Reflections on the Monograph "The Head of the Spanish State: the History of Constitutionalization" by Tatyana Alekseeva[1]

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ABSTRACT
In the article, the author examines the monograph by Tatyana Alekseeva. "The Spanish Head of State: A History of Constitutionalization". The author notes the relevance of the study by Tatyana Alekseeva Institute of the Head of State, as relevant in modern conditions. The author notes that this historical and legal study has every reason to claim recognition in constitutional and legal comparative studies, as well as in the science of constitutional law in a broad theoretical sense. The author analyzes the role of the monarchy as an institution, on the one hand, exerting a restraining effect on the state of society, and on the other, serving as the basis, including for a democratic social order, based on the force of law. Research by Tatyana Alekseeva proves that free and careless treatment of state and legal institutions is costly for people, estates and nations.
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On the pages of her new monograph, T. A. Alekseeva, in an academically intelligible and lively presentation, conducts a historical and legal study of the institution of the head of state in a variety of its incarnations, starting with the origin and ambiguity of this term. The expression "head of state" has recently entered the front ranks of the political and legal vocabulary, where it represents this ruling authority in person in a synthetic concept. With its advent, a now well-known and seemingly simple generalization appeared in science, politics and practical jurisprudence, in which, however, sometimes something looks confusing. This is usually the case in the polysemy of capacious concepts, especially if they are complicated by disparate political beliefs and doctrinal ambiguities.

The author of the book takes the head of state as an object of research on the fertile ground for this, which is the Spanish political and legal history in its various channels: both in its conditionally legitimate course and in the breaks of legitimate statehood. T. A. Alekseeva is a well-known scholar of Spain among law scholars with many publications on the history of Spanish constitutional law. The monarch's status occupies a lot of space in the monograph, not so much because of its specific merits, which, however, cannot be taken away from the monarchy, but because the legitimate Spanish statehood of the last two centuries was represented mainly in monarchical form, as long as the presidency there was short-lived and nondescript, and Francoism was lawless.

The research proceeds mainly in the constitutional and legal dimension — it is this system of legal coordinates that the author takes as landmarks in its inherent signs and meanings, even when it comes to institutions created contrary to constitutional law. After all, even in encroachments on its foundations, this right remains itself until it fades away, and really shows itself in an urgent imperative, in a demanding force, which it does not lose even in the negative, when it, though trampled, exposes lawlessness, condemns usurpation and does not leave hope for legitimacy to arbitrariness. Constitutional law will still eventually deprive the lawless government of the dignity of rightness, even when it confidently triumphs, and at the same time devalue even those of its real achievements that history would credit to the constitutional authorities and record in grateful honest memory. In this sense, the constitutional and legal orientation is quite correct and appropriate as the basis for the study of the institution of the head of state in any of its forms — from the venerable monarchy to the notorious dictatorship.

At the same time, this historical and legal (in terms of the subject profile) study has every reason to claim both recognition in constitutional and legal comparative studies within this scientific field, and in the study of constitutional law in a broad theoretical sense. Moreover, understanding the monograph implies familiarity with comparative state law and with its most famous part — constitutional comparative studies, with the subject of this knowledge, with its concepts, principles, system connections and useful effects. Aside from the comparative methodology, much will be missed in the understanding of the institution of the head of state, in its genetics and variability.

We shall note, however, that these days the discipline of foreign state (constitutional) law has fallen a victim to the opportunistic craze and has got under "optimization" in law schools. Specialized departments, deans and rectors treat it as if there are only illustrations, entertaining cases and curiosities in comparative state law, with which it is useful to revive some "real" academic subject, where a lawyer is "really educated" in useful "competencies" in local law. At the same time, they pretend that comparative constitutional jurisprudence does not lose anything significantly, but simply merges into the general course of constitutional law, where it makes a modest contribution to universal and sectoral "constitutionalization" in order to "run its errands". Constitutional comparative studies have come close to universal abolition in universities, and now it is not

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so easy to explain why Spanish, in particular, experiments are instructive and important, including in the Russian legal order, and why breaks in monarchical statehood or restoration are important and edifying in understanding republican statehood.

Meanwhile, not only in, say, American presidencies, but also in Spain and in many other European countries, the evolution and homology of the institution of the head of state reliably present the head of the republic as a rather stingy reproduction of the status of the monarch, pretty much debunked and supposedly "fat-free", first of all, from the right of sovereign (own supreme) power and from some of its possessions, such as immunity with freedom from legal liability, inviolability, domain and other rights of the sovereign from two conditional groups (honorary and real). In a republic, such rights do not disappear so much as they fade and lose something in the grounds and content, sometimes, however, only so that in the clothes of democracy, the presidency declared itself in the omnipotence of personal domination, fully adapted to republican sovereignty with its definition of the source and bearer of the plenary right to supreme power.

