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"Over the Top" ("*chereschur*"): The Russian Model of the Proportionality Principle

The use of proportionality in different jurisdictions demonstrates universal approaches to the protection of the fundamental rights. At the same time, some countries preserve the uniqueness of their legal culture, introducing new aspects to the content of this principle. Studies of national models of proportionality draw attention to under-researched problems. In this regard, the aim of this paper is to analyze the Russian model of the proportionality principle, taking into account the general trends in global constitutionalism. The author intentionally does not conduct a dogmatic analysis of proportionality in constitutional law. The key argument of this paper is that, today, the Constitution of Russia cannot be understood by means of formal logic. The 2020 Constitutional Amendments have further increased the gap between black-letter rules and law in action. Hence, the paper researches, first of all, the social and cultural context of proportionality in Russian law.

The structure of the paper is as follows. It starts, in the first section, with an overview of the idea of proportionality in Russian mythology and folklore. The author draws attention to the problem of borrowing of the metaphor of scales by Russian culture and analyzes the manifestation of proportionality in Russian proverbs and sayings. The second section provides an outline of the evolution of proportionality in the legal history of Russia in light of possible limitations of public power. The reflection of proportionality in law of Ancient Rus, the Moscow state, the Russian Empire, and the Soviet Union is given a consistent consideration. The paper also defines the nature of proportionality in terms of survival of the socialist legal tradition in Russia.

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CONTENTS

1. PROPORTIONALITY IN LEGAL CULTURE OF RUSSIA

Without even touching the interdisciplinary methodology, it can be argued that the application of proportionality in constitutional adjudication cannot be separated from the cultural context of a particular society. One can agree with the more general thesis that "law, being an autonomous and relatively isolated social system, is influenced by the 'external environment', i.e., society as a system of a higher order."[1] Under the reverse influence, legal culture predetermines the development of society and formation of constitutional statehood.[2] Moreover, the latest constitutional reform of 2020 is assessed by some foreign researchers as Russia's "farewell to the European constitutional tradition."[3]

Opposite approaches are being shared both among Russian researchers and in constitutional adjudication, where the concept of identity is gaining popularity.[4] The Constitutional Court of the Russian Federation uses this concept to back its disagreement with certain judgments of the European Court of Human Rights.[5] Of course, this concept is not a new one. Similar doctrines (Cultural Relativism[6] and the

[1] Presnyakov M. V. K voprosu o sotsiokul'turnom podkhode k pravu [On the issue of sociocultural approach to law] // Vestnik Saratovskoy gosudarstvennoy yuridicheskoy akademii [Bulletin of the Saratov State Law Academy]. 2013. no. 4 (93). P. 157. (in Russian)

[2] Blankenagel A. Kultur und Tradition im Verfassungsstaat // Politik und Kultur. 1987. Bd. 14. H. 5. S. 3–18.

[3] Socher J. Farewell to the European Constitutional Tradition: The 2020 Russian Constitutional Amendments//Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [ZaöRV]. 2020. Bd. 80. H. 3. S. 615–648.

[4] Zorkin V. D. Konstitutsionnaya identichnost' Rossii: doktrina i praktika [Constitutional Identity of Russia: Doctrine and Practice] // Zhurnal konstitutsionnogo pravosudiya [Journal of Constitutional Justice]. 2017. No. 4. P. 1–12. (in Russian)

[5] Judgment of the Constitutional Court of the Russian Federation dated July 14, 2015 No. 21-P // Sobraniye zakonodatel'stva the Russian Federation [Collected Legislation of the Russian Federation]. 2015. No. 30. Item 4658; Judgment of the Constitutional Court of the Russian Federation of April 19, 2016 No. 12-P // Collected Legislation of the Russian Federation. 2016. No. 17. Item 2480; Judgment of the Constitutional Court of the Russian Federation of January 19, 2017 No. 1-P // Collected Legislation of the Russian Federation. 2017. No. 5. Item 866.

[6] Donnelly J. Cultural relativism and universal human rights // Human Rights Quarterly. 1984. Vol. 6. № 4. P. 400–419.

Margin of Appreciation in international human rights law,[7] originalism in American constitutionalism,[8] constitutional patriotism,[9] etc.) remind one of the everlasting Russian disputes between the Westernizers and Slavophiles. At present, such doctrines have found the fertile soil due to continuity of anti-Western and isolationist views in socialist jurisprudence. Therefore, the author's main thesis implies the inadmissibility of distortion of the essence of constitutionalism behind the facade of cultural uniqueness and the justification of the governmental intrusion into the individual's freedoms. Proportionality in constitutional adjudication is a means of judicial control over legislation (Article 125 of the Constitution of the Russian Federation), capable of unduly encroaching on the highest value of a person, his/her dignity, and inalienable fundamental rights (Article 2, Part 2 of Article 17, Part 1 of Article 21, Part 2 of Article 55 of the Constitution of the Russian Federation).

In contrast to these "eternal" norms, the doctrine of constitutional identity was originally the product of judicial development of the abstract rules of the Basic Law. However, even after the mentioning of the cultural uniqueness of peoples (pt. 3) and the all-Russian cultural identity (pt. 3) in the updated Art. 69 of the Constitution of the Russian Federation, it is important to remember the place of these rules in the normative system. In a socio-cultural sense, an attempt to change the constitutional aspirations is a denial of the literal liberal intention of the constitutional legislator who sought to prevent the arbitrariness of the socialist state. There is also no doubt that legal culture is of decisive importance for the constitutional development of Russia. Accordingly, the problem of reflection of proportionality in mythology, folklore, and other examples of Russian culture deserves special attention.

1.1. The God of Boundaries (Chur) in Russian Mythology

The study of proportionality can be started with mythology. The word *chereschur* in the title of this paper defines the essence of proportionality in Russian culture. This adverb is associated with the concept of *Chur* in Russian mythology. Myths are an important informational source of folk ideas about society and law. According to some researchers, the Slavs even had a separate god of boundaries named *Chur*. In the classical writing of the historian Vasily Kluchevsky (1841–1911), one can find its description: "the deified grandfather was revered under the title of the *tchur* – an appellation which still survives in our compound word *pashtchur*. Moreover, we still see the grandfather's supposed protective power over his descendants in the expression used to exorcise some evil influence or avert a threatened danger – Tchur menya! (i.e. "May my grandfather preserve me!"). While safeguarding his posterity from every sort evil, the tchur also looked after their property, for tradition, which has left its mark upon the language assigns to this ancestral deity a function very similar to that of Roman *Term* – i.e. of being the guardian of the lands and boundaries of his clan. To this day we designate the offence of removing a legal

[7] Legg A. The Margin of Appreciation in International Human Rights Law: Deference and Proportionality. Oxford: Oxford University Press, 2012. 264 p.

[8] Gardbaum S. The myth and the reality of American constitutional exceptionalism // Michigan Law Review. 2008. Vol. 107. № 3. P. 391–466.

[9] Michelman F.I. Morality, Identity and "constitutional patriotism"//Ratio Juris. 2001. Vol. 14. №3. P. 253–271.

landmark by the word *tcherestchur – tchur* having thus come to mean landmark or boundary."[10]

The relationship of this deity with the forefathers is interesting, in light of the direct appeal in the updated Art. 67.1 of the Constitution of the Russian Federation not only to the memory of the ancestors (pt. 2), but also to the respect for the elderly (pt. 4). The tradition of paternalism served as one of the legal arguments in the case that dealt with the problem of municipal filter in the election of governors. In this case, the limitation of the constitutional electoral rights of "immature" citizens was backed by the reference to the assumption of "political and life experience of an elected person."[11]

The myth about *Chur* is widespread not only in Russia but also in Poland, Ukraine, and other Slavic countries.[12] However, most Slavists do not recognize *Chur* as a deity. According to some scholars, the word *chur* is derived from the Greek κύριος, "owner, lord, master."[13] Therefore, *chur* means a warning ("Oh, Lord!") and can be correlated with the concept of measure in the Christian tradition, in which God is simultaneously the measure for the righteous and unrighteous. There is also an opinion defining the interjection *chur* with a phallus.[14] Yet, even given such a connotation, the word *chur* among the Eastern Slavs and Bulgarians served as a means of protection from evil ghosts.[15]

In this regard, it is interesting how V.N. Toporov describes the so-called basic myth in children's games. In his opinion, *chur* in games has a function similar to the Latin *Terminus*, the Roman god of boundaries.[16] In colloquial speech, *chur* also means an exclamation that something is forbidden to touch or to cross (originally, the word *chur* implied a boundary in spells).[17] In other words, children unconsciously express in games the intrinsic meaning of the term *chur* that is close to the concept of proportionality.

Similar conclusions ensue from the linguistic analysis of the adverb *chereschur*. Dictionaries describe it to mean "too much, excessively, extremely."[18] The etymology of this adverb traces back to the concept of a "forbidden line."[19] This word embodies

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[10] Kluchevsky V.O. A history of Russia/translated by C.J. Hogarth. New York: Russell & Russell, 1960. Vol. 1. P. 45.

[11] Judgment of December 24, 2012 No. 32-P // Sobraniye zakonodatel'stva the Russian Federation [Collected Legislation of the Russian Federation]. 2012. No. 53 (pt. 2). Item 8062.

[12] Chur // Malyy entsiklopedicheskiy slovar' [Small encyclopedic dictionary]/ed. F.A. Brockhaus, I.A. Efron [Reprint]. In 4 vol. Moscow: Terra, 1997. [1907]. Vol. 4: Pochva – Vssop. P. 1706.

[13] Strakhov A.B. Vostochnoslavyanskoye *tchur:* ot detskoy igry – k vzrosloy magii [East Slavic *tchur:* from child's play to adult magic] // Palaeoslavica. 1993. vol. 1. P. 41–86. (in Russian)

[14] Dulichenko A.D. Yeshcho raz o russkom chure [Once again about the Russian *chur*] // Filologicheskiye zapiski [Philological notes]. 1994. No. 3. P. 125–127. (in Russian)

[15] Tolstoy N.I. Genitalii [Genitals] Slavyanskiye drevnosti. Etnolingvisticheskiy slovar' [Slavic antiquities. Ethnolinguistic dictionary]/ed. N.I. Tolstoy. Vol 1. Moscow, 1995. P. 494–495. (in Russian)

[16] Toporov V.N. Ob otrazhenii nekotorykh motivov («osnovnogo» mifa v russkikh detskikh igrakh (pryatki, zhmurki, gorelki, salki-pyatnashki) [On the reflection of some motives (the „main" myth in Russian children's games (hide and seek, blind man's buffs, burners, tag-tag)] // Balto-slavyanskiye issledovaniya [Balto-Slavic studies]. XVI. Collection of scientific works. Moscow: Nauka, 2004. P. 9–65. P. 47. (in Russian)

[17] Tolkovyy slovar' russkogo yazyka [Explanatory Dictionary of Russian language]/S.I. Ozhegov, N.Yu. Shvedova. Moscow: Temp, 2006. P. 890. (in Russian)

[18] Ushakov D.N. Tolkovyy slovar' sovremennogo russkogo yazyka [Explanatory dictionary of the modern Russian language]. Moscow: Adelant, 2013. P. 754. (in Russian)

[19] Etimologicheskiy slovar' sovremennogo russkogo yazyka [Etymological dictionary of the modern Russian language]/comp. A.K. Shaposhnikov: in 2 volumes. Vol. 2. Moscow: Flint: Nauka, 2010. P. 520. (in Russian)

a social phenomenon of excessiveness, whose prevention is the initial function of proportionality. Even the attempt to recognize *chur* as a deity by analogy with classical mythology reveals an academic attempt to find roots of the concept of temperance in Russia. Radicalism and the lack of temperance are significant features of Russian culture. This idea was well expressed by Mikhail Saltykov-Shchedrin (1826–1889): "We know no golden middle: It is either [a punch] "straight in the puss" or "May I kiss your noble hand?" The philological analysis has a direct implication for legal communication in society. The lack of temperance in legal culture, combined with the tradition of autocracy, ought to be considered a stipulation of the permanent priority of the common good in constitutional adjudication. It is curious in this regard that Andreas Voßkuhle was attracted to the issue of the middle way, who considers it central to constitutionalism.[20] The president of the Federal Constitutional Court of Germany (2010–2020) explains this interest by the negative experience of extremes in previous historical periods.

