MAIN STRUCTURAL CHARACTERISTICS OF GLOBAL CONSTITUTIONALISM.

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Summary.

Nowadays current global problems stand as burning challenges of multi-level governance and reflect the importance of advanced cooperation of the states. Moreover the expansion of international human rights revealed the necessity of modification of international legal methods of common values security, shifting them on the global level. In these conditions modern international public law vividly evolved and is apt to reconfiguration including altering positions from cooperation to constitutionalization. Modifying relations among the international public authorities and the global activity of modern international actors (individuals, transnational companies and business organizations, international non-governmental organizations, etc.) pointed out the changes in the international legal norms making.

The ideas of reconfiguration of international public law structure, gaining the characteristics of constitutional importance, are of significant scientific interest. Constitutionalization of international law and unification of constitutional law are the most discussed problems of modern law in globalization settings.

At the beginning of the 21st century constitutionalist approach to the regulation of international law order gave birth to innovative political-legal theory and ideology named global constitutionalism. The core idea of this ideology is based on constitutionalist concern to launch political legitimacy for global norms for international community. So the regulative norms will be approved not only by the sovereign will of powerful actors, but also by different members of global legitimate community.

This article deals with academic aspects of global constitutionalism and the problems, concerning the necessity of revision of role of international law as a universal system of principles and norms, being the basis of new international
order for the whole international society. The focus of the author’s thesis is that
global constitutionalism occurs to be up to date concept that obtains fundamental
grounding of United Nations Law and European constitutionalism. Global
constitutionalism is of great theoretical and practical importance for the future
improvement of international law system.

In this paper the concept aspects of formation of global constitutionalism
and its critical ideological positions are highlighted. The author examines the
global constitutionalism’s critical potential, and the reasons why global
constitutionalism raises doubts and provokes alternative critical points.

The paper addresses to the specialists in international public law and
constitutional law. Though in Ukraine there is a lack of conceptual framework to
research global constitutionalism, this concept will be of great use to the country
counting its Euro integration perspectives.

The author’s thesis examines the classification of global constitutionalism’s
elements and defines its objective, legislative and organizational essentials. Besides in the article the author analyzed the basic burning questions of global
constitutionalism and titled the visions of its formation.

Global constitutionalism is understood as an inter-disciplinary phenomenon
that advocates for the application of constitutionalist principals in international
relations in order to stimulate the value of international law order. The author is
determined that global constitutionalism is helpful for the establishment of political
legitimacy for global regulation.

**Statement of the problem.**

Permanent dominant globalization tendency and feeble governmental
counteracting the global challenges turned out to be a powerful incentive to
activation of international cooperation in order to solve ecological and socio-
economic problems and to manage the international integration phenomena.

Not only the processes of integration and globalization, but also rapid
technological progress, the expansion of the Internet, the increase of data
transmission rate aroused new tasks for international human rights protection system.

The mentioned processes also provoked new ways for international law-breaking (terrorism, cyber-criminality, human trafficking, swindle, etc.) and so actualized the necessity of adapting global authorized power in order to create unified legal instruments to counteract the matching menaces.

In current moment international public law stays the only deliberated instrument of this kind. Nevertheless, the matter of corresponding of international law theory to the international practice produces irreconcilable contradictions. On the other hand, at the beginning of the 21st century genuine negative moving forces and trends of the international relations objectified the problems of optimal legal regulation of international law order.

In such conditions, globalization of law caused the appearance of new conception in modern western jurisprudence. This concept secured the idea of creation of global legal society with its own organizational-legal mechanisms of governing the political power that will guarantee general interests of the states and common human rights and values. The above mentioned concept envisages the reconfiguration of international public law, which sense was summarized as “constitutionalism” [1], and furthermore got the conforming innovative title – global constitutionalism.

**The object of this article** is to determine the influence of global processes on structural elements of the modern constitutionalism and to make complex research of the essence and value of the newest idea of "global constitutionalism", offered by the representatives of western legal science at the end of the XX century.

**State of research.**

In Ukraine, theoretical-methodological aspects of the influence of globalization on the construction of constitutional legal relations and the legal analysis of the progress in the system of international, European and Ukrainian constitutionalism were discussed in works of such recognized scientists, as:
However, modern scientific researches of global constitutionalism are based on works in the sphere of constitutionalization of international law order and global governance of such foreign academics – A. von Bogdandi, Ch. Weseman, A.Wiener, J.Dunoff, P.Dobner, R. Johansen, S. Kim, J.Klabbers, M.Koskenjemi, M. Loughlin, M.Maduro, A.Peters, D.Rosenau, A. Stone Sweet, E.Tanchev, Ch. Tomuschat, J.Trachtmann, M.Touschuet, R. Falk, Ch. Swoebel and others.

