



KUTAFIN UNIVERSITY LAW REVIEW

Volume 1

September 2014

Issue 1

WHAT IS CONSTITUTIONAL LAW TODAY?

**THE SCOTTISH INDEPENDENCE REFERENDUM:
PEACEFUL, CONSENSUAL, AND LAW-BASED**

JURY TRIAL: THE RULE OF LAW OR NULLIFICATION?

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Dear readers,

On behalf of the Kutafin University Law Review, let us be among the first to welcome you to the pages of our journal. We hope you will find this periodical as enjoyable as we do. This is one of the few English-language legal journals in Russia.

The Kutafin Moscow State Law University (MSAL) was founded in 1939 as a successor of the Judicial Courses. Today, the MSAL is the biggest and most famous Law University within the territory of the former Soviet Union. About 18.000 students are studying different law disciplines behind the walls of the MSAL at the moment.

The Kutafin University Law Review (KULawR) was established by the MSAL in 2014 as an editorial project aimed to spread legal knowledge generated by leading Russian scholars all over the world. Their achievements have not been accessible to respective non-Russian speaking audiences for a long time. One of the main ideas of this journal is to fill that gap.

In addition, we welcome contributions from all legal researchers from every corner of the world. We would like to bring the Kutafin University Law Review to the level of a new and authentically international law journal. It presumes that the content of the periodical should reflect actual, modern, and innovative legal issues.

The contents of the KULawR cover different legal branches and scholarships. We would be happy to focus on random topics of law, as well as allied sciences – legal sociology, criminology, forensics, etc. The pages of the KULawR are opened for a wide range of new and creative opinions.

We hope you will enjoy reading the Kutafin University Law Review. All additional information may be found on the journal website at www.kulawr.ru

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LECTURE

CONSTITUTIONAL LAW: NOTION AND SOURCES

By Boris Strashun

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Abstract

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

Keywords

Constitution, constitutionalism, Constitutional Law

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

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

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

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

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

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

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

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

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

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

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

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

The most important subject within Constitutional Law is a group of social relations, which form a ground for the state organization.

Another group of social relations is formed by the relations that have a basic level of significance for those spheres through which they have come into existence. Such relations are not obligatory and they can become elements of Constitutional Law, just in case where there is a state interest².

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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