1.2. The Scales as a Metaphor in Legal Culture

Self-evident for the proportionality analysis is the metaphor of scales as an image of justice.[21] From the mythology of antiquity, this metaphor passes into other eras changing names of goddesses and details of their image. Starting with the ancient Egyptian Maat *(M3't)*, some of the goddesses were associated with process of weighting and personified justice, harmony, and ethical norms.[22] This image was absorbed by the Greek civilization, in which the scales served as an attribute of goddess Themis [Ancient Greek Θέμις] and Nemesis [Ancient Greek Νέμεσις]. Euripides [Ancient Greek Εὐριπίδης] (480-406 BC) describes one of the Greek goddesses who "prize equality that ever linketh friend to friend, city to city, and allies to each other; for equality is man's natural law; but the less is always in opposition to the greater, ushering in the dayspring of dislike. For it is equality that hath set up for man measures and divisions of weights and hath distinguished numbers."[23]

Under the influence of the previous eras of Roman mythology, the scales are at the disposal of goddess Justice [Latin *Iustitia*]. According to Ovid's [*Publius Ovidius Naso*] (43 BC – approx. 18 AD) description of the Greek deity Astrea [Ancient Greek Ἀστραία], "The sin of mortals had not yet put Justice to flight (she was the last of the celestials to forsake the earth): honour's self, not fear, ruled the people without appeal to force: toil there was none to expound the right to righteous men."[24] A denial of justice violates the unattainable ideal of conflict-free legal communication. This mythological image should not be considered to stand far from the legal order. One could understand proportionality in antiquity only as one idea for various areas

[20] Voßkuhle A. Die Verfassung der Mitte. München: Carl Friedrich von Siemens Stiftung, 2016. 69 s.
[21] Curtis D.E. Images of justice/D.E. Curtis, J. Resnik // Yale Law Journal. 1987. Vol. 96. № 8. P. 1727–1772.
[22] Assmann J. Maaat: Gerechtigkeit und Unsterblichkeit im Alten Ägypten. München: C.H. Beck, 1990. S. 65.
[23] Euripides The Phoenician Maidens In: Edward P. Coleridge (ed.) The Plays of Euripides Translated into English Prose From the Text of Paley by Edward P. Coleridge. II. London: G. Bell and Sons, 1913. pp. 217–273, 234–235.
[24] Frazer J.G. (ed.) Ovid in six volumes. Vol. V Fasti. Cambridge: Harvard University Press, 1989. 245 p. P. 19.

of human life, including law. Since the Middle Ages, the influence of these ideas is seen in political ethics and political studies.

In Slavic mythology, the idea of proportionality is expressed in the image of goddess Lada. She is considered to be the guardian of harmony of the universe, and her image is associated not with justice but with love and motherhood.[25] The existence of this deity in the Slavic pantheon is not supported by all researchers. I.N. Danilevsky explains the attempts of some authors since the 15th century to expand the pantheon by "the desire to 'tailor' the Slavic mythological ideas to the Greek or Roman models, which they recognized as a reference [...] the results of such a 'rethinking' of Slavic mythology were artificially created mythological characters that did not exist in authentic traditions (examples of the so-called 'armchair' mythology are Lel, Lada, Kolyada, Kurent, etc.)."[26] Notwithstanding the absurdity of the argument over "scientific nature" of the deity, one can notice the desire to comply with the universal standards of mythology. In any event, the meaning of the word *lada* is connected with proportionality in contract law. It "meant equal, even (cf. *láden* – equable, even [number])."[27] A similar meaning in Russian has the colloquial expression *ladý*, which means a concordance of interests of the parties to a commercial contract, for example.

The researchers argue that the idea of proportionality is alien to Russian legal culture. According to A.P. Semitko, "we will not find the scales in Russian mythology and such an important and absolutely necessary for the implementation of legal principles symbol of pre-law as scales, which testifies about people's awareness of such concepts as standard, measure-ness, proportionality of action, and retribution for it."[28] One cannot agree with this opinion. The image of scales comes across in Russian folklore, including fairy tales.

For example, the plot of the Russian fairy tale "The Witch and the Sun's Sister" is based on the image of scales. Ivan the Prince hides in the place of the Sun's Sister while escaping from his witch-sister who is trying to eat him. The witch, in response to the refusal to hand over the brother, suggests weighing the dark and light forces: "Let Ivan the Prince come with me onto the scales and see who outweighs whom! If I do, I will eat him, and if he does, let him kill me! So, Ivan the Prince sat on the scales first, and then, the witch climbed up: And as soon as she stepped on the scales, Ivan the Prince was catapulted with such a force that he landed straight in the tower of the Sun's Sister; and the witch remained on the ground."[29] This plot corresponds to the practice of weighing witches during their prosecution in medieval Eu-

[25] Kuzmichev I.K. Lada, ili Povest' o tom, kak rodilas' ideya prekrasnogo i otkuda russkaya krasota stala yest': Estetika Kiyevskoy Rusi [Lada, or the Story of How the Idea of Beauty Was Born and Where Russian Beauty Came From: Aesthetics of Kievan Russia]. Moscow: Molodaya gvardiya, 1990. 301 p. (in Russian)

[26] Danilevskiy I.I. Drevnyaya Rus' glazami sovremennikov i potomkov (IX-XII vv.) [Ancient Russia through the eyes of contemporaries and descendants (IX-XII centuries)]. Moscow: Aspect Press, 1998. 399 p. P. 194. (in Russian)

[27] Miller V. Lada // Entsiklopedicheskiy slovar' Brokgauza i Yefrona [Brockhaus and Efron Encyclopedic Dictionary]. Vol. XVII. Kultagoy – Led. St. Petersburg: Semenovskaya Tipolitografiya (I.A. Yefrona), 1896. 499 p. P. 235. (in Russian)

[28] Semitko A.P. Russkaya pravovaya kul'tura: mifologicheskiye i sotsial'no-ekonomicheskiye istoki i predposylki [Russian legal culture: mythological and socio-economic origins and background] // Gosudarstvo i pravo [State and Law]. 1992. No. 10. P. 108–113, P. 109. (in Russian)

[29] Afanasyev A.N. Russian Folk Tales. In 3 vol. Moscow: Nauka, 1984. 511 p. Vol. 1. P. 112. (in Russian)

rope.[30] Moreover, the story itself can be considered an example of a cultural borrowing. This tale was recorded in Ukraine and Siberia, but it is also found in Hungarian folklore, in Indian and other Oriental fairy tales.[31] Interestingly, that the Finnish folklorist Antti Aarne (1867–1925) developed a classification of folktale types in the beginning of the 20th century.[32] Unfortunately, comparative constitutional law has no similar classification. There is no doubt that proportionality is a representative example for the migration of constitutional ideas.[33]

1.3. Proportionality in Russian Proverbs

The sociocultural context of proportionality can be better understood through the analysis of old truths expressed in proverbs. We can agree with the opinion of the German researcher of legal history Franz Wieacker (1908–1994), who emphasizes that countless manifestations of proportionality can be found not only in historical law sources but also in such inexhaustible treasures of practical legal wisdom as parables, proverbs, sayings, and judicial precedents of various historical eras.[34] Such forms of popular culture, reflecting everyday beliefs, constitute a subsidiary source of information on proportionality.

In Russian cultural tradition, the concept of *measure* is identified with the human soul ("the soul is the measure of everything," "the soul knows the right measure"[35]). Human behavior requires moral evaluation. In accordance with a popular wisdom, a deviation from the right measure leads to injustice and unjust actions: "There is one measure, yet different precision."[36] According to popular beliefs, the concept of justice as a way of life *(pravda)* has priority over laws ("let all laws disappear, if only people lived justly"[37]). Morals are a subsidiary means in litigation ("mercy upholds justice" [38]).

The idea of good and measure is made concrete in two main forms of justice: retributive ("like the gain, like the pain,"[39] "easy to steal but hard to appeal,"[40] "it is

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[30] Seidenberg A., Casey J. The ritual origin of the balance // Archive for History of Exact Sciences. 1980. Vol. 23. № 3. P. 179–226. P. 195.

[31] Afanasyev A.N. Russian Folk Tales. In 3 vol. Moscow: Nauka, 1984. 511 p. Vol. 1. P. 460–461. (in Russian).

[32] Aarne A. A. The Types of the folk-tale. Helsingfors: Suomalainen Tiedeakatemia, 1928. 279 s.

[33] См.: Dixon R. Proportionality and Comparative Constitutional Law versus Studies // Law and Ethics of Human Rights. 2018. Vol. 12. № 2. P. 203–224; Pulido C.B. The Migration of Proportionality Across Europe // New Zealand Journal of Public and International Law. 2013. Vol. 11. P. 483–515.

[34] Wieacker, F. Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung // Festschrift für Robert Fischer/hrsg. M. Lutter. Berlin, 1979. S. 874.

[35] Russkiye poslovitsy i pogovorki [Russian proverbs and sayings]/ed. V. Anikina. Moscow, 1988. P. 88. (in Russian)

[36] Russkiye poslovitsy i pogovorki [Russian proverbs and sayings]/ed. V. Anikina. Moscow, 1988. P. 177. (in Russian)

[37] Dal' V.I. Poslovitsy russkogo naroda [Proverbs of the Russian people]. Moscow, 1989. In 2 volumes. Vol.1.P. 215. (in Russian)

[38] Dal' V.I. Poslovitsy russkogo naroda [Proverbs of the Russian people]. Moscow, 1989. In 2 volumes. Vol.1.P. 107. (in Russian)

[39] Russkiye poslovitsy i pogovorki [Russian proverbs and sayings]/ed. V. Anikina. Moscow, 1988. P. 128. (in Russian).

[40] Dal' V.I. Poslovitsy russkogo naroda [Proverbs of the Russian people]. Moscow, 1989. In 2 volumes. Vol.1.P. 139. (in Russian)

much easier to commit a fault than to confess it"[41]) and distributive ("every person gets what he deserves", "honor to whom honor is due", "a good dog deserves a good bone"[42]). Thus, in general, proportionality in proverbs is associated with an intuitive, irrational evaluation.

Proverbs reflect certain elements of proportionality. The very definition of a proverb is linked with the idea of *rationality,* which is considered to be an element of proportionality. "A tree stump is no herb, and silly talk is no verb."[43] It is incredible how old popular wisdom can be precise and relevant for testing the absurdity of recent voting "on the stump."[44] Rationality (which requires applicability of legislative decisions and a prognosis of their consequences) is expressed in the proverb, "a rigid law creates guilt out of thin air, so that even good reasons become unfair."[45] It captures popular fears of excessively strict laws. The same proverb clearly defines negative social consequences of irrational parliamentary decision-making. It is namely law-abiding citizens who are often forced to "circumvent" unreasonable laws.

The proverb "Necessity has (knows) no law[46]" (a law in need is no law indeed) describes the priority of the social need over legal rules as an element of proportionality. This aspect is applicable to state of emergency in administrative law, as well as to the necessity in civil and criminal law. Even closer to the requirement of a least restrictive means is the expression, "of two evils choose the least."[47] A similar meaning have such proverbs that reflect Christian mercy ("The Lord is rich in mercy and the king – in pity"; "the tsar is fearful, but God is merciful"[48]). The test of necessity makes concrete the proverbs that prescribe to replace severe corporal punishment with more benign financial sanctions ("Don't beat your peasants like hell, better pay well"[49]). This proverb captures the main meaning of the *ultimo ratio* principle, which prescribes the use of severe measures only as a last resort.

Proportionality *stricto sensu* in Russian proverbs is associated with *measure.* Popular beliefs demand the measurement of different phenomena and objects. "Measure

[41] Margulis, A. Russian-English dictionary of proverbs and sayings/A. Margulis, A. Kholodnaya. Jefferson: McFarland, 2000. 487 p. P. 54.

[42] Margulis, A. Russian-English dictionary of proverbs and sayings/A. Margulis, A. Kholodnaya. Jefferson: McFarland, 2000. 487 p. P. 180.

[43] Dal' V. I. Poslovitsy russkogo naroda [Proverbs of the Russian people]. Moscow, 1989. In 2 volumes. Vol. I. P. 14. (in Russian).

