

## PROPERTIES OF CONSTITUTIONAL PRINCIPLES

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The subject. The article is devoted to the study of the trinity of properties of constitutional principles.

The purpose of the article is to confirm the hypothesis that constitutional principles, often perceived by researchers and law enforcement officials as abstract norms with declarative content, are in fact full-fledged legal institutions that are endowed with all the necessary properties to achieve constitutional goals. In this regard, the article analyzes the property of axiomatization, the property of presumptivity and the property of fictitiousness of constitutional principles.

The methodology. The systemic-structural, comparative, formal-legal and formal-logical methods made it possible to identify and characterize the properties of constitutional principles, such as axiomatization, presumptivity and fictitiousness. The use of these methods in their combination predetermined the appeal not only to topical problems of constitutional law, but also to issues of the theory of law, as well as other branches of law, which made it possible to most objectively and comprehensively approach the study of the properties of constitutional principles.

The main results of the research. The trinity of the properties of the constitutional principle lies in the fact that the constitutional principle formulates the basic rule and determines the direction of development of the legal system and thereby has the property of axiomatization. At the same time, the constitutional principle has the property of presumptivity due to the duty of the law enforcement officer to proceed from the assumption of compliance with the provisions of such a principle by all subjects of legal relations. Thereby constitutional principle ensures the necessary stability of the legal system of the state. At the same time, in order to achieve full-fledged stability of the legal system, along with the assumption that the subjects of legal relations comply with the provisions of the constitutional principles, it should be possible to monitor such compliance. In the absence of prior control over compliance with the provisions of the law, the solution is the application of legal presumptions. In this regard, within the framework of the presumptive property of constitutional principles, constitutional presumptions are inextricably linked with the corresponding constitutional principles. In turn, having the property of fictitiousness, the constitutional principle allows to interpret the provisions that make up such a constitutional principle and, as a result, create the necessary regulatory legal framework.

Conclusions. Constitutional principles are the driving force of the legal system. They fill all legal relations without exception with legal meaning and content and have a special meaning due to their irreplaceability and the obligation to strictly observe them. In turn, the trinity of properties of the constitutional principles reflects their legal essence as fundamental normative provisions that determine the generally binding basic rules and directions of the development of the legal system, ensure the stability of the legal system of the state, and also have the possibility of timely development and adaptation to the changing legal reality.

## 1. Introduction

Legal principles are the most essential legal categories at the core of a legal system – they reach into every sphere of society and the state, shaping the course of their development. Legal principles are viewed as extremely important – and with good reason because they are irreplaceable and have to be observed without fail. This applies before all to constitutional principles, which are a vital force in the creation of a legislation because “the distinctiveness of the principles of constitutional law consists in their seminal role for all other sector-specific principles based on them” [1, p. 374]. A combination of these principles is at the core of legal systems of states, including the Russian Federation and “the collective constitutional cultures of Europe, even if interpretation and application of these principles in different national constitutional orders varies” [2, p. 602]. There can be no doubt that constitutional principles are the motor of a legal system and that they fill with legal meaning and substance, and are the source of, all legal relations without exception – this is why constitutional principles are the guiding force of legal regulation.

At the same time, it is well known that some of their characteristics elevate constitutional principles above the level of standard legal tenets. For instance, what makes constitutional principles distinctive is their normative generality and the absence of clear boundaries of their legal meaning. And such cornerstone concepts as democratic state, welfare state, rule-of-law state, meanwhile, lack established legal definitions. There is a need therefore to further elaborate the normative framework and continue interpreting constitutional principles accordingly.

It should be pointed out that the problem of normativity of constitutional tenets, including the problems resulting from their generalized character, to this day cause debates among legal scholars. Besides, there is a lack of a single understanding of the legal essence of constitutional principles. As a result, in theory

and in practice constitutional principles are often considered as abstract and purely decorative norms. Yet, there can be no doubt about the fact that constitutional principles are fully-featured legal tenets with all the properties necessary for achieving the goals set out in the Russian Constitution<sup>1</sup>. In view of this, this writer believes it is important to continue the inquiry into issues pertaining to legal nature of constitutional principles.

