RUSSIAN CONSTITUTIONAL DEVELOPMENT: FORMAL AND INFORMAL PRACTICES*

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Transitional constitutionalism remains the subject of intensive political controversy. Based on a project made possible by the Institute of Law and Public Policy (Moscow) this article presents the analysis of the basic constitutional principles of pluralism, the separation of powers, federalism, the independence of the judiciary and the guarantee of political rights and freedoms. It describes the changing character of their implementation in different areas of constitutional practices – legislation, constitutional justice, administrative activities and informal practices, and the comparative level of constitutional deviations in each of them. The important new expertise of this research is the concept and methodology of the constitutional monitoring and recommendations for full-scale reforms in key areas of Russian constitutional and political settlement. The author shows that the true choice facing modern society is not between constitutionalism or its negation, which is a dilemma, but between real and sham constitutionalism, with a wide variety of intermediate options separating them. It is precisely this intermediate area which the author defines as a transitional type of constitutionalism, the field of collision between different political stakeholders. This is an area of unstable equilibrium where the implementation of different legal strategies and technologies may produce a definitive effect.

Keywords: Russian Constitution; constitutional principles; legislation; justice; administration; formal and informal practices; constitutional reforms.

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Introduction

The Russian Constitution of 1993 has played a critical role in the processes of transition to democracy in Russia and elsewhere. Its adoption led to the end and definitive renouncement of a grandiose social experiment on building a communist (socialist) society by utilizing physical force. Owing to this fact, the Constitution represents a social choice by Russian society in favor of democracy, liberal values and human rights. On the one hand, this document is a full-fledged representation of the systemic changes seen worldwide at the end of the twentieth century. On the other hand, it is an independent document that to a large extent has determined the course of governmental changes in today's Russia and in other post-Soviet countries. Contemporary discussions of the Russian Constitution, however, put aside the issues as to what extent the Constitution has reflected transitional processes around the world; how the process of constitutional modernization has (or has not) fit into the context of post-Soviet social development in Eastern Europe; how the Constitution has affected social changes occurring throughout Russia; what areas of social tensions have been revealed during the course of constitutional development; and, finally, given all the above, what the prospects for Russia's constitutional system are in the future.

When speaking of the significance and prospects of the 1993 Constitution, one should look at it from three perspectives: comparative (commonalities and particularities in Russian constitutional development); historical (the past, present and future of the Russian Constitution) and functional (how norms correlate with

reality and what mechanisms are used for enhancing the social efficiency of the Constitution). We believe that an analysis based on these three factors will help answer the widely debated issue of the advisability and prospects of constitutional reform in Russia.

The comparative analysis is conducted, horizontally and vertically, on the basis of methods employed by the contemporary sociology of law that primarily investigates the way legal rules operate in society. This approach seems to be highly relevant to Russia where the constitutional crisis of the transitional period was simultaneously a political crisis affecting economic, social, national, cultural and legal aspects. Therefore, it is necessary to draw a comparison between "constitution" (in the strictly legal sense of the term) and "constitutionalism" (a social movement seeking to transform constitutional norms into reality). There emerges a situation resembling the theory of Rudolf Stammler according to which the formal aspects of law are far more important than the real ones. Law, to some extent, outpaces reality, hence evolving into an a priori category, formal logical structure that is independent of society's (social) reality and becomes an accessory. Yet, law by itself can influence society's reality through producing a variety of strategies for regulating and restricting people's reality, strategies which are based on a purposeful goal-setting. Any changes to society's reality (social relations) should, therefore, be introduced through the rational modification of legal rules. Under this approach, a constitution acts as an independent, indispensable element of institutionalization of new socio-economic relations, which possibly could both accelerate and hamper their development. The constitutional form is still searching for its social content, an idea that has not materialized yet.

This approach makes it possible to interpret the very attitude towards the constitution as a motive of social behavior and to analyze it pursuant to the theory of rational choice. It also provides an opportunity for reviving the theory of the social contract and for creating a metalaw, i.e. a specific socio-cultural reality enabling one to adapt rational legal rules in the conditions of irrational legal behavior (or legal nihilism). Finally, this approach permits analyzing the process of transition as the dynamics of dissemination of constitutional principles, whereby changing the entire political and legal reality (particularly by way of the so-called constitutionalization of branch law). Some countries apply the notion of "political constitution" that conveys the fundamental commonality of objectives pursued by law and politics in relation to the creation of a new social ethics in a democratic society.