[44] Car Trunks, Tree Stumps and Playgrounds: The Weirdest Locations for Russia's Constitutional Vote // The Moscow Times. 2020. June 26. URL: https://www.themoscowtimes.com/2020/06/26/car-trunks-tree-stumps-and-playgrounds-the-weirdest-locations-for-russias-constitutional-vote-a70702 (last visited: 1.7.2021)

[45] Illustrov I. Yuridicheskiye poslovitsy i pogovorki russkogo naroda. Opyt sistematicheskogo, po otdelam prava, sobraniya yuridicheskikh poslovits i pogovorok russkogo naroda [Legal proverbs and sayings of the Russian people. The experience of a systematic collection of legal proverbs and sayings of the Russian people, according to branches of law]. Moscow: Tipografiya V. V. Chicherina, 1885. 72 p. P. 10. (in Russian)

[46] Margulis, A. Russian-English dictionary of proverbs and sayings/A. Margulis, A. Kholodnaya. Jefferson: McFarland, 2000. 487 p. P. 162.

[47] Margulis, A. Russian-English dictionary of proverbs and sayings/A. Margulis, A. Kholodnaya. Jefferson: McFarland, 2000. 487 p. P. 84.

[48] Illustrov I. Yuridicheskiye poslovitsy i pogovorki russkogo naroda. Opyt sistematicheskogo, po otdelam prava, sobraniya yuridicheskikh poslovits i pogovorok russkogo naroda [Legal proverbs and sayings of the Russian people. The experience of a systematic collection of legal proverbs and sayings of the Russian people, according to branches of law]. Moscow: Tipografiya V. V. Chicherina, 1885. 72 p. P. 13. (in Russian)

[49] Dal' V. I. Poslovitsy russkogo naroda [Proverbs of the Russian people]. Moscow, 1989. In 2 volumes. Vol. I. P. 107. (in Russian).

three times before you cut once"[50] – says a well-known Russian proverb. Similar proverbs emphasize the importance of a balanced decision ("Measure is a treasure", "There is enough where there is not too much"[51]). These proverbs have no direct legal implication. At the same time, the proverb "He, who does not keep his abuttals strong, does not live long"[52] extends to land law and even emphasizes the universal importance of measure in legal relations.

Many Russian proverbs concerning certain social groups are also linked to proportionality. Some proverbs recognize the proportionality of restricting the rights of civil servants ("When in tenure, endure"[53]). Other examples of folk wisdom show a lack of equilibrium in society. A striking example of social inequality is the sayings concerning the dependence of justice in Russia on the property status of a person ("One law for the rich, and another for the poor"[54], "He who is powerful can prove that he is right"[55], "The rich and the dead have nothing to dread"[56]). Also interesting are the proverbs that indicate the lack of temperance in behavior of certain groups. There are many proverbs about the priesthood (for example, "The mouth of the wolf and the eye of the priest: never satisfied"[57]). These sayings have a negative connotation. At the same time, they registered the inability of the legal system to correct social inequalities. It is a pity that these proverbs are still topical ("The poor in court face a trial, and the rich enjoy a denial"[58]), ("The kopek thief is hanged, while the thousand-ruble thief is honored"[59]).

2. PROPORTIONALITY IN THE HISTORY OF RUSSIAN LAW

Proportionality cannot be understood outside general legal history. This principle has evolved from a philosophical idea to a legal obligation of government. All stages of the development of this principle cannot be investigated in this paper. The history of proportionality is well-researched in the German doctrine,[60] including three mo-

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[50] Margulis, A. Russian-English dictionary of proverbs and sayings/A. Margulis, A. Kholodnaya. Jefferson: McFarland, 2000. 487 p. P. 199.

[51] Margulis, A. Russian-English dictionary of proverbs and sayings/A. Margulis, A. Kholodnaya. Jefferson: McFarland, 2000. 487 p. P. 40.

[52] Russkiye poslovitsy i pogovorki [Russian proverbs and sayings]/ed. V. Anikina. Moscow, 1988. P. 150. (in Russian)

[53] Illustrov I. Yuridicheskiye poslovitsy i pogovorki russkogo naroda. Opyt sistematicheskogo, po otdelam prava, sobraniya yuridicheskikh poslovits i pogovorok russkogo naroda [Legal proverbs and sayings of the Russian people. The experience of a systematic collection of legal proverbs and sayings of the Russian people, according to branches of law]. Moscow: Tipografiya V.V. Chicherina, 1885. 72 p. P. 15. (in Russian)

[54] Bodrova Yu.V. Russkiye poslovitsy i pogovorki i ikh angliyskiye analogi = Russian proverbs and sayings and their English equivalents. Moscow: AST, 2007. 159 p. P.42

[55] Margulis, A. Russian-English dictionary of proverbs and sayings/A. Margulis, A. Kholodnaya. Jefferson: McFarland, 2000. 487 p. P. 109.

[56] Russkiye poslovitsy i pogovorki [Russian proverbs and sayings]/ed. V. Anikina. Moscow, 1988. P. 177. (in Russian)

[57] Russian proverbs, newly translated. With illustrations by Aldren Watson. Mount Vernon: Peter Pauper Press, 1960. 61 p. P. 26.

[58] Dal' V.I. Poslovitsy russkogo naroda [Proverbs of the Russian people]. Moscow, 1989. In 2 volumes. Vol. I. P. 143. (in Russian).

[59] Russian proverbs, newly translated. With illustrations by Aldren Watson. Mount Vernon: Peter Pauper Press, 1960. 61 p. P. 28.

[60] См.: Jakobs, M.Ch. Der Grundsatz der Verhältnismäßigkeit. Mit einer exemplarischen Darstellung seiner Geltung im Atomrecht. Köln u.a., 1985. S. 2–6; Merten, D. Verhältnismäßigkeitsgrund-

nographs.[61] There are some publications in the English-speaking academia on the history of the principle.[62] Proportionality appears to be so obvious an idea that its historical analysis even seems to be useless. Thus, the Danish researcher J. Christoffersen expressed the opinion that "it would not make sense to describe or apprehend the emergence of the principle of proportionality in various legal orders and in various points of time as the result of an unbroken, let alone logical, line of development."[63] This idea seems to be self-evident since prehistoric times due to its relationship with the concepts of equity, equality, and justice. At the same time, its historical analysis helps reveal the essence of proportionality. The main attention in this section will be paid to the analysis of some examples of Russian legal history, which are important for understanding the national model of proportionality or may be useful for a discussion of the principle in global constitutionalism.

2.1. Proportionality in Ancient Russian Law

Ancient Russian law (IX-XII centuries) was well-developed for that time. According to the Swedish researcher E. Anners, "the level of law of the Old Russian statehood in general was adequate to the one of legal development of England and Scandinavia that time." [64] Slavic tribes structured their relationships via unwritten conventions. According to M.F. Vladimirsky-Budanov (1838–1916), "a peaceful tribal (patriarchal) life of the Slavs could be managed for a long time by the unchanged reserve of legal norms developed through customs since time immemorial."[65] The dominance of unwritten rules demonstrated both the archaic nature of law and primitive social equilibrium. As N.I. Kostomarov (1817–1885) emphasized, "the Slavs did not tolerate autocracy, were incapable of uniting and forming a state, extremely loved freedom and, because of their love of freedom, lived in small communities or republics, not only having not thought of establishing mutual protective links between these communities, but leaving the ungovernable arbitrariness for quarrels and

satz // Handbuch der Grundrechte in Deutschland und Europa/hrsg. von D.Merten, H.-J. Papier. Bd. 3. Grundrechte in Deutschland. Allgemeine Lehren. 2 Heidelberg, 2009. S. 521–527; Wieacker, F. Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung // Festschrift für Robert Fischer/hrsg. von M. Lutter. Berlin, New York, 1979. S. 867–882.

[61] Avoine d' M. Die Entwicklung des Grundsatzes der Verhältnismäßigkeit insbesondere gegen Ende des 18. Jahrhunderts. Trier, 1994; Heinsohn, S. Der öffentlichrechtliche Grundsatz der Verhältnismäßigkeit: historische Ursprünge im deutschen Recht, Übernahme in das Recht der Europäischen Gemeinschaften sowie Entwicklungen im französischen und im englischen Recht. Münster, 1997; Remmert, B. Verfassungs- und verwaltungsrechtsgeschichtliche Grundlagen des Übermaßverbotes. Heidelberg, 1995.

[62] Bennett K.E.P. Proportionality Review: The Historical Application and Deficiencies // Capital Defense Journal. 1999. Vol. 12. № 1. P. 103–122; Bomhoff J. Genealogies of Balancing as Discourse // Law and Ethics of Human Rights. 2010. Vol. 4. № 1. P. 108–139; Cohen-Eliya M., Porat I. American balancing and German proportionality: The historical origins // International Journal of Constitutional Law. 2010. Vol. 8. № 2. P. 263–286; Engle E. The History of the General Principle of Proportionality: An Overview // Dartmouth Law Journal. 2012. Vol. 10. P. 1–11; Poole Th. Proportionality in Perspective // New Zealand Law Review. 2010. Pt. II. P. 369–391.

[63] Christoffersen J. Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights. Leiden, Boston, 2009. P. 33.

[64] Anners E. Istoriya yevropeyskogo prava [History of European Law]. Moscow: Nauka, 1994. 397 p. P. 253. (in Russian).

[65] Vladimirsky-Budanov M.F. Obzor istorii russkogo prava [Review of the history of Russian law]. Moscow: Territoriya budushchego, 2005. 800 p. P. 115. (in Russian).

misunderstandings."[66] These elements of self-government have inspired the founders of Russian anarchism to develop their own theory. The limitation of the arbitrariness of community members, being the goal of proportionality in the early periods of legal history, was achieved by means of blood feud and financial compensation.

Ancient forms of social equilibrium in Slavic society hardly need to be idealized. Compared to the ancient models of proportionality, Russian law of that time was at a lower level of development, as well as rules of conduct of the European barbarian tribes. For example, in contrast to the Greeks, Slavs did not have the death penalty, that does not imply, of course, a progressive nature of Ancient Russian law. The treaties of 911 and 945 with Byzantium differentiated responsibility for murder: it stipulated the death penalty for the Greeks, and blood vengeance for the Russians. According to Art. 4 of the 911 Treaty, "if someone kills (someone) – a Russian kills a Christian or a Christian kills a Russian – he shall die on the site of murder. If the murderer escapes, being a wealthy person, then the relative of the murdered shall take that part of his property that is due to him under the law; however, the murderer's wife shall also keep what is due to her according to the custom. If the murderer is poor and (at the same time) escapes, then he shall be on trial until he is found and (if found, then) he shall die."[67] Noting the dominance of Russian law over Byzantine law in the treaties under consideration, researchers denied that "the Russians had superiority over the Greeks, and so, because it is easier for a person of culture to adapt to an infancy state than vice versa [...] death was ordered for homicide, which for the Greeks meant the death penalty, and for the Russians – revenge by the hand of the relatives of the murdered person."[68] There was no *lex talionis* in Russian law at that time, which better corresponds to the idea of retributive justice. The prevention of homicide was carried out through excessive forms of self-defense. Legal historian M. A. Dyakonov argued, "revenge was an unequal punishment determined only by the measure of the avenger's angry feelings and the existence of the conditions under which this feeling was manifested. In such an extreme form, revenge entailed grave consequences – enmity or war not only between the victim and the offender, but also between their families, sometimes a very long war. [...] From this state of barbarism, mankind could come out only by means of restrictions of revenge, and this constitutes its whole further history."[69]

An elementary manifestation of such a restriction is found in Art. 4 of the 911 Treaty, which actually involved the balancing of interests of the relatives of the offender and the victim. Compensation for the relatives of the murdered person was limited by the requirement that the wife of the offender keep some property. This requirement can be considered one of the first written sources on proportionality in Russian law. It is important that this legal rule occurred in an international treaty and under the influence of communication with a European state.