One of the noteworthy studies addressing the legal essence of constitutional principles is N.V.Vitryk’s monograph “Loyalty to the Constitution”[3], which highlights a wide range of issues of general theoretical concern, including those related to the ontology of the Russian Constitution, this Constitution’s socio-legal backbone, its values, mechanisms of its action and realization, the constitutional principles. The author of this study also drew on some of the articles written by Ye.S.Anichkin[4], N.A.Arapov[5], M.N.Vorobieva[6], Ye.V.Ilyina[7], Yu.V.Kim[8], G.N.Komkova[1], A.A.Liverovsky[9], N.I.Matuzov[10], V.N.Pyatkin[11], V.A.Sivitsky[12] and others.

One should note meanwhile that the existing studies focused on legal principles in general, as well as the ones devoted to constitutional principles in particular, do not pay due attention to properties of legal principles, a circumstance which slows down the evolution of constitutional principles and, accordingly, limits the opportunities for their comprehensive realization.

This article addresses constitutional principles by exploring the triad of their properties: the axiomatic property, presumptiveness, and dogmatic fictitiousness (hereinafter referred to as fictitiousness). This is because these principles

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<sup>1</sup> The Constitution of the Russian Federation (approved at a nationwide referendum on December 12, 1993, with the amendments approved at a nationwide referendum on July 1, 2020). Rossiyskaya Gazeta (newspaper), July 4, 2020, No. 144.

need to be studied “as a single, global, independent and self-sufficient but also changing legal category, which is vital for the establishment of a legal system, its efficacious protection, and its sustained development” [13, p. 51]. Inquiry into the properties of constitutional principles, meanwhile, is one of the undertakings that open up new avenues for studying these principles and legal categories interconnected with them. As N.I. Matuzov correctly noted, “an in-depth analysis of the principles of law can contribute to solving the eternal problem of law-making and understanding law. Because law is a complex social phenomenon with many dimensions: social, economic, political, cultural, moral, philosophical, axiological, volitional, informational. And it goes without saying that the unpacking of the principles of law is bound to express the essence of law itself in relation to all mentioned parameters and directions” [10, p. 18]. In view of this, there can be no doubt that constitutional principles have a great potential for growth, which a comprehensive study of them is certain to further.

## **2. The triad of the properties of constitutional principles**

Apparently, the “systemically important role assigned to constitutional principles gives rise to the specific demands placed on them. Firstly, constitutional principles should be the source for universally binding basic rules and define directions for the legal system’s development. The truth of such basic rules should be beyond dispute. Secondly, constitutional principles serve to ensure stability of the state’s legal system. Thirdly, constitutional principles should have a capacity for evolving in a timely manner and adapting to changing legal realities.” [13, p. 50]

Constitutional principles meet these demands because they possess a combination of different properties. These properties, in our opinion, are the axiomatic property, presumptiveness, and fictitiousness. The triad of the properties of constitutional principles, therefore, consists in this: informing a basic rule and defining directions for the legal system’s development, constitutional principles are

therefore axiomatic. At the same time, constitutional principles are presumptive because practitioners of law must presume that all subjects of law observe them, thus ensuring the necessary stability of the state’s legal system. And being fictitious, constitutional principles allow for flexible interpretations of themselves and, as a consequence, for the creation of a necessary legal framework. Now let’s review each of these properties.

## **3. Axiomatic property**

Legal axioms have a long history. Axioms are undeniably a product of the development of humankind because the basic notions of law, justice, and courts of justice took shape yet at the dawn of the civilization [14, p. 28].