Along these lines, we are going to explore the genesis, relevancy and future prospects of the Russian Constitution. To examine these aspects, we have formulated the following problems:

– Constitution in the context of worldwide transitional processes from authoritarianism to democracy;

– A constitutional revolution in Russia;

– The Constitution of the Russian Federation as a turning point in establishing civil society and a law-based state in Russia;

– Constitution and federalism;

– A form of government and a type of political regime in Russia;

– Potential and strategies for constitutional reform in present-day Russia.[1]

The research project "Twenty Years of the Democratic Path: The Constitutional Order in Contemporary Russia," realized by the Institute of Law and Public Policy (ILPP) in 2011–2013, focusing on the fundamental constitutional principles, reflects the structure and logic of the country's constitutional development. On the methodological ground of cognitive jurisprudence, comparative jurisprudence, sociology of law and political science the expert group conducted a systematic analysis of values, principles and norms, reconstructed the logic of their formation and systematic evolution, and researched the degree of their practical implementation and the main tendencies of the post-Soviet political transformation after the adoption of the Russian Constitution of 1993. The results of the project were presented in subsequent publications of the Institute – "Fundamentals of the Russian Constitutional Order: Twenty Years of Development"[2] and "Constitutional Monitoring: The Concept, Methods and Results of the Expert Inquiry in Russia in the Spring of 2013";[3] and also in five issues of the Institute's bulletin "Monitoring of the Constitutional Processes in Russia (2011–2012)."[4] In a summarized form, the results of the research were presented in an analytical report for the expert community.[5] In this edition the system of the key definitions of the project, an explanation of the methodology of legal and sociological inquiry, the empirical basis of the research and the argumentation of the proposed conclusions and recommendations were represented.

The original character of the presented approach, from our point of view, consists in the following: firstly, up to now this is the most systematic and comprehensive research relating to constitutional principles – from their formation in 1993 to current

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1 Andrey N. Medushevskiy, *Russian Constitutionalism: Historical and Contemporary Development* (London; New York: Routledge, 2006).

2 Основы конституционного строя России: двадцать лет развития [*Fundamentals of the Russian Constitutional Order: Twenty Years of Development*] (A.N. Medushevskiy (ed.), Moscow: Institute of Law and Public Policy, 2013).

3 Конституционный мониторинг: концепция, методика и итоги экспертного опроса в России в марте 2013 года [*Constitutional Monitoring: The Concept, Methods and Results of the Expert Inquiry in Russia in the Spring of 2013*] (A.N. Medushevskiy (ed.), Moscow: Institute of Law and Public Policy, 2014).

4 Мониторинг конституционных процессов в России: аналитический бюллетень. № 1–4 [*Monitoring of the Constitutional Processes in Russia (2011–2012): Analytical Bulletin. Nos. 1–4*] (A.N. Medushevskiy (ed.), Moscow: Institute of Law and Public Policy, 2014).

5 Конституционные принципы и пути их реализации: российский контекст: Аналитический доклад [*Constitutional Principles and Ways of their Implementation: The Russian Context: Analytical Report*] (A.N. Medushevskiy (ed.), Moscow: Institute of Law and Public Policy, 2014).

fulfillment; secondly, the elaborated method of constitutional monitoring and expert inquiry makes it possible to move from a simple narrative approach to quantitatively revealed and measurable indicators of constitutional principles implementation, to verify the proposed conclusions on constitutional deviations dynamics; thirdly, to formulate a system of concrete and proof-grounded recommendations for further Russian constitutional modernization.

1. Fairness, Equality and Proportionality in Current Post-Soviet "Law-Related Disputes"

Cognitive information theory demonstrates that the solution to the problem of human knowledge consists in investigation of any purpose-oriented human behavior which as developed in empirical reality definitely involves the process of fixation of research activity results – intellectual products. These products as sources of information create the solid ground for reliable knowledge and rational construction of reality images. In contemporary political philosophy, three main theories of justice can be verified: the idea of distributive justice (formal equality of possibilities in the formation of legal order);[6] the idea of legalistic justice (priority of the existing norms of positive law over abstract moral norms);[7] and the idea of combining the positive law and legal consciousness of any concrete society as the basis for justice.[8]

The last approach involves the broader spectrum of argumentation over the relationships between positive law, ethical principles and historical tradition, and of their reciprocal relations and practical implementations. In a globalized world, this kind of problem is actively debated by philosophers,[9] moralists[10] and political scientists.[11] Juridical constructivism (and political projects to resolve acute problems) appears under such conditions as a creative orientation for the understanding of the society-transformation process. On the one hand, it actively constructs a new legal reality; on the other hand, it actualizes problems of the legitimacy of legal decisions. In the post-Soviet transitional period, juridical constructivism covers three main dimensions – space, time and the essence of being, to demonstrate a sharp conflict between law and justice.