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[66] Kostomarov N.I. Sobraniye sochineniy N.I. Kostomarova: istoricheskiye monografii i issledovaniya [Collected works of N.I. Kostomarov: historical monographs and research]. Vol. 12: Nachalo yedinoderzhaviya v Drevney Rusi [The origins of autocracy in ancient Russia]. St. Petersburg: Transheliy, 1872. 462 p. P. 3. (in Russian)

[67] Pamiatniki russkogo prava: Pamiatniki prava Kiyevskogo gosudarstva. Vyp. 1 [Sources of Russian Law. Sources of Law of Kievan State 10th–12th centuries. Vol 1]/ed. A. Zimin. Moscow: Gosyurizdat, 1952. P. 11. (in Russian)

[68] Vladimirsky-Budanov, M. F. Obzor istorii russkogo prava [Review of the history of Russian law]. Moscow: Territoriya budushchego, 2005 [1908]. P. 116. (in Russian)

[69] Dyakonov M. A. Ocherki istorii russkogo prava: Istoriya ugolovnogo prava i sudoproizvodstva [Essays on the history of Russian law: History of criminal law and procedure]. Yur'yev: Tipografiya El. Bergman, 1905. 139 p. P. 7. (in Russian)

One cannot understand the Russian model of proportionality without the fact of adoption of Orthodoxy in 988. The canon law of the Eastern Church, until now, influences the concordance of private and public interests. It is important to emphasize that the idea of practical concordance (*die praktische Konkordanz* in German), which is the most important manifestation of proportionality in Germany, was borrowed from the title of a medieval canon law text.[70] Initially, Orthodoxy greatly influenced Russian statehood and its inclusion, through the Greek heritage, into proto-European civilization. With the borrowing of Orthodox Christianity from Byzantium by Prince Vladimir (c. 960–1015), Byzantium being an unrivaled culture of that era, the Slavic tribes gained access to its achievements in law. It is Byzantism, as a cultural phenomenon, that has left an imprint on the Russian model of proportionality. Emphasizing the uniqueness of the Byzantine phenomenon for Russia, S.S. Averintsev noted that "all the highest spiritual values, both religious and secular, such as the Bible, transmitted by the Church, and Homer, transmitted by the school, Greek philosophy, Roman law, and others, which the man of the Christian area knew, were contained within the boundaries of one and the same state."[71] Byzantism, as an identity of Christian peoples and one culture, predetermined the development of Russian law for many years to come.

An obvious example of the influence of Roman law in Medieval Russia is a collection of church texts called *Merilo Pravednoe (A Just Measure)*.[72] The title of this document combines two basic aspects of the philosophical idea of proportionality: measure and rightness (justice). In lexicons, *proportionality* is defined "compliance with some measure"[73] or a correspondence "between something in size, magnitude, quality, dignity, etc."[74] In this definition, the measure means a criterion for evaluating phenomena or objects.

This historical source of Russian law, which dates back to between 1273 and 1294,[75] consisted of two main *parts*. The first part was a religious teaching on just and unjust trials. The righteous justice is characterized as follows: "Who is a righteous judge, he judges on the merits, like degree against degree, reason against reason, power against power, death and life being in the hand of the tongue" (P. 1).[76] Thus, righteous justice

[70] Bäumlin R. Staat, Recht und Geschichte. Eine Studie zum Wesen des geschichtlichen Rechts, entwickelt an den Grundproblemen von Verfassung und Verwaltung, Zürich: EVZ-Verlag, 1961. 68 s.S. 30; Hesse, K. Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland. 20. Aufl. Müller, Heidelberg 1999. 335 s.S. 28; Lübbe-Wolff G. Das Prinzip der praktischen Konkordanz // Festschrift für Christian Kirchberg zum 70. Geburtstag am 5. September 2017/hrsg, D. Herrmann, A. Krämer. Stuttgart: Boorberg, 2017. 644 s.S. 143–149.

[71] Averintsev S.S. Vizantiya i Rus': dva tipa dukhovnosti. Stat'ya pervaya [Byzantium and Russia: two types of spirituality. Article One] // Novyy mir. 1988. No. 7. P. 210–220. P. 214. (in Russian)

[72] Zaliznyak A.A. «Merilo pravednoye» XIV veka kak aktsentologicheskiy istochnik [The Merilo Pravednoe of the XIXth Century as a Source of Accentology]. München: Sagner, 1990. 183 s. (in Russian)

[73] Tolkovyy slovar' russkogo yazyka [Explanatory dictionary of the Russian language]/ed. D.N. Ushakov. In 3 vol. Moscow, 2001. Vol. 3: R-Ya. P. 269. (in Russian)

[74] Lopatin, V.V. Russkiy tolkovyy slovar' [Russian explanatory dictionary]/V.V. Lopatin, Ye.V. Lopatina. Moscow, 2000. P. 657. (in Russian)

[75] Vershinin K.V. Merilo pravednoye kak pamyatnik drevnerusskoy knizhnosti i prava [The measure of the righteous as a source of ancient Russian literacy and law]: abstract of thesis ... candidate of historical sciences. M., 2016. 20 p. P. 8. (in Russian)

[76] Merilo pravednoye, ustav. krasivyy, iskh. XIV veka, v chetvert', 348 listov [Righteous measure, charter. beautiful, ref. XIV century, in a quarter, 348 sheets] // Fund 304.I. Glavnoye sobraniye biblioteki Troitse-Sergiyevoy lavry [The main collection of the library of the Trinity-Sergius Lavra] URL: http://old.stsl.ru/manuscripts/book.php?col=1&manuscript=15 (last visited: 1.7.2021) (in Russian)

should be based on "geometric" equity (to each according to his merit), taking into account the measure (degree or power) and meeting the reasonableness test. The first surviving page of the legal document has an image of Jesus Christ, above whom is a six-pointed cross. The symbol of the cross serves as a measure for human actions and refers to the execution of Christ. The liturgical text of the 9th hour of service to the Cross of the Lord refers to proportionate punishment on Golgotha for two robbers according to their merit ("Between the two robbers, the just measure, Thy Cross was: one was put down to hell via the burden of blasphemy, and the other one was relieved from sins to the cognition of theology"). The first robber, who slandered the Lord, is destined for hell, and the second one, who confessed his sins, was liberated.[77] In accordance with this implication of justice, the Savior himself acts as a "superior" righteous judge. This conclusion follows from the provisions of *Merilo Pravednoe* ("The foundation of all good is the law of God, a hedge and a wall [protection] for all intelligent beings [humans]", P. 24). This corresponds to the New Testament provisions, "Do not avenge yourself, beloved, but give place to the wrath of God. For it is written: Vengeance is mine, I will repay, says the Lord" (Romans 19:12).[78]

The second part of the document is a legal collection of rules of due process, which includes the provisions of Byzantine canonical and secular law (for example, the *Eclogue* and Justinian's *Novellae*), as well as the codification of Slavic customary rules. L.L. Kofanov wonders that "the definition of "*pravda* (truth)", that is, "law" in the Old Russian language, is identical to the definition of *ius* in Roman law."[79] Thus, one of the first legal text borrowed the core provisions of antique law, including proportionality as a guiding principle of justice.

In this regard, it is important to pay attention to the features of Byzantism that continue to influence the modern understanding of the idea of proportionality. In particular, I.I. Sokolov distinguished three among them: 1) strict compliance with Orthodox canons without loosening in application; 2) the system of the clerical state, which includes the priority of the Faith and the Church over the principles of political life; 3) the domination of the church in all spheres of societal life.[80]

If we apply the first feature of Byzantism to constitutionalism, one could understand the dominance of formalism in law-making and unanimity of judicial behavior in Russia. The very institution of dissenting opinions, reasoning independently from the majority of judges, was criticized by conservative researchers,[81] and was abolished in 2020 by the legislator.[82] Interestingly, the misunderstanding of Byzantinism

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[77] Chasoslov [Book of Hours]. Moscow: Izdatel'skiy sovet Russkoy Pravoslavnoy Tserkvi, 2002. 352 p. P. 142. (in Russian)

[78] Official website of the Moscow Patriarchate of the Russian Orthodox Church. URL: http://www.patriarchia.ru/bible/rom/12/ (last visited: 1.7.2021) (in Russian)

[79] Kofanov L.L. «Merilo pravednoye» i ponyatiye «pravednyy sud'ya» v rimskom i drevnerusskom prave ["Just measure" and the concept of „righteous judge" in Roman and Old Russian law] // Religii mira. Istoriya i sovremennost'. 2012. Vol. 2010. P. 239–245. P. 241. (in Russian)

[80] Sokolov I.I. O vizantizme v tserkovno-istoricheskom otnoshenii [On Byzantism in the Church-Historical Relationship] // Khristianskoye chteniye. 1903. No. 12. P. 733–775. P. 736, 740, 747. (in Russian)

[81] Ispolinov A.S. Osobyye mneniya v mezhdunarodnykh sudakh: doktrina i praktika [Dissenting opinions in international courts: doctrine and practice] // Pravo. Zhurnal Vysshey shkoly ekonomiki. 2018. No. 1. P. 218–233. (in Russian)

[82] Federal Constitutional Law of November 9, 2020 No. 5-FKZ "On Amendments to the Federal Constitutional Law" On the Constitutional Court of the Russian Federation" // Collected Legislation of the Russian Federation. 2020. № 46. Item 7196.

and the risk of unanimous decision-making were seen by the drafters of the legislation on the German Federal Constitutional Court as the main reason for rejecting the dissenting opinions.[83] This approach existed only until 1971 in German legislation, when the dissenting opinions of judges were allowed, and it was de facto Byzantine by origin. After all, this cultural phenomenon insists on unity in the understanding of canon and legal dogmas, avoiding pluralism of value judgments. In this regard, one can recall the political slogans of pluralism and *glasnost* (openness) during *perestroika.*[84] These slogans were not accidental and reacted to the experience of like-mindedness during the Soviet era. Therefore, the limitation of the pluralism of opinions and transparency in constitutional adjudication should be regarded as a restoration of the socialist legal tradition.

However, this "Byzantine" approach contradicts the modern legal methodology. The proportionality in the interpretation of abstract constitutional provisions presupposes competition and balance of arguments in constitutional adjudication. According to the decision of April 5, 1990 of Federal Constitutional Court of Germany, "the interpretation, especially of constitutional law, has the character of a discourse in which, even in the course of methodologically perfect work, absolutely correct, for competent persons indisputable statements are not offered; rather, some arguments are advanced first, then counterarguments are presented and, finally, the best arguments are given decisive importance."[85] Byzantism does not accept such a plurality of constitutional interpretation. The orthodoxy of legal discourse reduces the importance of proportionality as a legal method in Russia.

The second characteristic of Byzantism corresponds to the liberal understanding of proportionality as limitation of government. According to I.I. Sokolov, the main achievement of Byzantium in comparison with other states is in the limitation of "an all-powerful and all-absorbing government [it] must improve the principle of equity by which it lives, under the guidance of the highest principle of love, by which the Church lives, – must be a theocratic monarchy in which the principle of the state becomes effective only insofar as it is penetrated by the teaching of the Church, and the bearer of secular power cannot stand ahead of the representative of ecclesiastical authority."[86] The thesis of such limitation of the state does not allow the conclusion of the existence of constitutionalism in Byzantium.[87] Despite the existence of positive or unwritten norms in the field of state law, they can hardly be considered a real limit against the arbitrariness of the authorities. Such a view would be no more than a modernization of history.

In medieval society, the Christian Church undoubtedly acted as a means of restraining the arbitrariness of public authorities. Russian history confirms the existence of the balancing function of the Orthodox Church. This is evidenced at least by the fact that Peter the Great abolished the patriarchate and the established a special

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[83] Von Mehren A.T. The judicial process: A comparative analysis // The American Journal of Comparative Law. 1956. Vol. 5. № 2. P. 197–228, P. 208.

[84] McNair, B. Glasnost, perestroika, and the Soviet media. London: Routledge, 1991. 231 p. P. 77.

[85] Beschluss des Ersten Senats vom 5. April 1990. 2 BvR 413/88 // Entscheidungen des Bundesverfassungsgerichts. 1990. Bd. 82. S. 30, 38.

[86] Sokolov I.I. O vizantizme v tserkovno-istoricheskom otnoshenii [On Byzantism in the Church-Historical Relationship] // Khristianskoye chteniye. 1903. No. 12. P. 733–775. P. 741 (in Russian)

[87] Medvedev I.P. Byla li v Vizantii Konstitutsiya? [Did Byzantium have a Constitution?] // Pravovaya kul'tura Vizantiyskoy imperii [Legal culture of the Byzantine Empire]. St. Petersburg: Aleteyya, 2001. P. 29–43. (in Russian)

administrative agency, the Most Holy Synod. With the adoption of the Spiritual Regulations of 1721,[88] the imperial power not only strengthened the autocracy, but also removed the clerical restraints for absolute power.