And it is clear then that the majority of nations cannot do without monarchical principles, even in a revised form. Even by overthrowing the lawful sovereign, the nations immediately show, moreover, unconsciously, the state-legal predilections cultivated in the monarchy. With them, the public and the ruling class continue their fundamental political inclinations in a republican way. There is a lot of enthusiasm and faith in the sinless rightness of democracy in republican moods, with which they usually lose sight of the fact that people's autocracy does not predetermine either a just law, or honest government, or the simple benefits of stability. It is especially wrong to wait for the happiness of the people, building a republic on the ruins of a legitimate monarchy, crushing the obsolete "autocracy" and assuring oneself that by the "will of the people" one can arrange everything and afford a lot.

The further, the worse people succeed in restoring the rule of law, especially the monarchy, and there is less and less chance that the nation, destroying fundamental legal institutions, will then be able to return to calm civil sanity, where people's political and legal reflexes will again work normally. Rather, one can imagine a senseless restoration in an attempt to restore the property of law and order, when the devastation for the monarchy is fatal and threatens the political nation itself. This happens if it is bogged down in lawlessness, lack of rights and schism and is ready to become the material of a foreign statehood, living out its life in social dreams and decay until its ethnic, cultural substratum, national faith and speech disappear.

Meanwhile, the power of the law shows itself even in the disorders and catastrophes of law and order. This force, whether more or less, acts in restorative endeavors, including half measures, where monarchical principles receive decent realization in a moderately balanced presidency. Often, however, everything turns into an arrogant emperorship, caudilism, treacherous regencies and juntas that usurp power with a promise to soon cede it to a legitimate appointment, postpone the cession indefinitely and, moreover, cannot perpetuate themselves in legitimate domination.

An objective study in a comparative historical context leaves no doubt that the monarchy is still not a fad and not an invention, but a legitimate and consistent basis of legitimate statehood, no less reliable in any case than other forms and foundations. The analysis presented in the monograph by T. A. Alekseeva is an unbiased evidence of this. It is, perhaps, appropriate to add to it the remark that under the shadow of long legitimate monarchies, not only democracies, but also simple people's well-being is well preserved, that the prerequisites for security and tranquility under them are no worse than among peoples who have decisively and lawlessly destroyed their monarchies. Over time, it turns out that they allowed themselves a lot in aspirations and dreams of a different kind of justice and hoped too much for power, uninhibited from the law, allowing it to rule over civil freedom, property, obligations and justice. It becomes clear that in vain they fantasized of bright prospects in the decadent popular feeling and in vain decided to arrange everything in the best possible way over the law in emotional promiscuity under the colors of scientific socialism. It is in such drives that monarchy is usually destroyed, including the already limited and balanced one, where balanced constitutional institutions help a political person to keep an innate faith in law.

Scandinavian countries (not counting Iceland), Australia and Canada, New Zealand and the United Kingdom, Benelux and other principalities and duchies — all these are monarchies, and with a convincing democratic reputation — unlike European and Latin American republics. Of course, in Italy, in the Balkans, the monarchy allowed fascism and the same kind of trends, but even those pale in comparison with the rabid Nazism of the Reich. The republics of the last century risked democracy most of all, betrayed it in the sins of national socialism, corporatism, caudilism, betrayed the law in totalitarian communist hobbies. Monarchies, in this sense, behaved noticeably calmer.

So in Spain of the twentieth century, unstable and not the longest democracy is imposed nevertheless on monarchical times and begins with restoration. It is no wonder that even now the ethnic parts of the Spanish nation remain in political unity under a common crown — it seems easier for them to preserve and feel such statehood when the king and justice do not prefer Galicians and Asturians to Basques, Andalusians or Aragonese, and do not put Castilians above Catalans. What if they had to do together without a king, taking into account the fact that the parliament in Madrid and the government in Barcelona are sometimes accused of biased injustice in the interests of well-known ethnic groups.