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6 John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971).

7 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, Inc., 1974).

8 Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1984).

9 John E. Hare, *The Moral Gap: Kantian Ethics, Human Limits, and God's Assistance* (Oxford: Clarendon Press, 1996).

10 Michael J. Sandel, *Justice: What's the Right Thing to Do?* (London: Penguin, 2010).

11 Michael Walzer, *Thinking Politically: Essays in Political Theory* (New Haven and London: Yale University Press, 2007).

The modern literature gives the *principle of fairness* three basic interpretations: it is understood as (*a*) the idea of distributive fairness (the formal equality of opportunities within the legal order concept); (*b*) the idea of legalist justice (the primacy of applicable positive norms over abstract moral principles); and (*c*) the idea of integrating positive law with the popular traditions of legal consciousness in order to form the foundation for justice. *The principle of proportionality* gives another perspective on the assessment of legal norms and their application in judicial practice which is based on a relationship between ends and means. It represents an "objective and reasonable" rationale for legal decisions that rely on constitutional provisions, on the one hand, and reject any interpretation leading to disparity, discrimination and therefore violating the principle of justice, on the other. Thus, the *interaction* between the principle of fairness and the principle of proportionality plays a decisive role in the judicial interpretation of the law which contemporary scholars define as value, norm and fact.[12] Additionally, the comprehensive interpretation of law is only possible in the light of all three of these competing parameters. Accordingly, the analysis focuses on those areas of legal regulation where there is some destabilization of a "fair balance" between international law and national law, individual rights and collective interests or there are various forms of inequality and discrimination in respect of rights and freedoms, their ambiguous interpretation and differential application of respective rules in legislative and judicial practice, as well as problems with politically motivated or selective justice.

A number of problems have become particularly relevant to post-Soviet society. These include: *conflict between law and fairness within the legal architecture of post-Soviet reality* (current debates over a relationship between international law and national law; issues of continuity and discontinuity of legal tradition; the proportion of legal and political arguments put forward during the adoption of key laws and court decisions determining the direction of constitutional development);[13] *tradition versus norm* (issues of conflict of the market economy principle with the principles of equality and welfare state economy in the context of privatization, newly formed property relations and traditionally stereotypical mindsets);[14] *solidarity and supremacy* – national identity and government structure (the impact of current debates about the nation and national identity on the solution of problems of sovereignty, citizenship, federalism and bicameralism);[15] *law and power* – the form

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[12] *Constitutional Principles and Ways of their Implementation*, *supra* note 5.

[13] Конституция в постановлениях Конституционного Суда России (1992–2014) [*The Constitution in Decisions of the Constitutional Court of Russia (1992–2014)*] (L.O. Ivanov (ed.), 2nd ed., Moscow: Institute of Law and Public Policy, 2015).

[14] *The Transformation and Consolidation of Market Legislation in the Context of Constitutional and Judicial Reform in Russia: Analytical Report 2003* (A.N. Medushevskiy & L. Skyner (eds.), Moscow: Institute of Law and Public Policy, 2004).

[15] Geoffrey Hosking, *Rulers and Victims: The Russians in the Soviet Union* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2006); Идеология «особого пути» в России и Германии: истоки,

of government and the type of political regime (debates over the conformity of the constitutional framework for human rights, the form of government and the type of political regime with the principles of fairness and proportionality; and the analysis of existing trends and techniques in the transformation of constitutional values and norms);[16] *cyclic nature of post-Soviet constitutional development* as a manifestation of conflict between the legal consciousness of people (perceptions of justice) and positive law (which at best provides a "moral minimum").[17]