Byzantinism predetermined a special manifestation of proportionality in the theory of symphonia (Greek: συμφωνία "accord"). In accordance with this theory, "the cooperation of the imperial governmental power with the conciliar reason of the Church was so close that in the legislative codes ... the church canons were considered binding, as were the civil laws. In turn, the civil legislation, which contradicted the basic church canons, was not recognized as valid."[89] Subsequently, this theory became the basis for the Slavophil trend in legal thought. Modern constitutionalists also emphasize the importance of this concept. The Chairman of the Constitutional Court of the Russian Federation V.D. Zorkin believes that "the union of the peoples formed on our territory was built on the principles of Orthodox symphony. Such a system admits that every religious voice is infinitely valuable to humanity and must be identified and heard."[90]

Finally, the third feature of Byzantism is the dominance of ideology in the life of society and government. This feature was reflected even in Soviet history. There was, in fact, a continuity between Orthodoxy and socialism. The latter replaced the missing ideological foundation of imperial statehood. Now, the appeal to sacral in the different areas of society is manifested in the concept of "spiritual bonds." This concept was mentioned in the Presidential Address to the Federal Assembly of the Russian Federation of December 12, 2012 as follows: "today the Russian society is experiencing a clear deficit of spiritual bonds: mercy, sympathy, compassion for each other, support and mutual assistance – a deficit of what is always and in all times have made us stronger, mightier than we have always been proud of [...] therefore, issues of general education, culture, and youth policy are of decisive importance. These spheres are not a set of public services, but, first of all, a space for shaping a moral, harmonious person."[91] Formally, spiritual bonds are even linked with a certain anthropological proportionality and harmony.

In a practical sense, the abovementioned concept of mercy is of interest for determining proportionality.[92] The borrowing of this concept by Medieval Russian law in a conceptual sense introduces a binary opposition between cruelty, violence and coercion, on the one hand, and mercy, gentleness, and charity, on the other hand. S.S. Averintsev considered the mercy in Byzantism identical to the moderation in the ethical doctrine of Thomas Aquinas. According to the former, the Latin term *dementia* cannot be translated by the word "mercy", rather "I mean a case when a holder of power of any kind, practicing this power, in other words, practicing violence, limits

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[88] Reglament Dukhovnoy kollegii i pribavleniya k nemu. Pomety imperatora Petra I. Kantselyariya Sinoda. [The regulations of the Spiritual Collegium and additions to it. Litters of Emperor Peter I. Chancellery of the Synod]. List of 1803–1919 // Presidential Library. URL: https://www.prlib.ru/item/465799?mode=archive (last visited: 1.7.2021) (in Russian)

[89] Ioann (Metropolitan for St. Petersburg and Ladoga) Rus' Sobornaya. Ocherki khristianskoy gosudarstvennosti. [Cathedral Russia. Essays on Christian statehood]. St. Petersburg: Tsarskoe Delo, 1994. 248 p. P. 22. (in Russian)

[90] Zor'kin, V.D. Na printsipakh pravoslavnoy simfonii [On the principles of an Orthodox symphony] // Nash sovremennik. 2013. No. 12. P. 194–196. P. 195. (in Russian)

[91] Official site of the President of the Russian Federation. URL: http://kremlin.ru/events/president/news/page/345 (last visited: 1.7.2021) (in Russian)

[92] Merciful judgments and contemporary society: legal problems, legal possibilities/ed. Austin Sarat. Cambridge: Cambridge University Press, 2012. 309 p.

this violence to absolutely necessary, sparing everyone who he can spare without damage to his power, protecting himself from unrestrained discretion."[93]

Canon law uses a related concept of *oikonomia* [Greek οἰκονομία – housekeeping], which has an applied meaning. It is usually defined as "a measure of appropriateness in resolving the issues of the ordinary life of the church, and the goal, that justifies to a certain extent the choice of means for achieving it, is the general good of the church or individual believers."[94] This concept was applied in Judgment of the All-Church Court of the Russian Orthodox Church of November 17, 2010 in case No. 02–04-2010, which, "for reasons of church oikonomia" reversed the decision of the diocesan church court of the Voronezh diocese to depose a priest in connection with the violation of a number of canonical rules (alcoholism, negligence, and laziness). Emphasizing the reasons for the priest's actions ("difficult life circumstances"), the court considered it possible to impose a lighter burden (a ban on ministry without the right to wear a cassock and a cross for a period of 3 years).[95] Thus, the concepts of mercy and *oikonomia* are close to the Test of Necessity (Least Restrictive Means) as an element of proportionality.

In the first written text of Old Russian law, one can find an expression of proportionality for criminal punishment. The proportionality in this area played a progressive role, ensuring the gradual moderation of private arbitrariness. Blood feud and other forms of reconciliation with the victim's relatives, which were unsafe due to uncontrolled violence, are being replaced by more proportionate criminal measures. In art. 1–17 (18) of the short version of Russkaya Pravda (c. 1016), an attempt was made to reduce the negative consequences of blood feud. Although revenge itself remained the main form of crime control (the homicide of a criminal by the victim's relatives is recognized as legitimate), a fixed monetary compensation is already being introduced (Article 1): "if there be no one to avenge [the man] then [the offender] is to pay 40 grivnas for the corpse [lit., for the head]."[96] In the later adopted Pravda of Yaroslav's sons (Art. 19–40 of the Short Pravda), blood feud was "criminalized", although only in relation to the murder of public officials. According to Art. 19, "If they kill a steward for an offense, then the killers shall pay for him 80 grivnas, and [no other] people [of the community] are responsible; and [for killing] the prince's collector of fines [they are also to pay] 80 grivnas." At the same time, psychological aspects played a certain role in the transformation of criminal law measures from excessive *(Blood Feud)* to more proportionate (*Bloodwite, Wergeld*). In accordance with art. 38, "if they kill a thief at their own home, or at the storeroom or by the barn, then the thief is killed [and there the matter ends]; [but] if they hold him until daylight, then [they are] to conduct him to the prince's residence; but if they kill him, and people have seen [the thief] tied up, then they shall pay for him." These norms may have been aimed at preventing excessive human anger, which could generate socially harmful violence. This rule of Old Russian law corresponds to similar provisions of the criminal legislation of many European states. At the same time, this circum-

[93] Averintsev S.S. Vizantiya i Rus': dva tipa dukhovnosti. Stat'ya vtoraya [Byzantium and Russia: two types of spirituality. Article Two] // Novyy mir. 1988. No. 9. P. 227–239. P. 234. (in Russian)

[94] Pashkov D. Ikonomiya kak printsip tserkovnogo prava [Ikonomia as a principle of canon law] // Zhurnal Moskovskoy Patriarkhii. 2011. No. 8. P. 34–40. P. 35. (in Russian)

[95] Official site of the Moscow Patriarchate of the Russian Orthodox Church. URL: http://www.patriarchia.ru/db/text/1331729.html (last visited: 1.7.2021) (in Russian)

[96] English translation of Short Russkaya Pravda // The laws of Rus& tenth to fifteenth centuries/translated and edited by Daniel H. Kaiser. Salt Lake City: C. Schlacks, 1992. 126 p.P. 15–19. URL: http://web.grinnell.edu/individuals/kaiser/shrp.html (last visited: 1.7.2021)

stance was often ignored in Russian historiography. As N.P. Pavlov-Sil'vansky stated, "Russian historians rarely used the comparative method, and we have a dominant idea of the complete uniqueness of the Russian historical process in toto, in particular, about the peculiar development of Russian law. There is, however, in our antiquity one area in which the Russian orders are so strikingly similar to the German and others [...] These are the well-known institutions of criminal law common to many peoples: blood feud, vira [*Bloodwite*], monetary penalties for bodily injury [...]."[97] Therefore, the idea of proportionality in medieval Russian law was quite developed and meets the European standards of that time.

2.2. Proportionality in the law of Muscovite state

In the era of the Muscovite state (XV-XVII centuries), it is probably pointless to look for the proportionality in law. On the contrary, this period demonstrates denial of fundamental interests of individuals. Such an attitude fundamentally contradicts the proportionality of the rule of law and the moderation of the public policy. An illustrative is the *Sudebnik* (the Code) of 1497, which prescribed death penalty for the homicide of a master, a conspiration, temple robbery, and arson (Art. 9).[98] Such rules were not more excessive than the other criminal statutes in Europe of the same time.

It is no coincidence that Siegmund von Herberstein (1486–1566), being the ambassador of the Holy Roman Empire in Moscow, partially translated into Latin and published the Sudebnik in 1549[99]. Apparently, this document was also of interest in Germany, where a comparable national codification occurred with the adoption of the Carolina in 1532[100].

At the same time, the aforementioned rules of the Sudebnik of 1497 show a rise in the value of state and church interests. The same document of Russian law made the final enslavement of the peasants. Some researchers tried to link the formation of serfdom with the governmental limitation of arbitrariness of landowners. M.F. Vladimirsky-Budanov argued that these legislative measures "were not to take away freedom from the peasants, but to limit the arbitrariness of the landowners"[101]. Perhaps these measures had good intentions, but this turned out to be terrible for all Russian history. This conclusion echoes the sociological studies of governmental goal-setting[102] and the opinion of lawyers about the threats of the instrumental approach in law[103].

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[97] Pavlov-Sil'vanskiy N.P. Simvolizm v drevnem russkom prave [Symbolism in ancient Russian law] // Zhurnal Ministerstva narodnogo prosveshcheniya. 1905. June. P. 341. (in Russian)

[98] The Sudebnik (1497) // Muscovite judicial texts, 1488–1556/compiled, translated, and edited, with annotation and selected glossary by H.W. Dewey. Ann Arbor: University of Michigan, 1966. 94 p. P. 7–21. URL: departments.bucknell.edu/russian/const/sudebnik.html (last visited: 1.7.2021)

[99] Herberstein S. von Rerum Moscoviticarum commentarii. Notes upon Russia: being a translation of the earliest account of that country, entitled Rerum Moscoviticarum commentarii/translated and edited, with notes and an introduction, by R.H. Major. In 2 Vol. London: Printed for the Hakluyt Society, 1851-52.

[100] Die peinliche Gerichtsordnung Kaiser Karls V. und des Heiligen Römischen Reichs von 1532 = (Carolina)/hrsg. und erl. von F.-Ch. Schroeder. Stuttgart: Reclam, 2014. 215 s.

[101] Vladimirsky-Budanov M.F. Obzor istorii russkogo prava [Review of the history of Russian law]. Moscow: Territoriya budushchego, 2005. 800 p. P. 176. (in Russian).

[102] См.: Scott J.C. Seeing like a state: how certain schemes to improve the human condition have failed. New Haven: Yale University Press, 1998. 445 p.

[103] См.: Tamanaha B.Z. Law as a means to an end: threat to the rule of law. Cambridge: Cambridge University Press, 2006. 254 p.

This measures from the very beginning assumed a significant weight of state interests in comparison with individual freedom. The same M.F. Vladimirsky-Budanov admitted that "the state directed private measures of dependence into bonding, into a general governmental measure for the sake of the public aims, for the sake of serving it; it was guided not by the private benefit of the landowners, but by its own interests ... in the Muscovite state, the entire population was called upon to serve the government; all interests of individuals, social classes and societies were extremely below the governmental interests, a person lived much less for himself, his family and the nearest society than for the government. Only with this extreme stress of all the forces of the population towards one goal, this government managed to endure its vast territory with the small numbers and poverty of the population."[104] The sacrifice of private interests in the name of the highest state good further seriously hindered the adoption of the proportionality in the Russian legal order.

A very insignificant legal measure designed to establish at least some semblance of balance with the interests of the landowners was the special privilege of serfs, the so-called St. George's Day *(Iur'ev den')*. Art. 57 of the Sudebnik of 1497 "Concerning the Peasant Quitting-Time" gave annually (for a week and a week after November 26) peasant quitting-time from one landlord to new one.[105] "Such a legal requirement can be considered valid in the interests of both parties (peasants and landowners) for elimination of disorder in the settlement of accounts."[106] Of course, by modern standards, it is really difficult to call such regulation proportionate.