The axiom is a premise at the cornerstone of a scientific theory which is taken to be true without logical proof and forms the foundation of proof of this theory’s other premises [15, p. 16]. This term is being applied in different areas of scholarship, and law is not an exception. Legal axioms are the seminal incontestable truths that are reflected in different areas of law and strengthen the effectiveness of legal regulation. Noting this, T.N. Radko approaches legal axioms as seminal and incontestable truths enshrined in legal norms, as certain postulates of legal science and case law, as widely known facts that do not need proof because they are self-evident [16, p. 123]. S.S. Alexeyev, in turn, rightly notes that legal axioms are the most important principles of law embedded in legal acts [17, p. 111]. Indeed, such state of affairs is arguably absolutely natural because legal axioms becoming legal principles is a normal stage in the development and formation of the axioms in the state’s legal system. Speaking about the duration of the formation of a legal axiom, it is impossible not to note that legal norms inevitably become interconnected with moral norms. Thus, according to N.A. Chechina, axioms are the legal norms reflecting universal moral values because, first, the necessity to observe the rules of conduct deriving from them is evident from the viewpoint of common sense, moral principles, and justice, and, so, this necessity does not need a proof; second, these norms are seminal for the system’s most other rules

because law should correspond to popular notions of fairness[18, p. 89].

In view of the above, in this writer's opinion, it is beyond dispute that constitutional principles are axiomatic because they are the source of universally binding basic rules, which are incontestable primary truths, unprovable and not requiring a proof, that form the backbone of the state's legal system and determine directions for its development.

Reviewing the axiomatic property of constitutional principles, one should address, *inter alia*, certain aspects of the philosophy of law. As is well known, there are different types of legal thinking. Thus, the legal thinking centered on natural law is distinguished by the legal dualism which discriminates between natural law and positive law. Prioritizing natural law, this type of legal thinking does not pit it against positive law. This means that provisions of natural law should be embedded, and prioritized, in normative framework, and violating these provisions should be prohibited.

This approach is at the core of the Russian Constitution, which postulates that individuals, their rights and freedoms are the foremost value. There can be no doubt that "the need to observe and protect civil and political rights and freedoms is obvious from the viewpoint of common sense and the principles of morality and justice and, therefore, does not require any proof. In a democratic and rule-of-law state rights and freedoms should always be the top priority, observed and protected in every possible way. This time-honored postulate is the cornerstone of every democratic constitution. It is hard to imagine a modern democratic and rule-of-law state where observing and protecting civil and political rights and freedoms would require an additional justification or would not constitute a paramount obligation on the part of the state" [19, p. 53]. Undoubtedly, this constitutional principle is axiomatic while also vital for shaping and strengthening both the foundation of the constitutional order in general and the foundation of the rule-of-law state in particular. It is worth noting that the core values enshrined in the legislation of the European Union in general and its

individual member states in particular include not only supremacy of law, freedom, democracy and equality but also human rights [20, p. 512], which, however, can sometimes compete with other constitutional principles [21] and often require an adaptation of national constitutional traditions to the general European principles [22, p. 7].

As A.S.Sidorkin fairly noted, principles of law form a coherent system where one principle logically gives rise to the next. Meanwhile, the key principle, in Sidorkin's opinion, is the principle of supremacy of civil and political rights [23, p. 9]. This constitutional principle is foundational because it is axiomatic. Civil and political rights and freedoms shape the content of all constitutional principles. Constitutional principles, therefore, are posited as axiomatic principles. This writer assumes that due to their axiomatic property constitutional principles form a basis of positive law, which is arguably the universally mandatory form of equality, freedom and justice. Obviously, this postulate also applies to the rights enshrined, *inter alia*, in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Despite certain particularities of the interpretations by the European courts [24, p. 483], the role of the fundamental rights and freedoms, including their social and economic aspects [25, p. 97], grows continuously and defines every direction of development of the European nations.

So, let's note that from the viewpoint of the triad of the properties, the constitutional principle is axiomatic because it is systemically important and, as a result, gives rise to a universally binding basic rule predicated on incontestable primary truths, unprovable and not requiring a proof, that lie at the core of the state's legal system and define vectors of its development. As N.A.Arapov aptly noted, principles of constitutional law grow from constitutionally important ethical ideas and their formulations are the benchmark of the greatest congruity with such ideas [5, c. 106]. This writer believes that this is the only appropriate approach.