Even outside Europe, where democracy often looks unconvincing, the fate of the peoples under the rule of the legitimate monarchs of Thailand or Malaysia was not as disastrous as in neighboring republics and juntas, for example, in Vietnam, Kampuchea and Laos, in Indonesia and the Philippines, where people suffered immensely from bloody misfortunes and unrest. The historical and legal destinies of the monarchies in Morocco, Tunisia, Jordan also look more prosperous

compared to the republics and despotisms close to them in geography, ethnography and culture, respectively, Western Sahara, Mauritania, Mali, Algeria, Libya, Egypt, Syria, Lebanon, where states and peoples are constantly threatened with dangerous clashes and where they get bogged down for a long time in civil wars, in national disintegration, in emergency and military situations under violent power. There is a little more to be said about the Gulf monarchies than about their oil-bearing republican neighbors from the same Arab-Kurdo-Persian area, and, say, Iran, Iraq or Yemen find it difficult to keep religious-political, ethnic, Shiite-Sunni, in particular, differences in peace and to refrain from unbridled violence themselves.

But we will not aggravate these dramatic generalizations, so that the supposed virtues of the monarchy do not overshadow a republic and the civic consciousness of its population with distrust. Instead, let's assume that the peoples, for example in Nepal or Afghanistan, vegetate in lawlessness not from infidelity to the law, but by misfortune, and lose the monarchy not from treason, but because of unrest in the dynasty itself, which also coincide with foreign interference, religious bitterness and tribal strife. Meanwhile , if we see in this a tragic condensation of evil from different parts of the general drama, then even in that case everything looks meaningful and instructive in the sense that the strength of law is not unlimited and the law itself will not hold among people if they do not agree to spend money on its protection and restoration.

It is not, of course, a question of nations following Spain in restoring lost monarchies. So, perhaps it would have been more correct to build and restore the damaged law and order, but now there are fewer and fewer nations that have access to monarchical statehood. The destroyed monarchy cannot be arbitrarily recreated in order to use its advantages for one's own benefit, as soon as it pleases and when it is needed. The environment in which it is possible is not very difficult to destroy, but it is not easy and sometimes impossible to restore it later, especially after a long time. In Bulgaria, for example, even now the mood for restoration has probably not cooled down yet, but nothing will come out of it, except nostalgia among a hopeless political minority.

The falls and difficult restorations of the monarchy, as in the Spanish case, are instructive in that they clearly convey the risk of losing the very possibility of resuming law and the threat of the final loss of state institutions. History seems to have clearly outlined this lesson already at the end of the First World War, when it suddenly turned out that some of the nations could no longer establish monarchies, although they were restored and even re-created in the last century. Finland, for example, not so guilty, by the way, of the loss of the reigning dynasty, tried to continue itself in the monarchy and even established a regency, but searched in vain for a new sovereign, and never found one.

Qualified candidates for the kingdom fell away, and the throne became desolate, forcing the Finns to declare an uninvited republic, and with dictatorial habits at first. And Hungary waited between the world wars for a king, tried for a regency, until finally it exhausted all the legitimate prospects of the monarchy.

In this sense, Spain, as it follows from the monograph, is a rare case where both the dynasty and the legitimate monarchical tradition have not completely stopped yet and therefore it was possible to resume them in law and order. But even here the breaks made obvious damage, so the continuation of this monarchy in the future does not look as convincing as the Scandinavian, for example, kingdoms — not completely trouble-free, but still quite confident in appearance with their dynasties that last without a break for more than a century or even two.

But most instructive of all, of course, is the sad lesson of the people's encroachment on the right in the image of the monarchy. Lawlessness will not stop at the monarchy and will certainly destroy other capital institutions. With the experience of lawlessness and with a taste for it, people will fulfill their desires in simple outrages, and in great temptations of national, historical, proletarian or some other kind of justice, in order to sow discord in bitterness, get enemies from everywhere and deprive fellow citizens oftheir rights, take away property, abolish trade and displace civil turnover on the sidelines of life. Then, instead of civil loyalty to the law, they release a political directive and unbridled "administrative delight" with plans and orders from the authorities, with quiet joys of accountability and seniority. Little by little, legal forms, electoral and parliamentary procedures, titles of rights, corporate clothes, the "empty ritual" of justice and other assets of legal civilization are getting out of business and losing importance. There are also no guarantees against lawless repression, which manifests itself in bitterness or moderate plausibility, in order to frighten less with ferocity, but certainly through the framework of law, so as not to allow the law to keep within the boundaries the people's state political will, fiscal interest and administrative discretion.