In general, it is hardly worth looking for in such epochs, for example, as the reign of Tsar Ivan the Terrible (1530–1584), even the minimal elements of constitutionalism. Written records from that period can be misleading. A formal-logical analysis of the legislation of the times of Ivan the Terrible may lead easily to a false conclusion about the proportionality of criminal policy. For example, responsibility for crimes against the state seems to be quite moderate since did not allow the death penalty. In reality, such rules "in the books" were not an obstacle to the arbitrariness of the monarch or his guardsmen in practice. The literature describes a case when, for committing a state crime, four Novgorodians were executed by the order of Ivan the Terrible, although formally such a punishment was not allowed[107]. Likewise, today in Russia one can often observe a gap between positive rules and informal practices.

2.3. Proportionality in the History of the Russian Empire

In the era of the Russian Empire (XVIII – 1917), real constitutionalism and a possible restriction of autocracy, including through the principle of proportionality, did not occur for various reasons. During this period, one can mark out only isolated attempts for constitutionalism. One of them lacked the necessary prerequisites. Oth-

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[104] Vladimirsky-Budanov M.F. Obzor istorii russkogo prava [Review of the history of Russian law]. Moscow: Territoriya budushchego, 2005. 800 p. P. 180. (in Russian).

[105] The Sudebnik (1497) // Muscovite judicial texts, 1488–1556/compiled, translated, and edited, with annotation and selected glossary by H.W. Dewey. Ann Arbor: University of Michigan, 1966. 94 p. P. 7–21. URL: departments.bucknell.edu/russian/const/sudebnik.html (last visited: 1.7.2021)

[106] Vladimirsky-Budanov M.F. Obzor istorii russkogo prava [Review of the history of Russian law]. Moscow: Territoriya budushchego, 2005. 800 p. P. 167. (in Russian).

[107] Vladimirsky-Budanov M.F. Obzor istorii russkogo prava [Review of the history of Russian law]. Moscow: Territoriya budushchego, 2005. 800 p. P. 23. (in Russian).

ers were initially an imitation, addressed for foreign users and did not affect the interests of their own citizens in reality.

An example of an unsuccessful attempt to restrict the Russian monarch is the "Condition" *(Konditsii)* of 1730. This quasi-constitutional document was prepared after the death of Emperor Peter II by members of the Supreme Privy Council. The conspirators planned with the help of Konditsy to bind the unlimited power of the new monarch. One of the versions of the document introduced the requirement of proportionality in taxation, binding the Russian monarch "impose no excessive taxes on anyone beyond what is necessary" (para. 8).[108] Called to the Russian throne, Anna Ioannovna (1693–1740) tore up the already signed text in public.

Unlike the Magna Carta of 1215, adopted in England also during the weakness of the monarch, the Russian attempt of constitutional restrictions was unsuccessful. As later regretted M.M. Shcherbatov (1733–1790) about this attempt: "If vanity and ambition did not darken it, that is, to impose fundamental laws on the state and to limit the power of the sovereign by the Senate or parliament."[109] However, history does not tolerate the subjunctive mood.

Another kind of quasi-constitutional documents, which created the fiction of limiting the imperial arbitrariness in Russia, is Nakaz (Instruction) to the Legislative Commission[110]. In art. 512 of this document, which Catherine II (1729–1796) prepared with her own hand, contains the aim of proportionality principle: "It is true there are cases where power ought and can exert its full influence without any danger to the state. But there are cases also where it ought to act according to the limits prescribed by itself." By the intention of the former Prussian princess "laws that overstep the measure of good, become the reason that excessive evil is born out of them. All laws which aim at the extremity of rigor, may be evaded. It is moderation which rules a people, and not excess of severity" (art. 65, 66). These provisions express the idea of self-limitation of public power and moderation in law-making.

Several elements of the principle of proportionality were established in the Nakaz. It defines the main legitimate aim of the Monarchy: "not to deprive people of their natural liberty; but to correct their actions, in order to attain the supreme good" (art. 13). Also, the requirement of suitability can be seen in the provision that "one must be careful that there are no laws that do not attain their intended aim" (art. 460). Thus, the legislator was instructed to predict the possibility of normative decisions achieving their goals. The requirement of necessity can be seen in the proportionality of punishment: "the most certain curb upon crimes is not the severity of the punishment, but the absolute conviction in the people that delinquents will be inevitably punished" (art. 222). Here you can see the influence of European Enlightenment on the humanistic definition of the softness of legislative regulation. This manifestation of the

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108 Konditsii, soderzhashchiye ogranicheniye vlasti monarkha v pol'zu verkhovnogo taynogo soveta ot 19 yanvarya 1730 g. [Conditions containing the limitation of the power of the monarch in favor of the supreme Privy council of January 19, 1730] // Konstitutsionnyye proyekty v Rossii XVIII – nachala XX veka [Constitutional projects in Russia in the 18th – early 20th centuries]/ed. A.N. Medushevskiy. Moscow: Rossiyskaya politicheskaya entsiklopediya (ROSSPEN), 2010. 640 p. P. 76.

109 Shcherbatov M.M. O povrezhdenii nravov v Rossii [On the damage of morals in Russia]. St. Petersburg: V. Vrublevsky, 1906. 84 p. P. 40. (in Russian).

110 The grand instructions to the commissioners appointed to frame a new code of laws for the Russian empire: composed by Her Imperial Majesty Catherine II., empress of all the Russias/ translated by M.Tatishchev. London: Printed for T. Jefferys, 1768. 258 p.

idea of proportionality is also established by Art. 453 of Nakaz, according to which "real candor and sincerity ought to be displayed in every part of the laws; and as they are made for the punishment of crimes, they ought consequently to include in themselves the greatest virtue and benevolence". Such thoughts of an enlightened monarch indicate the desirability of a minimum burden to individual freedom.

Despite the detailed definition of proportionality, Nakaz had no legal force, and one can only partially believe in the reality of the liberal intentions of Catherine II. Nakaz itself established the traditional principle of unlimited monarchy: "The sovereign is absolute; for there is no other authority but that which centers in his single person that can act with a vigour proportionate to the extent of such a vast dominion" (art. 9) ... Every other form of government whatsoever would not only have been prejudicial to Russia, but would even have proved its entire ruin" (art. 11). Geographical conditions besides the well-known justification of uniqueness, indeed, to a certain extent, justified the autocracy of the Russian Empire. As a result of the Mongol conquest, authoritarian and centralized methods of government to hold back the moderation of power under the threat of preserving such vast territories. This conclusion proves the illusory nature of beautiful constitutional ideals and the futility of adoption of proportionality in Russia.

If the Conditions and the Nakaz are widely known examples of failed constitutionalism, then in the legislation of the Russian Empire one can find unexpected examples of using the idea of proportionality. One of them is the 1804 Regulations on the Peasants of the Livonian Gubernia[111], which was adopted by Emperor Alexander I after the Kauguri Peasant Uprising of 1802 and based on the threat of possible support of Napoleon Bonaparte's troops by the inhabitants of modern Latvia.

Among other things, this Regulation determined the correspondence between the duties of the peasants and the size of the used land of different kinds. According to Art. 57 in the assessment of peasant plots, along with arable land, hayfields and vegetable gardens were also included, for which auxiliary work was previously imposed. Under the intent of the legislator, such a change was carried out "in order to bring the peasants into lawful proportionality with the land, so that hayfields and vegetable gardens at the same rate were included in the assessment of peasant plots." Apparently, the principle of proportionality was used to prevent possible arbitrariness of landowners when imposing duties on peasants in the form of auxiliary work. Considering this act one of the largest transformations in the social sphere of the era of Alexander I, a Russian historian emphasizes that a number of its provisions were aimed "at mitigating serfdom, and the implementation and extension of its norms to Estonia led in fact to the landless liberation of the Eastsee peasants."[112] The threat of

[111] Imennoy Ukaz Imperatora Aleksandra I, s prilozheniyem Vysochayshe utverzhdennykh Polozheniya dlya poselyan Liflyandskoy gubernii i Instruktsii revizionnym komissiyam dlya opredeleniya ikh povinnostey [Personal Decree of Emperor Alexander I, with the attachment of the Imperially approved Regulations for the villagers of the Livonian province and Instructions to the auditing commissions to determine their duties] from February 20, 1804, No. 21.162 // Polnoye sobraniye zakonov Rossiyskoy imperii, s 1649 goda [Complete collection of laws of the Russian Empire, since 1649]. St. Petersburg: Printing House of the II Department of His Imperial Majesty's Own Chancellery, 1830. Vol. XXVII: 1804–1805. P. 100.

[112] Dolgikh A. N. Liflyandskoye polozheniye 1804 g. v imperskom aspekte: k istorii krest'yanskogo voprosa v Rossii v nachale XIX v [The Livonian position of 1804 in the imperial aspect: to the history of the peasant question in Russia at the beginning of the 19th century] // Izvestiya Samarskogo nauchnogo tsentra RAN [News of the Samara Scientific Center of the Russian Academy of Sciences]. 2010. No. 6-1. P. 19–25, P. 19. (in Russian).

further disorders provoked the improvement in the legal status of the individuals. This reaction of the government seems to be quite liberal. At the same time, the introduction of proportionality was determined by foreign policy. In addition, the reform presented only affected the outskirts of the Russian Empire. Afterwards, the landowners lobbied for amendments, partially returning the previous regulations.

Another example of the use of the principle of proportionality in legislation is provided by the Decree of Emperor Alexander I of 1808, which was aimed at establishing proportionality in the collection of clerical fees and duties for property registration[113]. It was emphasized in this document that some of these fees "still do not have certainty, and are levied under the same acts in a variety of ways, in other places more, and in others less, through which the very abuses often creep in to the detriment of private people and the treasury of Our; then in the cessation of all that, and on the other hand, the collection of these things throughout the State to decide once and for all in a uniform proportionality with one another". In accordance with proportionality, the correlation (in percentage) between the range of obligatory payments and the value of the property affected has been clearly established. When such a proportion was difficult to determine in practice, the fee was set in a flat amount. So, the fees for the certification of merchants, entries in the register, for printing and for unnecessary pages in the letter were instructed to "cancel everything altogether, as if non-equal, subject to various calculations and interpretation, and instead ... take without any calculation in the letter and in pages, in equal numbers 10 rubles each, and moreover nothing to pay or demand." This document fixed the reasons for the introduction of the principle of proportionality in the fiscal sphere, including excessive or insufficient balance between private and public interests. Also, these provisions show the relationship between legal certainty and proportionality, which are mutually aimed at preventing arbitrariness of government and abuse of rights by individuals.

If the first example touched upon the difficult issue of the legislative struggle against social tradition (serfdom as a kind of prejudice in relation to the social group), and the second example refers to the "eternal" scope of proportionality (taxation), then the next example is the progressive development of legislation in the field of rational use of natural resources. Proportionality as principle was established by art. 22 of the draft Charter on Forests of 1802, which later acquired the binding force, in the following wording: "essential and lasting state benefit requires that for hereditary abundance in the forest, there was an exact proportionality between cutting forests and growing them again."[114] Similar regulations can be found in the Decree of June 1, 1805, which was aimed at preventing excessive deforestation by mili-

[113] Imennoy Ukaza Imperatora Aleksandra I, dannyy Senatu «O yedinoobraznom postanovlenii kantselyarskikh sborov i poshlin za sovershenie i yavku krepostnykh aktov [Personal Decree of Emperor Alexander I, given to the Senate "On a uniform resolution of clerical fees and duties for the registration of property] from October 28, 1808, No. 23.317 // Polnoye sobraniye zakonov Rossiyskoy imperii, s 1649 goda. SPb.: Tipografiya II otdeleniya Sobstvennoy Yego Imperatorskogo Velichestva Kantselyarii [Complete collection of laws of the Russian Empire, since 1649]. St. Petersburg: Printing House of the II Department of His Imperial Majesty's Own Chancellery, 1830. T. XXX: 1808–1809. P. 633.