#### 4. Presumptiveness

As is well known, the Russian Constitution obliges national public authorities, organs of local self-government, public officials, and citizens

(alliances of citizens) to observe the Constitution's provisions and the laws. At the same time it is presupposed that subjects of law such as mentioned above are law-abiding because within the Russian legal system a supposition that subjects of law do not observe provisions of the Russian Constitution and laws is impossible and inadmissible. Such approach would be at odds with the basics of a democratic and rule-of-law state first of all. Moreover, the Russian Constitution was adopted by national referendum, which is an indication that the citizens chose and accepted the values enshrined in it. This concerns first of all civil and political rights and freedoms and their priority. Constitutional principles serve to ensure stability of the state's legal system in keeping with basic rules deriving from them, and to bring this function into play, one should, among other things, oblige law practitioners to proceed from this presupposition in their work. A legal system in this case is stable because there is no need to exercise relentless anticipatory control of the entire range of subjects of law and their deeds – for instance, to check the lawfulness of legal acts issued by national public authorities – since such control would paralyze the entire legal system.

Inasmuch as constitutional principles are concerned, such approach abolishes the need to control whether subjects of law observe constitutional principles when they enter into legal relations of one or another type. For achieving a robust stability of a legal system, however, the presupposition that subjects of law observe constitutional principles is not enough – there should also be instruments for compliance control. In the situation when there is no anticipatory control of compliance with laws, applying legal presumptions is the solution because when the fact of observance of a legal principle cannot be questioned one can hardly expect this principle to be rigorously observed by subjects of law. Thus, the property of presumptiveness inseparably interlinks constitutional principles and their corresponding legal presumptions. It should be noted that presumptiveness does not place constitutional principles in the category of legal presumptions.

Like legal axioms, legal presumptions have

a long history, with records of them dating back yet to the Roman law period. In general terms, the legal presumption is a presupposition, directly or indirectly enshrined in a legal norm, which is considered as true unless established otherwise. Apparently, it is hard to overestimate the role of legal presumptions in efficient regulation of the full spectrum of legal relations. Sure enough, this concerns first of all constitutional presumptions, which “promote the establishment of a single constitutional space... and form the requisite normative content that ensures coherence and efficiency of all elements of the mechanism of constitutional regulation” [26, p. 334].

A good case in point is the principle of constitutionality of legal acts, which gives rise to several requirements as to constitutionality of such legal acts. Accordingly, in the absence of anticipatory control of constitutionality of legal acts, it is presumed that all constitutionality requirements have been met and, therefore, the legal act in question conforms to provisions of the Constitution. At the same time, given the possibility that legislators sometimes can adopt legal acts that run contrary to provisions of the Russian Constitution, there exists an option to have the constitutionality of a legal act adjudicated on by Russia's Constitutional Court through application of the presumption of constitutionality of legal acts.

Examining interconnections between legal presumptions and legal principles, Louis Katzner fairly notes that legal presumptions encapsulate legal principles and values enshrined therein [27, p. 92-93]. Moreover, legal presumptions are so important because, *inter alia*, they are used for the reason of a “procedural impasse,” as a time saver [28, p. 1439], and also because courts of law themselves have at their disposal only a limited range of options for verifying information and facts [29, p. 5].

To sum it up, constitutional principles are presumptive because law practitioners in their work are obliged to presume that all subjects of law observe these principles, and this obligation ensures the necessary stability of a state's legal system. And the legal presumption corresponding to a particular constitutional principle is an instrument to control whether subjects of law duly observe the

constitutional principle in question.

## 5. Fictitiousness

Because boundaries of their legal meanings are vague and because they often have a high degree of normative generality, constitutional principles are fictitious. As noted by A.A.Liverovsky, some constitutional principles, like mathematical axioms, grow from basic ideas – justice, freedom, equality – which, like mathematical basic ideas, should be regarded as fictions, that is ideas assigned an instrumental role in the theory of knowledge. The “social contract” – the agreement to accept abstract / subjective interpretations of these ideas – applies to them just as it does to the basic ideas in mathematics. Subjectively interpreted in individual constitutional cultures, fictions link together normatively defined objects and thus form objective constitutional principles [9, p. 243].