From such inclinations, neither the monarchy nor the republic will be well, where there is certainly no more "holiness" and the law, and there is no perfection, even less, because it is not found in any statehood. A republic is no less vulnerable than the monarchy both in its initial foundations, and in the technique of power, and in its embarrassing deeds. The prosperous longevity of statehood and law is due to the previous behavior of the people, the strength, quality of civic skills and the fact that people are able to keep them in themselves, civic attachment to institutions and rules and the determination to stand up for them, not to lose, not to give them up in insensibility, cowardice and obsequiousness.

Republican benefits will not be for the good of citizens if among them, in their parliament and in court, prevails, along with the "common will", say, faith in the striking "sword of revolution", in proletarian and socialist "legality" and in something else piercing and cutting, even if conditionally peaceful, such as, for example, "penetrating responsibility", which does not care about "corporate veils", statute of limitations, legality of possessions and transactions, presumption of good faith and innocence. If in a republican spirit such beliefs and habits ruin the monarchy, then together with it they oppress the entire right down to the ground. Neither the rule of law nor obedience to the law will stand when people value their wishes and intentions more than institutions, rules and obligations, when expediency prevails, for example, in a "teleological" (directed)

interpretation, which with a predetermined outcome interprets the law for a plausible purpose. Then, instead of fair adversarial justice and legitimate evidence, the concept of "general justice of the decision" will settle and prevail in court, for example, where the rules of proof are not the main thing and defective evidence is excusable, because the judicial act ultimately follows a decisive intuition — one that shrewdly and, as if, "from the heart" determines the guilty and the innocent, distributes strictness and leniency, even if it reminds someone of biased arbitrariness.

Along with teleology, the philosophical "essentialism" has long been rooted in law and has already entered into force, which supposedly penetrates the very essence of political and legal things, owns it and is ready to solve everything directly from it, overstepping the "insignificant" particulars of law. So it sees the republic "in essence" in indisputable, albeit unproven advantages, and in monarchical power, accordingly, it recognizes "in fact" only an old darkness and fate in order to deny it legal recognition. It will respect only the "essence" in other legal institutions, and the "core" in civil rights, defining all this according to taste from the predominance of the "essence" over forms, rules and procedures, in order to deny them dignity and recognition on occasion. And not only the monarchy, but, for example, the boundaries of someone else's property and freedom, parliamentary and judicial rituals constantly prevent something "substantial" and good to undertake, and achieve, and do something significant "in fact" so much that there is no choice but to step over and neglect. In the essential drives, the conventions of law seem inconspicuous and inappropriate, precisely "in essence" on the way to the triumph of progressive goals and core values, the advantages of which, however, are also determined by taste and mood, as in "teleology".

T.A. Alekseeva's research will inspire and prove that the free and careless treatment of state-legal institutions is costly to people, estates and peoples. No matter how distracted they are from the law, from obligation and process, court and civil freedom, all the same in the end everyone someday will seek protection and important decisions in them. And the more boldly people treat their law and order and constitutions, concede their rights and rules to the authorities, the more they believe in the political will with the ability to create law and truth on their own, the more likely they will be denied the protection of the law and justice at some "concrete historical stage of social development."

The generalization of the political and legal meanings that once gathered and formed into the concept of the head of state, in itself indicates that people, and nations urgently need legitimate authority. Otherwise, this concept would not have taken root in political practice and legal vocabulary so thoroughly and widely. For some time now, it has been impossible to do without it, if only because the very expression "head of state" exudes legitimacy. It is put into action in order, for example, to determine the president on a par with the sovereigns in the general row of legitimate rulers, to designate his legitimacy not only by virtue of conditional popular will, but also in the sense that the president is seen in tribal unity with the monarchs, where together they are almost "the same". This kinship, secured by legality by virtue of tradition, was once vital and necessary for the new ruling power, even if the republican presidency manifested itself separately as an institution of the people's will alone.

It is clear that there is a lot of temptation from this people's willpower to rise above the law for the sake of the general state interest. This force, however, no matter how impressive, is always somehow not enough for the final domination of democracy and the ruling will over the law, which in the end can neither surpass the law nor do without it in the status of a state ruler. No wonder, according to the Constitution of 1852, the newly-minted president of France was designated as the head of state (Article 6) in order to put him on a par with the kings, enrolling them all in one "breed". Then, abolishing the unconvincing, as it turned out, presidency in order to raise the ruling majesty to unattainable imperial heights, they again considered it good to enter the emperor himself into the family of legitimate heads of state. In the imperial splendor, both the presidency and the monarchy seemed to have faded hopelessly, and yet France adopted the "Senatus Consult" of May 21, 1870, where Article 14 recorded the emperor in the category of heads of state, so as not to yield to "simple" rulers in the merits of legality. True, there was so much imperial greatness and self-confidence in the French of that time that only a calming moral defeat, which France immediately received, frightened and dishonored in the war, in the excesses of the Paris Commune and in the collapse of the empire itself, could have brought the nation to reason and forced it to law. This important episode was not ignored in T. A. Alekseeva's monograph.