[114] Vysochayshe utverzhdennyy proyekt Ustava o lesakh [The highest approved draft of the Charter on Forests] from November 11, 1802, No. 20.506 // Polnoye sobraniye zakonov Rossiyskoy imperii, s 1649 goda [Complete collection of laws of the Russian Empire, since 1649]. St. Petersburg: Tipografiya II otdeleniya Sobstvennoy Yego Imperatorskogo Velichestva Kantselyarii, 1830. Vol. XXVII: 1802. P. 350, 353.

tary teams. The document stipulated that "forest officials should, when issuing forests, observe the proportionality of supply with the abundance of forest dachas, so that they remain forever without depletion, and about forests cut down by teams, with their permission, must keep an account and receive froth money for these forests, which are followed to forest income".[115] Of course, the proportionality here pursued primarily economic goals, but the actual ecological purpose of these norms is no less obvious. So, in the special literature it is noted that the legislative measures of that period were largely caused by a significant shallowing of navigable rivers, at the mouth of which uncontrolled deforestation was carried out[116]. Therefore, proportionality in forestry regulation of the Russian Empire was aimed at both natural resources and environmental goals.

Until 1917, proportionality in Russian law developed along the aforementioned lines. Although attempts to establish constitutional limits for monarchy carried out, but were largely theoretical or nominal in nature. An example of imitating constitutionalism is the Manifesto of Alexander I of January 1, 1810 "On the Formation of the State Council", which proclaimed the desire "to gradually establish an image of government on firm and indispensable foundations of law as it enlightened and expanded public affairs" (preamble)[117]. In ordinary legislation, it was also possible to find scattered manifestations of proportionality principle, which were could not exist without effective constitutionalism.

At the same time, one cannot deny the theoretical reflection on proportionality in jurisprudence at the turn of the 19th and 20th centuries. During this time, a whole galaxy of Russian scientists developed concepts that were ahead of their time. Some of these ideas, such as the concept of a human dignity and existence minimum[118], anticipated the development of constitutionalism after the Second World War. However, as often happens, researcher in Russia generate creative ideas, but unfortunately, their implementation does not occur. Most of the pre-revolutionary researchers often studied at leading European universities and were fluent in several foreign languages, and therefore were not separated from the trends of legal thought.

The very concept of law was connected with the proportionality and balance of interests. Following the definition of V.S. Solovyov (1853–1900) that "the essence of

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[115] Ukaz Imperatora Aleksandra I iz Voyennoy kollegii [Decree of Emperor Alexander I of the Military Collegium] from June 1, 1805, No. 21.819 «O naznachenii polkam i komandam samim mest k vyrubke i po trebovaniyu dlya nikh lesa, i o ne rubke onogo bez pozvoleniya lesnykh chinovnikov [On the appointment for the regiments and teams by themselves of places for cutting down and at the request of the forest, and about not cutting it down without the permission of forest officials]» // Polnoye sobraniye zakonov Rossiyskoy imperii, s 1649 goda [Complete collection of laws of the Russian Empire, since 1649]. St. Petersburg: Tipografiya II otdeleniya Sobstvennoy Yego Imperatorskogo Velichestva Kantselyarii, 1830. Vol. XXVIII: 1808–1809. P. 1102.

[116] Sutyagin S.S. Lesnoye zakonodatel'stvo v dorevolyutsionnoy Rossii: istoricheskaya pravopreyemstvennost' i evolyutsiya [Forest legislation in pre-revolutionary Russia: historical succession and evolution] // Yuridicheskaya tekhnika. 2011. No. 5. P. 458–462. (in Russian).

[117] Manifesto of January 1, 1810 No. 24.064-24.941 "Obrazovaniye Gosudarstvennogo soveta [Creation of the State Council]" // Polnoye sobraniye zakonov Rossiyskoy imperii, s 1649 goda [Complete collection of laws of the Russian Empire, since 1649]. St. Petersburg: Tipografiya II otdeleniya Sobstvennoy Yego Imperatorskogo Velichestva Kantselyarii, 1830. Vol. XXXI: 1810–1811. P. 1.

[118] Novgorodtsev P.I. Pravo na dostoynoye chelovecheskoye sushchestvovaniye [The right to a dignified human existence] // O prave na sushchestvovaniye: Sotsial'no-filosofskiye etidy [On the right to exist: Socio-philosophical ethics]/P.I. Novgorodtsev, I.A. Pokrovsky. St. Petersburg: T-vo M.O. Vol'f, 1911. P. 3–13. (in Russian).

law lies in the balance of two moral interests: personal freedom and the common good," [119] some of his supporters tried to develop a synthetic legal understanding. If V.S. Solovyov is striving to balance the liberal and communitarian ideology, then his follower A.S. Yashchenko (1877–1934) tried to synthesize natural law and positivism. The scientist understood by law "the totality of those acting in society as a result of the collective psychological experience of members of society and the compulsory implementation by the authorities of the norms of behavior that establish a balance between the interests of personal freedom and the public good."[120]

In addition to representatives of synthetic legal thinking, among the prerevolutionary Russian jurists, one can single out a large number of supporters of legal realism, in its various manifestations. Starting from the sociological direction (Yu.S. Gambarov, B.A.Kistyakovsky, S.A. Muromtsev), and ending with the influential socialist school in the subsequent history of Soviet Russia (M. A. Reisner). The latter, in an in-depth study on the doctrine of the common good in an absolute state, noted an important feature of the Russian legal order from the point of view of the proportionality. "In Russia, – the future developer of the first Soviet constitution emphasized in 1902, – despite the proclamation of various "liberties" at one time, the same principle of the government's exclusive right to take care of the common good has always been and is being carried out." [121] Such concern even now in Russian constitutionalism translates into an almost absolute presumption of the priority of public interests over the constitutional interests of a private person. Already at the beginning of the 20th century, the Russian researcher saw serious problems "in the broadcast formulas of the Age of Enlightenment with the comparison of public and private good; moreover, the first always goes forward and in the event of a collision excludes the second." [122] This opinion underlines the main difficulty in perceiving the conflict of private and public interest in the era of socialism in Russia.

3. PROPORTIONALITY AND SOCIALIST LEGAL TRADITION

For the understanding of the Russian model of proportionality, the socialist legal tradition that developed in the Soviet state (1917–1991) is of decisive importance. The question of proportionality in socialism, as well as the more general issue of illiberal constitutionalism, may even seem absurd. According to radical views, Soviet law is identified with "an oxymoron" (brutal, hypocritical and overweening use of political power).[123] Moreover, this definition, along with the argument about the illegal nature of Soviet legislation, contains a denial of proportionality and separate elements of this principle. Brutality or cruelty in law does not meet the *necessity test* or require-

[119] Soloviev V. Opravdaniye dobra [The Justification of Good]. Moscow: Institut russkoy tsivilizatsii, Algoritm, 2012 [1897]. 656 p. P. 533. (in Russian).
[120] Yashchenko A.S. Teoriya federalizma. Opyt sinteticheskoy teorii prava i gosudarstva [The theory of federalism. The experience of the synthetic theory of law and state]. Yur'yev: Tipografiya K. Matissena, 1912. 841 p.P. 185. (in Russian).
[121] Reisner M.A. Obshchestvennoye blago i absolyutnoye gosudarstvo [Public good and the absolute state] // Vestnik prava [Bulletin of law]. 1902. No. 9–10. P. 1–128. P. 24.
[122] Reisner M.A. Obshchestvennoye blago i absolyutnoye gosudarstvo [Public good and the absolute state] // Vestnik prava [Bulletin of law]. 1902. No. 9–10. P. 1–128. P. 66. (in Russian).
[123] Glenn, H.P. Legal Traditions and Legal Traditions // The Journal of Comparative Law. 2007. II. P. 69–87, 81.

ment of *least restrictive means*. Hypocrisy means a gap between the declaration of beautiful public goals and hidden governmental intentions in practice. Finally, the thesis of the overweening exercise of public power contradicts the essence of proportionality.

The denial of the principle of proportionality can be understood in the spirit of the dialectical method (thesis – antithesis – synthesis). This methodology is well illustrated by the thought of Alexander Herzen (1812–1870), who was not only well acquainted with Hegel's dialectical logic, but also deeply understood the deficiencies of socialism. In his letter of 1851, the thinker predicted that "socialism will develop in all its phases to the extreme consequences, to absurdities; and then a shout of protest will break forth from the titanic breast of the revolutionary minority and a deadly struggle will begin anew, in which socialism will take the place of present-day conservatism and be vanquished by a future revolution unknown to us. The eternal play of life is as relentless as death and as inevitable as birth, corsi e ricorsi of history, perpetuum mobile of the pendulum."[124] The most significant shortcomings of the absolutism of the Russian Empire (thesis), which socialism initially denied (antithesis) in the course of its dialectical development, gradually absorbed such shortcomings (synthesis). This device of dialectical logic in general corresponds to the history of the development of constitutional rights. In this sense, these rights can be considered a dialectical reaction to the negative experience of infringement of the most fundamental interests of individuals.

Attempts to find now in Soviet law elements of proportionality in its liberal understanding are counterproductive. Within the framework of the latter approach, constitutionalism could not exist in Soviet legislation. Socialist law is rather an example of gross violations of human rights. Even the provisions on social rights in Soviet constitutions cannot be regarded as legally significant.[125] This conclusion does not mean that it is useless to study the history of formation of proportionality in the Soviet era. Its analysis makes it possible to establish those phenomena that contradict this principle. The following is a brief overview of the main manifestations of proportionality in Soviet legislation and doctrine.

In the initial period of the Soviet state, its founders openly declared the possibility of the cruelest and massive forms of state means of coercion to achieve supposedly important public aims. In accordance with the Decree of the Council of People's Commissars of September 5, 1918, "On the Red Terror", the goals of the fight against the counter-revolution on activities, the provision of the rear were planned to be achieved "by means of terror", and the goals of securing the Soviet Republic from class enemies – "by isolating them in concentration camps." [126] The meaning of the "red terror" was clarified as follows: "all persons involved in the White Army organizations, conspiracies and revolts are subject to execution." In addition, there was a requirement "to publish the names of all those who were shot dead, as well as the grounds for applying this measure to them." The justification for such restrictive

[124] Herzen A. The Russian People and Socialism. Letter to J. Michelet // Selected philosophical works. Moscow: Foreign Languages Pub. House, 1956. 629 p. P. 437.

[125] Smith M. B. Social rights in the Soviet dictatorship: the constitutional right to welfare from Stalin to Brezhnev // Humanity. 2012. Vol. 3. № 3. P. 385–406.

[126] Decree of the Council of People's Commissars of September 5, 1918 "O krasnom terrore [On the Red Terror]" // RGASPI (Russian State Archive of Social and Political History). Fond [Holdings] 19. Opis'[Inventory] 1. Delo [File] 192. List [Page] 10. URL: http://doc.histrf.ru/20/postanovlenie-soveta-narodnykh-komissarov-o-krasnom-terrore/ (last visited: 1.7.2021)

measures is found in the writings of the founders of socialism. In a letter of 1918, V.I. Lenin put forward the thesis "that is correct in principle and politically (not only strictly juridical), which explains the substance of terror, its necessity and limits, and provides justification for it. The courts must not ban terror – to promise that would be deception or self-deception – but must formulate the motives underlying it, legalise it as a principle, plainly, without any make-believe or embellishment."[127] Hence, the justification for the cruelest governmental measures to achieve the goals of socialism was to be carried out by the Soviet justice.

In Soviet doctrine of later periods, one can find attempts to formulate a requirement of legitimate limitations of constitutional rights. For example, according to the Soviet jurists V.E. Guliyev and F.M. Rudinsky, the principle of legality" [...] implies a legitimate restriction of personal constitutional rights (arrest, rummage, etc.) occurs only given legal grounds and the due procedure."[128] It is true that the proposed requirement is associated rather with formal legality than with a test of substantive legitimacy of interference with constitutional rights. It should also be remembered that legal theory often contradicted practice.

Although socialism declared its commitment to the academic substantiation of any governmental action, in practice, the requirements of reasonableness and suitability were often violated. The title of the book of A.A. Tille, "The Law of the Absurd. Socialist feudal law," is representative.[129] According to the researcher, "the main and defining thing in Soviet law is absurdity, in general and in detail, arising from the absurdity of the entire socio-economic system."[130] In his book, A.A. Tille described a significant number of absurd examples from legislation and legal practice. The lack of a rational connection between public goals and the means of achieving them demonstrates art. 154.1 of the Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR).[131] On the one hand, the Soviet state imported grain mainly for fattening livestock, on the other hand, for the purchase of baked bread, flour, cereals and other food products for feeding livestock, criminal liability was established up to three years in prison.