Like legal axioms and legal presumptions, legal fictions have a long history. A legal fiction (from Latin *fictio* – “invention,” “figment of imagination”) is usually understood as something untrue which is legislated to be true and, therefore, obligatory. It goes without saying that one should discriminate legal fictions from the fictitiousness of legal norms in a negative sense, such as the failure to put these norms into practice – in other words, the situation when the norms “cement that what appears as superficially real, theoretically possible but does not materialize” [30, p. 51]. This is a very important qualification because legal fictions in their most widely accepted sense are a significant and often indispensable element of a state’s legal system whereas fictitious legal norms undermine this system, discredit it.

Legal fictions have currency in all branches of law. Constitutional law, too, has its share of legal fictions, which, because of this area’s specific function as the regulator of all aspects of political and social life, have certain distinctive characteristics and differ from fictions in other branches of law. Legal scholars usually approach constitutional legal fictions as an instrument of legal workmanship. Thus, according to Ye.V.Iliyna, the constitutional legal fiction can be regarded “as a universal instrument of legal workmanship,

which is used to construct, more or less arbitrarily, that what definitely does not exist but is recognized as being in existence, and the other way round, and this construct is categorical, imperative, irrefutable, formal, embedded in legislation, reflects a particular legislative policy, and has a special function in the mechanism of legal regulation of the most important social relations” [7, p. 27]. Ye.S.Anichkin argues in the same vein, pointing out that constitutional legal fictions “are normative constructs in the Russian Constitution and other sources of constitutional law that recognize that what is definitely non-existent as being in existence, and the other way round, while also having some sector-specific characteristics” [4, p. 100].

At the same time, some legal scholars’ arguments appear to lack a clear understanding of the essence of constitutional legal fictions, failing to discriminate between the idea of the fiction as an instrument of legal workmanship and fictitiousness as the property. This writer believes that constitutional fictions as an instrument of legal workmanship should be distinguished from fictitiousness as a quality.

For instance, according to V.N.Pyatkin, the constitutional fiction “is an imperative normative construct that is lawfully created by the state (the people); expresses this state’s legislative policy; is embedded in the constitution and constitutional legislation; establishes (regulates) the order, states, processes, institutions which, although not based in reality, projects the legislator’s will; and has certain legal implications in the area of constitutional law” [11, p. 87]. The above definition lacks an acknowledgement of the constitutional fiction as an instrument of legal workmanship. At the same time it provides characteristics of states, institutions, processes which contradict the reality. Because this definition does not contain clarifications, it may well be referring to fictitiousness of constitutional provisions, which is reflected, inter alia, in a high degree of their normative generality and abstractness. Or to other aspects of fictitiousness of the mentioned normative constructs.

And now let’s review the arguments of the scholars who focus, this writer believes, on constitutional fictions as indicators of fictitiousness of, inter alia, constitutional principles. Thus,

Yu.V.Kim argues that “the tendency to reject objective truth can be also often observed in political process, which is to some extent serviced by constitutional law, whose norms are quite heavily laden with ideological messages and perform, in addition to the regulatory function, also the function of programming and reproducing a legal and political doctrine prevailing in society” [8, p. 8]. In view of this, according to Kim, “the fundamental law of any state is what might be called a legal instrument constituting political myths of a respective era” [8, p. 9]. In this particular case Yu.V.Kim correctly points at the special role of constitutional law, its ideological and political components, which, in combination, lend fictitiousness to provisions in this branch of law.

In view of this, M.N.Vorobieva correctly notes that the fiction is an instrument of sorts for reflecting constitutional values in constitutional norms, while also being instrumental in shaping constitutional norms, which occupy the highest position in the hierarchy of legal norms because they – constitutional norms – form a basis for the production and development of Russia’s sectoral legislation [6, p. 59]. This writer believes that in the above argument the fiction is also referenced as something that lends fictitiousness to constitutional tenets by enshrining in them foundational provisions of a general nature.

