territorial limits of the Empire and became involved with disputes with the foreigners. The law created by judges, known as *jus gentium*, was not the last to emerge with an emphasis on comparative legal analysis. As before, now judges and other jurists, often intuitively, in order to add weight to their argumentation, especially in a situation of inevitable legislative gaps, seek support in the wisdom of a classical legal order, indeed dormant, but retaining its impalpable attractiveness of the Latin language.

In international law, the general principles of law receive normative consolidation as one of the three basic sources of applicable law for the principal international courts. They have there enormous conceptual significance. Being part of unwritten law, on the historical plane these principles emerged as an element of jusnaturalism and at present enable international courts to fill existing gaps in treaty or customary norms. General principles of law are closely linked with the last source, but not identical, for they may not require evidence of the existence of State practice for their application. This source is required in conditions of the defragmentation of contemporary international law and the inability of States for objective (economic, social, cultural, and so on) or subjective reasons (egoistic national interests) to elaborate universal rules for their community. In this sense general principles of law as a non-consensual source clearly or latently enable international judges (and not only them) to ensure the development of international law.

For evidence of the existence of a concrete general principle of law in a judicial examination a comparative-legal study may be undertaken of the most developed legal systems with an evaluative achievement of their critical mass and compatibility with the character of the dispute to be resolved.

For Russian constitutional adjudication, general principles of law as unwritten rules are complex to apply by virtue of the dominance of positivism. In the event of legislative fixation, the nature of these principles does not change. On the contrary, from hypothetical positivist detailization, general principles of law became rather lost or were not so required by judges Because of the abstract character, the normative content of these principles often cannot be grasped, but this comprises not only a shortcoming, but also an undoubted virtue.

General principles of law provide to agencies of constitutional adjudication an essential freedom of discretion and additional support in relations with the legislator (or other agencies of power). In hard cases, general principles of law serve not only as a scale of constitutional judicial review, but ensure the establishment of a relative weight between private and public interests. Such a methodological means of judicial weighing, being an element of proportionality, demonstrates the system-forming character of general principles of law.

These principles, against the background of the doctrine of constitutional identity, reflect the necessary idealism with regard to the existence of universal values in law. Ultimately, general principles of law confirm the constitutional maxim about the highest value of man and the primacy (base values) of fundamental individual freedoms. For the Constitutional Court of the Russian Federation, these principles play a key institutional

role as means for the legal protection of the constitutional system, including doubtful decisions of the highest State agencies, even if they are motivated by the need to achieve important public purposes.