The contradiction of the idea of rationality in Soviet legislation was clearly reflected in the economic field. A planned economy and overly centralized private law defy rational explanation from a modern point of view. Thus, the institution of bankruptcy actually did not make sense under the state ownership of most enterprises. In Soviet economic law, there was a phenomenon of "planned loss-making" enterprises. Today, the employer's obligation to reward employees of such enterprises at the expense of reducing losses can be taken as absurd.[132] The challenging of rationality of

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127 Lenin V.I. Letter to D.I. Kursky (May 17, 1922) // Collected Works. 2nd ed. Moscow: Progress Publishers, 1965. Vol. 33. P. 358–359, 358.

128 Guliev V. E., Rudinsky F.M. Sotsialisticheskaya demokratiya i lichnyye prava [Socialist democracy and personal rights]. Moscow: Jurid. lit., 1984. 192 p. P. 160. (in Russian).

129 Tille A.A. Pravo absurda. Sotsialisticheskoye feodal'noye pravo [The Law of the absurd. Socialist feudal law]. Moscow: Kont, 1992. 239 p. (in Russian).

130 Tille A.A. Sovetskiy sotsialisticheskiy feodalizm [Soviet socialist feudalism]: 1917–1990. 2nd ed. revised and add. Moscow: Probel-2000, 2005. 260 p. P. 15. (in Russian).

131 The Criminal Code of the RSFSR from October 27, 1960 (as amended on May 28, 1986) // Bulletin of the Supreme Soviet of the RSFSR. 1960. No. 40. Itemt. 591.

132 Art. 18 of the Regulation of the Central Committee of the CPSU, the Council of Ministers of the USSR from March 20, 1986 (as amended on January 13, 1989) No. 358 "O dal'neyshem sovershenstvovanii ekonomicheskogo mekhanizma khozyaystvovaniya v agropromyshlennom komplekse strany» [On the further improvement of the economic mechanism of management in the

socialist legislation could entail the diagnosis of applicant's mental disorder. Many Soviet dissidents were thus hospitalized for political reasons, and the phenomenon was labeled punitive psychiatry.[133]

The spread of strong measures in the Soviet system means the violation of the necessity requirement. After a trip to the USSR in 1920, this characteristic feature of the socialist system was accurately described by Russell Bertrand (1872–1970), who drew attention to the enormous hardships of the Soviet people in the name of the common good. According to Russell's observation, a convinced communist "shrinks from no measures, however harsh, which seem necessary for constructing and preserving the Communist State. He spares himself as little as he spares others... He is not pursuing personal ends, but aiming at the creation of a new social order. The same motives, however, which make him austere make him also ruthless. Marx has taught that Communism is fatally predestined to come about; this fits in with the Oriental traits in the Russian character, and produces a state of mind not unlike that of the early successors of Mahomet. Opposition is crushed without mercy, and without shrinking from the methods of the Tsarist police."[134] Being a supporter of the leftist ideology, the British researcher nevertheless came to the conclusion about the extreme cruelty of the new regime.

Socialist legislation did not directly enact the idea of a balance of interests. However, the principle of combining public and personal interests was described in detail in the Soviet doctrine.[135] Even several dissertations researched this topic.[136] The sequence of listing conflicting interests is indicative, where public benefits invariably precede the needs of the individual. The very concept of private interests was excluded from official documents and was not used in the doctrine. This is explained by the approaches of the classics of Marxism-Leninism. The tradition of criticizing private interests was laid down by Karl Marx (1818–1883) in his 1843 essay "On the Jewish Question". Expressing a negative attitude towards the "egoistic bourgeois" as a member of capitalist society, the German thinker believed that "the so-called rights of man, the droits de l'homme as distinct from the droits du citoyen, are nothing but the rights of a member of civil society – i.e., the rights of egoistic man, of man sepa-

agro-industrial complex of the country]" // Sobraniye Postanovleniy Pravitel'stva SSSR [Collection of Regulation of the USSR Government]. 1986. No. 17. Item. 90.

133 Bonnie R. J. Political abuse of psychiatry in the Soviet Union and in China: complexities and controversies // The journal of the American Academy of Psychiatry and the Law. 2002. Vol. 30. № 1. P. 136–144.

134 Russell B. The practice and theory of bolshevism. London: G. Allen & Unwin ltd., 1921. 188 p. P. 28–29.

135 Patulin V. A. Interesy gosudarstva i grazhdan pri sotsializme [The interests of the state and citizens under socialism] // Sovetskoye gosudarstvo i pravo [Soviet state and law]. 1972. No. 5. P. 20–29; Sverdlyk G. A. Grazhdansko-pravovyye sposoby sochetaniya obshchestvennykh, kollektivnykh i lichnykh interesov [Civil law means of combining public, collective and personal interests]. Sverdlovsk: Sverdlovsk Law Institute named after R. A. Rudenko, 1980. 72 p.; Vitruk, N. V. Sochetaniye obshchestvennykh i lichnykh interesov v pravakh i obyazannostyakh grazhdan SSSR [The combination of public and personal interests in the rights and obligations of citizens of the USSR] // Sovetskoye gosudarstvo i pravo [Soviet state and law]. 1984. No. 9. P. 3–10. (in Russian).

136 Sabikenov S. Sochetaniye obshchestvennykh i lichnykh interesov v sovetskom prave [Combination of public and personal interests in Soviet law]. Abstract of thesis. dis. ... Cand. jurid. sciences. Moscow, 1969. 16 p.; Stepanyan, V. V. Obespecheniye sochetaniya obshchestvennykh i lichnykh interesov v pravovom regulirovanii sotsialisticheskikh obshchestvennykh otnosheniy [Ensuring the combination of public and personal interests in the legal regulation of socialist public relations]. Abstract of thesis. dis. ... Cand. jurid. sciences. Moscow, 1978. 15 p. (in Russian).

rated from other men and from the community."[137] This negative attitude towards individual freedoms predetermined the Marxist theory of building a classless society, which is supposedly aimed at the harmony of public and private interests.

Such theoretical postulates justified the excessive governmental interference with individual liberties. The famous complete quotation from V.I. Lenin in connection with the drafting of Soviet civil legislation is as follows: "We do not recognise anything "private", and regard everything in the economic sphere as falling under public and not private law. We allow only state capitalism ... Hence, the task is to extend the application of state intervention in "private legal" relations."[138].

In the modern doctrine, one can find an unexpected continuity of the idea of the absence of antagonisms between private boon and public interests. According to V.D. Zorkin, "the distinction between the private and the public is conditional. Any rule contains both private and public interests. If there is a legal norm, then there is a governmental interest vested in it. Law expresses the interests of all the constituent parts of legal communication – citizens, groups, and the state as a public community as a whole. The essence of law is a compromise of interests at every given stage."[139] The need for such a compromise is beyond doubt. However, it is worth considering the thesis of a harmonious combination of public and private in Russian law. Socialist law, instead of the promised exclusion of social conflicts, in fact established an indisputable priority of public interests, whereas the private good was diminished too much.

4. CONCLUSIONS

The features of the legal culture of Russia predetermine the national model of the principle of proportionality. While the constitutional text and constitutional adjudication are familiar with this idea, the understanding of proportionality depends on a broader socio-cultural context. Already mythology fixes the borrowing of the idea of measure and scales from European culture. Attempts to link proportionality to a separate female deity in the Slavic pantheon, which would express balance and peace, had similar aspirations. There is clearly an analogy here with the mythology of antiquity. Likewise, the scales metaphor was not unknown in Russian folklore. The mechanism of borrowing images in fairytales is similar to the spread of ideas in global constitutionalism. Another source of folklore is proverbs and sayings that also capture the national specifics of proportionality in Russian culture. This area, undoubtedly, predetermines even at present the adherence to a certain legal tradition in Russia. Deeply rooted conservative values, including stereotypes or prejudices regarding certain social groups, make it difficult to overcome the power of tradition in legal practice.

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[137] Marx K. On the Jewish Question [1843] // The Marx-Engels Reader/ed. by R. Tucker. New York: Norton & Company, 1978. P. 26–46. P. 42.

[138] Lenin V.I. On the tasks of the People's Commissariat for Justice under the New Economic Policy (February 20, 1922) // Collected Works. 5th ed. Moscow: Progress Publishers, 1971. Vol. 36. P. 560–565, P. 562.

[139] Zorkin, V.D. The 1993 Constitution – Legal Legitimation of the New Russia [Konstitutsiya 1993 goda – pravovaya legitimatsiya novoy Rossii] // Kommentariy k Konstitutsii Rossiyskoy Federatsii (postateynyy) [Commentary on the Constitution of the Russian Federation (article by article)]/ed. V.D. Zor'kin. 2nd ed., Revision. Moscow: Norma; INFRA-M, 2011. P. 11. (in Russian).

Orthodoxy has strongly influenced the Russian legal system. The phenomenon of Byzantinism, along with the mobilization-type statehood and huge territory, determines today the priority of the supreme good in constitutional practice. The latter, from the point of view of proportionality, means a low value of a human person and individual freedom. Nevertheless, through canon law, Russia has inherited the maxims of Roman law. The use of Latin and general principles of law in constitutional adjudication leads to the conclusion that Russia is not devoid of modern ius gentium. The history of Russian law demonstrates that, along with written rules, informal rules and political practice can play a significant role. A few attempts to formulate the idea of constitutionalism proved futile, such as the Conditions torn by the Empress Anna Ioannovna in the eighteenth century, which thus did not turn into a Russian version of Magna Carta.

Inequality and extreme forms of capitalism embedded in the structure of Russian society predetermined the success of socialist ideology. The Marxist project to eliminate the conflict between private and public interests in order to reach a utopian social equilibrium turned out to be just a good intention. In practice, in accordance with the logic of dialectical development, the previous privileges of the nobility and bourgeoisie were taken over by the Communist Party nomenklatura and Soviet officials. The continuing socialist tradition is expressed in the considerable priority given to the common good, where the slightest and often reliably unverifiable threat to the public good causes the ideal of the supreme value of the individual and his fundamental rights to be set aside in practice.

ZUSAMMENFASSUNG

Im Zentrum des Aufsatzes steht der Begriff der Verhältnismäßigkeit im Verständnis des russischen Rechts. Die Anwendung der Verhältnismäßigkeit in verschiedenen Rechtsordnungen zeigt universelle Ansätze zum Schutz der Grundrechte. Gleichzeitig bewahren einige Länder die Einzigartigkeit ihrer Rechtskultur und führen neue Aspekte in den Inhalt dieses Grundsatzes ein. Studien zu nationalen Verhältnismäßigkeitsmodellen machen auf wenig erforschte Probleme aufmerksam. In diesem Zusammenhang besteht das Ziel dieses Beitrags darin, das russische Modell des Verhältnismäßigkeitsprinzips unter Berücksichtigung der allgemeinen Trends im globalen Konstitutionalismus zu analysieren. Auf eine dogmatische Analyse der verfassungsrechtlichen Verhältnismäßigkeit verzichtet der Autor bewusst. Das Hauptargument dieses Aufsatzes ist, dass die Verfassung Russlands heute nicht mit formaler Logik verstanden werden kann. Die Verfassungsänderungen von 2020 haben die Kluft zwischen dem geschriebenen Recht und dem geltenden Recht weiter vergrößert. Daher untersucht der Beitrag zunächst den sozialen und kulturellen Kontext der Verhältnismäßigkeit im russischen Recht. Die Untersuchung beginnt im ersten Abschnitt mit einem Überblick über die Idee der Verhältnismäßigkeit in der russischen Mythologie und Folklore. Der Autor macht auf das Problem der Adaption der Skalenmetapher durch die russische Kultur aufmerksam und analysiert die Manifestation der Verhältnismäßigkeit in russischen Sprichwörtern und Redewendungen. Der zweite Abschnitt gibt einen Überblick über die Entwicklung der Verhältnismäßigkeit in der Rechtsgeschichte Russlands angesichts möglicher Beschränkungen der öffentlichen Macht. Die rechtliche Reflektion der Verhältnismäßigkeit der Alten Rus, des Moskauer Staates, des Russischen Imperiums und der Sowjetunion wird ebenso berücksichtigt. Der Aufsatz untersucht schließlich auch das Wesen der Verhältnismäßigkeit im Hinblick auf das Überleben von Teilen der sozialistischen Rechtstradition in Russland.