**Presentation of principal material.**

The necessity of modification of international legal instrument of guarantee of common human values gave birth to forming of global constitutional reality and modernization of the newest categories in constitutional law, that are related to globalization of law. Globalization of law, that also depends on circulation of authorized institutions between the national systems and their circulation from domestic to the global level and vice versa, is seen as foundation for the constitutional reading of international law and the appearance of conception "global constitutionalism”.

Global constitutionalism is the newest concept of interdisciplinary character and deals with the revision of problems of the constitutionally-legal adjusting of public relations between and beyond the states.

It is worth to agree with Ukrainian scientist P.Martynenko concerning the fact that constitutionalism covered international legal relations quite late, and even not completely. But while affirming the ideas of legal state, its evolution into constitutional state, the origins of democracy were absolutely applied to the sphere of foreign policy and expressed after the Second World War into the "international tendency" of development of the democratic constitutionalism. P.Martynenko also claims that despite of considerate warnings from the specialists in international law, the tendency evolved thanks to well-known processes of euro-integration and
renovating of independence of the states in Central-Eastern Europe, especially the independence of Ukraine. [2]

In 1993 the founders of the theory of global constitutionalism R.Falk, R.Johansen, S.Kim first presented global constitutionalism as a set of transnational norms, rules, procedures, and the institutes, created to show the direction of transformation politics, dedicated to realization of values of world order both inside and between three systems of interconnected political activity in the independent world. [3] The first system, in opinion of the scientists, is comprised of territorial state actors and their supporting systems of intersecting politics. The second system consists of international intergovernmental organizations, including the United Nations. The third system is represented by nongovernmental citizens thinking globally but acting locally through the nongovernmental organizations and critical social movements. R.Falk, R.Johansen, S.Kim believe that global constitutionalism is something profounder and broader than the course of propaganda of the war/piece system as a political project and is something less legal than positive and Justinian expansion of effective legal power to the global level.

So, while making the research of global constitutionalism, we may conclude that its meaning has synthetic and integrative features, and consists of two units – 1) the general definition of constitutionalism, 2) the most important connection to the processes of globalization and world globality.

*The first unit* is highlighted by the fact that in Ukrainian constitutional legal science there is no common point of view as to the definition of the term “constitutionalism”. Despite of enormous approaches to the problem of the emergence of constitutionalism, there is a dominant idea that originally the term “constitutionalism” (from French “Constitutionnalisme”, from Latin “Constitution” – statement) appeared in American political-legal conception at the end of XVIII – the beginning of XIX century, as a supreme power of the written constitution over the laws and other performed normative statements. [4, p. 197]

As to Mcilwain C., at the stage of its foundation, constitutionalism stood as a
limitation of a state by the law, and the opposite to constitutionalism were tyranny and willfulness. [5]

Furthermore, the definition of constitutionalism got new sense in connection with the changes in constitutional-legal regulation of social affairs. Today the term “constitutionalism” is considered in political, philosophic and juridical aspects.

In political understanding constitutionalism is a political association of a state and civil society, in philosophical sense - a philosophy of juridical point of view with the postulates of legal state, that has historical and philosophical sources in theological ideology, ideas of absolute right. [6, C.23]

Ukrainian scientist, professor J.Voloshin points out that in a legal aspect constitutionalism may be understood in a narrow sense - as a special mode of functioning of constitutional order on the basis of constitutional principles and methods, in the wide understanding - as a complex political-legal system. [4]

Famous Ukrainian scientist – specialist in constitutional law, professor M.Orzih confirms that constitutionalism, as a system of theory, ideology and practice, consists of such elements:

1. Constitutional legal consciousness, that goes far beyond the limits of positive understanding of law currently in force in the sphere of the rule of law,

2. Constitutional – normative postulates (legal principles and norms-definitions) , that are accepted not as something immobile, static , but as something accepted together with their doctrinal roots, legal values system, that reveal the concept, philosophy, sense of the constitution and the practice of its realization.

3. Constitutional legal relations, that foresee human rights recognition and a subjective will (as such that can be directed against state power in a positive model: citizen A against the State).