The Spanish history of the head of state is vividly marked by protracted lawlessness in his fate, and the monograph is informative and instructive in presenting the legitimate version of this institution in decisive differences from the illegal ruler. All of them, however, structurally and functionally fall into the general tax on of the "head of state", which allows them to "know their place" among the institutions of supreme power, but their commonality does not change much in the sense that within the framework of law, legitimate heads and usurpers stand apart from each other as antipodes. In any case, in the legal and civil sense, it is this difference that determines everything. It has a capital significance apart from other important criteria, not to mention the conditional evaluative side, where at times simple-minded ideas about the valor and merits of the ruler, his mistakes and vices prevail. All this approval and censure sometimes makes it difficult to separate legitimate power from "beneficial" or "effective" usurpation, which, however, is not so effective, but rather spectacular, and does not so much bring good to its subjects as it hides its innate and acquired vices, taking advantage of lawless freedom. Meanwhile, neither the glory of victories, nor the ferocity of repression, nor the longevity will outweigh and replace legality.

But the legitimate head of state, even if his moderate rule seems vague, ineffective and inexpressive to the population, will not in any case remain defenseless under the shadow of the law, which will not allow ignoring his rights and fearlessly taking away his legitimate power. Encroachments on this power will be made criminal by the law and forever overshadow the usurpation. And on the other hand, even the "government junta" will be marked with signs of legitimacy if the legitimate

monarch "orders it to begin performing all the functions of the sovereign," as it was in Spain, and, of course, if it had remained within the framework of the received mandate.

In this important topic, the author of the monograph attaches importance to the fact that the recognition of the head of the Francoist state as an institution of national supreme power has entered into the legislation of Spain itself, and under the title of "fundamental laws". However, there was no place for a caudillo (leader) in the provisions of the constitution, which sets off the unlawful extra-constitutional meaning of usurpation. It responds with irreparable consequences in the acts of institutions established and operating contrary to the meanings and rules of constitutional law.

It follows from this that the adoption of legislative orders, even under the title of "basic law", does not cover lawlessness and does not cancel its consequences when constitutional and legal vices are fundamental and irreparable. Here it is also useful to take into account the simple truth that not everything written down and declared as the basic law predetermines and creates the constitution. By itself, the writing of basic laws (constituent acts, nizams, declarations, etc.) will not give the constitution to the people, will not allow it to be stated and instill constitutional law among people, as long as and if there are provisions in legislative writing that are unacceptable to constitutional law both in meaning and in view of their vicious origin. Such was caudilism, whose attempt to legitimize itself in the fundamental laws is still questionable, as is significant popular support. With that, it remains to conclude that there will be no constitution, no matter how many basic laws are written, if the subjects recognize lawless authority, participate in lawlessness and suffer disenfranchisement over themselves and around them.

Historical and legal research presents the Spanish statehood and the constitution as they suffered from Francoism, socialism, anarchy and from their legislation, including the "basic laws". In this observation, an unhistorical and not harmless delusion betrays itself in untruth, when the constitution is defined and interpreted by all means as the "basic law of the state". Contrary to the hoary and modern history, this interpretation suggests that the constitution really took shape in the writing of sovereign legislation and that any legislative expression can be considered a constitutional act from now on, as long as it does something impressive in the state. In this wrong light, the constitution will indeed be seen even in the way the military hand over supreme power to their leader and junta, and in any lawlessness that will be recorded in its basic legal guise. In that way it will not be surprising to ascribe a constitution to absolutism.

Therefore, the author's decision to place the subtitle "From absolute to constitutional monarchy" in the chapter on the "Constitutional design of royal power" seems controversial. After all, absolutism precedes the constitution and disappears as "constitutionalization" proceeds, for it binds the monarch with restrictions in favor of his subjects, thereby terminating absolute power. This apparently also applies to Spain, with, of course, respectful reservations about the tradition of the Cortes and regional independence. And yet, can an absolute monarchy participate in the constitutional formation of power if absolutism and the constitution are the opposites? This little intrigue has a solution in this chapter, which would be worth reading, as well as the entire monograph by T. A. Alekseeva.