Ye.S.Anichkin approaches constitutional fictions along the same lines, noting that “the foundational role of constitutional law in Russia’s legal system, the highest position occupied by provisions of the Russian Constitution, as the main source of constitutional law, in the hierarchy of legal norms, the traditionally abstract and unreal character of certain provisions of the state’s Fundamental Law, a strong dependence of constitutional law on an official ideology and a political situation, as well as some other actualities, create a fertile environment for the production of constitutional fictions” [4, p. 90].

The Russian Constitution contains a number of provisions that elude definitive interpretation, cause debates among researchers, and are difficult to apply in the practice of law. An example of this is the provisions of Chapter 1 of the Russian Constitution – “The Fundamentals of the

Constitutional System.” First of all, this is the characteristic of Russia as a democratic, rule-of-law and welfare state. These constitutional provisions have a high degree of normative generality and abstractness and their legal meaning lacks clear boundaries. As a result, such constitutional provisions inevitably become fictitious. Discussing this, Ye.S.Anichkin aptly notes that the fictitiousness of these constitutional norms is caused by the incompleteness and inadequacy of legal regulation while the fictions are nestled in the abstract legal concepts and terms whose understanding and interpretation has been a matter of debate. In Anichkin’s opinion, as a rule, such concepts lack legal definitions and their legal attributes are not sufficiently detailed, which makes their meanings opportunistically flexible. The researcher correctly places in this category such concepts as “state,” “democracy,” “sovereignty,” “justice,” “freedom,” “dignity,” “civil society,” “federalism” [4, pp. 92-93]. Yu.V.Kim takes a similar view, commenting that the fictions include constitutional constructs characterized by a low degree of institutional certainty. He correctly places in this category both the term “state” and its more sophisticated versions (“democratic state,” “rule-of-law state,” “welfare state,” “federative state”), because the scholarship has yet to provide universal definitions of these constructs [8, pp. 8-9].

So, this writer believes that fictitiousness, as one of the three properties of constitutional principles, consists first of all in the unclearness of the boundaries of these principles’ legal meaning, as well as in abstractness and a high degree of normative generality. In this writer’s view, the absence of clear boundaries of a legal meaning, abstractness, and a high degree of normative generality per se are just a transitional characteristic of constitutional principles. Essentially this means that legislation contains abstract provisions lacking specific details. This is a characteristic of the fictitiousness. At the same time, a high degree of normative generality is what shapes the potential of constitutional principles – thanks to this potential, constitutional principles can be brought into play, developing the legal system and promoting this system’s efficient functioning. The fictitiousness of constitutional principles – the property we analyze

here - does not mean, however, that constitutional provisions are fictitious in the negative sense, i.e. that they are not or cannot be realized, because the Russian Constitution does not cement the relations that are already in place but, rather, sets out goals and objectives that society and the state have to achieve in order to fully and efficiently realize the constitutional provisions.

## 6. Conclusion

By way of a conclusion, it should be stressed that legal principles are legal categories to which special importance is attached and which are vital in every sphere where they are applied. This concerns first of all constitutional principles, whose legal nature includes many dimensions defining their legal essence. This writer believes that an inquiry into the properties of constitutional principles is one of the undertakings that open up new avenues for studying these principles and legal categories interconnected with them. So, it has been established that constitutional principles possess three properties at once: they are axiomatic, presumptive, and fictitious. This triad of constitutional principles reflects these principles' legal essence as pivotal normative constructs which inform universally binding basic rules as well as directions of the legal system's development, ensure a stable existence of the state's legal system, and have a potential for evolving in a timely manner. It can be argued that these properties of constitutional principles should be taken into account by legislators, practitioners of law, and academic researchers. This would bring more precision to legal regulation and expand the range of options for activating the limitless potential of constitutional principles.

So, constitutional principles, often viewed by researchers and practitioners of law as abstract and purely decorative norms, in reality are full-fledged legal tenets that have all the necessary properties for achieving the goals set out in the constitution.

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