4. Constitutional legitimacy, that is not limited by obligatory fulfilling of law with is inner hierarchy, and stands as an indication of constitutional statements, deeds and inactivity of the subjects of constitutional law. [6, C.24]

Besides, the necessity of marking the real existing constitutionalism is really worth taking into consideration, in other words - the existing practice of
considerable regulation of social affairs must be detached from the ideal constitutional law order, that civilized state and world civil society want to achieve in their law-making and that is a goal of modern legal regulation.

Russian researcher V.Bogaturjov methodologically correctly affirms that the appearance of the first constitutions and the ongoing formation of constitutional law and the ideas of constitutionalism are the first “newscasters” of the beginning of globalization in legal sphere of the planet, in other words – the conforming similarity of constitutional law of different countries of the world is formed on the basis of common legal doctrine. [7]

The second unit of the definition of global constitutionalism also has its peculiarities that are connected with critical explanation of the meaning of globalization and the ideology of globality.

Indeed, the approval of “globalization” is very complex because of having big advantages for the mankind – on the one hand, and magnificent problems and threats – on the other hand.

Another Russian researcher, doctor of historical sciences, M.Muntyan, considers that globalization, which stands as a corresponding product of combination of spontaneous processes of world development and people’s conscious intended deeds, leads to the next:

- transformation of various national private elements into equal common human civilization, converting the world association of peoples into the world society,
- suspension of some common globally accepted rules of behavior, that are acknowledged peacefully or under pressure,
- formation of safe system of economic and political world order, etc. [8]

Besides, M.Muntyan cited the opinion of B.Badiet, prof. of Paris institute of political sciences, who marks three measures of understanding of the globalization phenomenon:

1) Homogenizing of the world (life under equal principals, equal values adjusting, taking equal traditions and norms of behavior, etc.),
2) Growing interdependence (appearance of new actors of the planetary stage - global forms and corporations, religious groups, transnational governmental and banking systems,

3) Historical process. [9]

At the end of the 20th century German author G.Triepel (1868-1946) created a theory of general will. To his mind, state law can be constructed by the will of the only one state, at the same time, the creation of a legal system in international society needs the united willpowers of independent states. In result of such arrangement, the new phenomenon appears – common will, which secures the obligatory international law. The work, which reflects the main ideas of the dualism, under the title of “Volkrrecht und Landesrecht” (International and Domestic Law) by G.Triepel, edited in 1899, was a great success. [10]

At the same time, French researcher of international law G.Scelle (1878-1961), continuing the ideas of Emile Durkgeim and Leon Dugi, proposed the thesis that international law is supreme in comparison to domestic law, because the international law reflects objective right of greater community. To his mind, international law develops in the direction of achieving of the supra-national characteristics, and the world community develops in the direction of the world state. State authorities act in the interests of a state and at the same time they perform in the name of international society (the law of functional bifurcation – la loi du dedoublement fonctionnel). [11]

Indeed, this statement also is stressed by the fact that in modern globalization environment none of the countries would be able to develop in the settings of autarchy and total isolation.

In such aspect, global constitutionalism can be defined as a center, over which the modern constitutional-legal doctrine (that guards the appliance of constitutional principles in the international sphere – the rule of law, checks and balances, human rights protection, democracy, etc.) turns round in order to upraise the effectiveness and honesty of international law order.
Anyhow, despite of its positive characteristics and great range of admirers, the ideas of global constitutionalism arouse significant scientific debates and are acknowledged to be premature.

The critics of global constitutionalism relate their fears with such negative characteristics of global constitutionalism, as:
- the lack of constitutional methodology,
- illusoriness of global constitutionalism,
- in conditions of global constitutionalism there is no opportunity for future revolutionary,
- eurocentrism,
- formation of constitutional imperialism (N.Luhmann, P.Ellot) [12],
- indemocratic juristocracy [13], etc.

It is clear, that such alternative critical visions are potential and understandable, though are not scientifically grounded, because global constitutionalism already has its methodology, inner reason of development, own elements and private theories, mechanism, principles, values and subjective-objective stuffing and stands quite realistic, though it’s a matter of time.

So, a well-known German international lawyer, the researcher of global constitutionalism Dr. iur., LL.M. (Harvard); Professor of Public International Law and Constitutional Law at the University of Basel, Anne Peters objects the critical opinion that constitutionalist reconstruction fraudulently creates the illusion of legitimacy of global governance. A.Peters emphasizes, that the danger that constitutionalism is misunderstood ‘as a mechanism that can instantly bestow legitimacy’ does not seem very real, and international and constitutional lawyers are sufficiently critical to realize that ‘constitutionalism’ is not a ready-made answer, but–on the contrary–a perspective which might help to ask the right questions. Prof. A. Peters conceives international (or global) constitutionalism as a legal argument which recommends and strengthens efforts (legal and political) to compensate for ongoing de-constitutionalization on the domestic level. [14, p.579]
In turn, while studying stability of the constitutional phenomenon, Greek lawyer Evangelos Venzilos, came to the conclusion, that modern participating of the states in integration processes on the international level and gradual "internationalization" of constitutions form a new constitutional theory and ideology, that in most cases determines the importance, contents and functioning of constitution on the edge of the 21st century [15]

Moreover, nowadays scientists relate forming of the field of international constitutional law with legitimizing of equal codified document - constitution, that would normatively objectivize international constitutional law and could define its role and place in the system of both international and domestic (national) law.

Various projects of World (Global) Constitution have already been recommended to the international community by the specialists from different countries of the world, in particular the idea of World Environmental Constitution (WEC) as a breakthrough to badly needed new model of International Environmental Law and Policy, providing a broad mandate for activities of World Environmental Organization (WEO) was presented by Ukrainian delegation at the beginning of 1990-s at the International scientific conference for federalism at Hofstra University (New York).

The Scientists-founders of WEC (Yriy Tunytsya and others) mark that with WEC creation and its control institutions, there will be a hope that mankind’s aspiration to sustainable development (in case of combination of economic interests with ecological imperatives) will be gradually realized in concrete situations. As WEC will become an international legal document, its structure and stuffing must be prepared in order not to threaten the sovereign will of any country, at the same time caring of domestic and all nations’ interests is the obligation of every state.

In such a case international co-operation of the world countries is possible in conditions of implementing the declarations of sustainable development concept
Acknowledging that UN Charter often plays the role of "international constitution", a well-known French scientist, specialist in international law, Jean Touscauze considers that international law order doesn’t have a formal constitution, as well as the international constitutional bodies. For today, only the material international constitution exists, presented by the international principles that provide the unity and integrity of international law order. This constitution is often complex and imperfect, however, Jean Touscauze concludes that, it would be by mistake to assert, that it doesn’t exist. [17] Jean Touscauze wrote a separate part in the textbook in international law under the name of "International order is not enough "constitutional". In this work the scientist asserts that international law order does not have a constitution in the way it exists on domestic levels. General conception of constitutionalism is naturally related to the ideas of the rule of law and legal state, which constitution stands as a fundamental element of domestic legal system. Nevertheless, we consider that material written Global constitution is not obligatory for the acceptance of global constitutionalism by the international community.

Ukrainian constitutionalist, doctor of jurisprudence M.Orzih, rightly notices, that in general constitutionalism is not identical to the constitution. It is a complex multilevel system, that has certain necessary and sufficient for the sake of her functioning constituents, goes far beyond the boundaries of the constitution as a basic law and a document of constituent power of people, in general outside the law, removing the features of mentality and existence of people. [5]

The scientists from Goa (India) Dr. Anthony D’Souza and Dr. Carmo D’Souza confirm that World Constitutionalism can even grow without a written document as in some countries Constitutionalism preceded the Constitution (e.g. India and USA - author). The researchers confirm that World Constitutionalism can have extra legal origin, say through academic debate, and peoples’ discussion via the net using various communication techniques. However, the best reason for
its acceptance is that World Constitutionalism has already stepped the threshold of International Law under various guises as its principles are applied in Environmental Law, Human Rights, and many other fields. Another reason is that World Constitutionalism has several advantages of a World Constitution itself with the added characteristic that it is free from the element of imposition and apprehension of power control. [18]

V.Voloshin gives the example of existence of dogma of "constitutional relativity" in modern German constitutional doctrine. This theory confirms that the real constitution is not only connected to text of Basic Law of 1949, but is based on the hierarchies of values, among that on an excellent degree there are principle of "loyalty of federation", party state and military democracy. There are positions of the written constitution stand on the second level, and superpositive principles, for example, of justice, dignity, moral law and others like that - on the third [3, p.311]

Besides, supporting the opinion of a famous foreign scientist G.Aroutjunyan, doctor of legal sciences, member of Venice Commission of CE, it is necessary to mark that the presence of Constitution does not settle all the problems. The more important is a confessing of the constitutional order, harmonization of realities of public life with the constitutional decisions based on the rule of law. [19]

Ukrainian scientist I.Slidenko, while defining the problems of correlation of legal and actual Constitution of Ukraine from positions of the world constitutional measuring, confirms the existence of actual constitution, in other words – such constitution that isn’t reflected in a written document, but establishes present posture of affairs in the state and society - that is a personal characteristic of the state of any type. Complication of legal relationships, development of legal culture, the need of fixing and stabilizing the relations, forming in the state, establishment of "staging" in the existence and development of the state needed the creation of the written act. [20]

So, having analyzed the essence of the phenomenon of global constitutionalism we were able to define its main criterion descriptions, i.e.: to our
opinion, *the objective constituent* of the definition of global constitutionalism shows that the processes of globalization stand as a matter of global constitutional diagnostics, including functioning of global governance, *the normative constituent* of the description of global constitutionalism stands in legalizing of international law, *the organizational constituent* of global constitutionalism is contained in the reflection in its ideas of democratic method of the circulation of power, with further institutionalization in form of government bodies, in which the constituent function of global management is also represented.

Partly what made global constitutionalism politically corresponding to modern realities was the appearance of global civil society, the first in history of the humanity - globally constituted relations, social connections, informative networks, transnational collaboration, public associations – the union of various cumulative forces and interests that have rich innovative potential. Global constitutionalism itself stand as the demonstration of global civil society in initial form. [21, C.14]

In opinion of recognized Ukrainian lawyer V. Fedorenko, this newest constitutional theory and ideology finds the objective expression in the structure of general part of domestic constitutional law of the countries – EU members, as the general part of constitutional law of the majority of EU countries contain institutes and norms of constitutional EU law together with institutes and norms of general theory of domestic constitutional law. V. Fedorenko proposes the term "Europeanizing of domestic constitutions", marking that it provokes the fact that in many EU countries’ constitutions, the institutes and norms of constitutional EU law became the important constituent of general part of constitutional law of these countries and they were normatively recreated in the corresponding parts of their constitutions, which have the institutes of constitutionally-legal status of a human and a citizen in EU, general organizations and the activity of EU institutions, legal protection of the Constitution, etc. [22]

To our opinion, the interpretation of general theoretic characteristics of constitutionalism on the global level supports the institutionalization and
establishing of functional bases of subject-objective structure of new fields of law -
global constitutional and global administrative law.

In such context, taking into consideration the opinion of M.Orzih that the
legal approach to constitutionalism envisages the doctrine basis (constitutional
ideas and opinions), constitutionally-normative orders and constitutional traditions
that specify constitutional practice, we think that it is possible to apply the above
mentioned element characteristic, proposed by M. Orzih, for modern
constitutionalism in the conditions of globalization (id est to show the elements of
global constitutionalism):

1) *Global constitutional legal consciousness* (the globalization of
constitutional law performs by globalization of legal consciousness (the shifting
from domestic to planetary consciousness). The expanse of constitutional thinking
to world order, that is based on ideas, beliefs like any policy or legal doctrine) (G.
Dunoff and G.Truchtmann),

2) *Constitutional-legal regulation of global governance* (The foundation of
the global social system (global community) with global democratic governance
and global constitutional law) (R. Falk, A.Peters, V.Bogaturjov, J.Voloshin,
V.Tchirkin),

3) *Global constitutional relations* (the expansion of the idea of the national
state as a form of institutionalized community may be considered as final point of
constitutional securing of international global processes. (R.Robertson))

4) *Global constitutional legitimacy* (the expansion of intensive world
globalization in the 21st century showed the tendency of approving the codes and
written constitutions in many countries, that resulted in the growth of the role of an
act as source of law) (V.Bogaturjov),

5) Global constitutional normative postulates (international principals and
norms – UN Charter, Earth Charter, constitutions of EU, Treaty of Lisbon 2007,
Document of the Copenhagen Meeting of the Conference on the Human
Dimension of the CSCE, Paris Charter for a New Europe, Declaration and
convention on sustainable development, etc.).
So, it is possible to make a conclusion, that the concept of "global constitutionalism" stands as a leading problem of modern constitutionality, has interdisciplinary character and violates the range of problems of international law, as touches the revision of question of the constitutionally-legal adjusting of public relations among and beyond the states. This newest approach significantly develops as a concept of great value for all states of the world in the conditions of global threats, comes forward as a measuring of global processes that fall under the constitutionally-legal adjusting and needs further expansion. Thus, global constitutionalism must not appear as a "pret-a-porter" product to consume, it performs as an ideology that grows and blossoms, corresponding with the existent international relations.

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