2. The Concept of Constitutional Cycles

The concept of constitutional cycles is intended to describe the relationship between static state and changes occurring within a single constitutional process, to identify its similar phases in various historical periods and cultures, and to explain the mechanisms used for setting up a new constitutional order. Thus, the comparative analysis of big constitutional cycles allows us to identify general and specific features of various legal systems and to establish a relationship between legal norms and institutions in the democratic transformation of society. The essence of transitional dynamics is determined by the dialectics of three phases. In order to interpret them, we introduce new terminology – the notions of deconstitutionalization (undermined legitimacy and repeal of the old constitution), constitutionalization (adopting a new constitution and specifying its norms in the sectoral legislation) and reconstitutionalization (introduction of constitutional amendments bringing current rules in line with former constitutional rules and practices). Hence, the full constitutional cycle means a return to the starting point of all subsequent changes. That is a question of the similarity between phases and not of their repetition (which is practically impossible). The constitutional cycle resembles a dialectical spiral: phases of the new cycle repeat analogous stages of the previous cycle, but at a different qualitative level.[18]

The question is, What gears this system towards the proper order of alternating stages? The dynamics stems from a conflict between the law and the social efficiency of constitutional norms. The logic of alternating phases is determined by their various combinations. Moreover, the next combinations, to some extent, are predetermined by the previous ones. The first phase of the constitutional cycle (deconstitutionalization)

содержания, последствия [*The Ideology of "Special Path" in Russia and Germa: Origins, Content, Implications*] (E.A. Panin (ed.), Moscow: Three Squares, 2010).

16 Power and Legitimacy – Challenges from Russia (P.-A. Bodin et al. (eds.), New York: Routledge, 2012).

17 Andrey N. Medushevskiy, *Law and Justice in Post-Soviet Russia: Strategies of Constitutional Modernization*, 3(2) Journal of Eurasian Studies 116 (2012).

18 *Медушевский А.Н.* Теория конституционных циклов [Andrey N. Medushevskiy, *Theory of Constitutional Cycles*] (Moscow: Higher School of Economics, 2005).

usually implies the rejection of current constitutional rules and shows a conflict between legal regulation (the old one) and social efficiency (based on a new sense of justice and regulatory legitimacy). The second stage (constitutionalization) reflects attempts to reconcile these two factors by adopting a new constitution (fundamental legal norms are viewed as optimal) by society (the constituent power). Finally, the third phase (reconstitutionalization) usually implies adjusting exaggerated constitutional expectations and leveling constitutional norms with traditional institutions in order to improve their efficiency. This phase may bring an end to the cycle, i.e. restore the pre-crisis situation. As a rule, reconstitutionalization is characterized by three trends. The first trend consists in limiting political space by curbing the activities of political parties. This is achieved through constitutional and other legal methods maintaining the supremacy of one pro-government party over other parties in the area of public policy, and by adopting legislation compelling parties to strictly observe the constitution (which also undergoes substantial modification). The second trend consists in revising the separation of powers (both horizontal and vertical) with a view to increasing their centralization: restricting federalism; introducing checks and balances systems at the federal level; building the vertical hierarchy of power; instituting the "constitutional" power based on the overwhelming discretionary authorities of the administration. This can be achieved through separating administrative law from the domain of public law and social control (through the adopted legislation on public order, state licensing, greater discretionary powers of administrative institutions and power structures along with limited independence of the judiciary). The coercive administrative supremacy of public law becomes a rationale for reconstitutionalization and concurrently determines its output. Lastly, the third trend shows the prevalence of a special imperial style presidency with the presidential administration ruling over all governmental bodies. Within such a structure, the separation of powers has purely administrative meaning, i.e. a pro-presidential party becomes dominant, especially if led by a president.

The characteristic trends of reconstitutionalization, to some extent, stem from society's unpreparedness to introduce liberal democracy and its response to the inefficiency of democratic institutions. These trends may have different political meaning but, on the whole, they imply a new interpretation of constitutional principles aimed at reinforcing centralism and reducing social control over the government through delegating extra powers to administrative bodies within the vertical hierarchy of power and, eventually, to the head of state. Comparative analyses show that the constitutional cycle completed during reconstitutionalization does not halt the process of development. Rather, it forms the basis for the next constitutional cycle.

The current Russian constitutional cycle, which began in the 1990s, has now entered its final stage. This cycle is remarkable because, like its predecessor, it was affected by the collapse of the state. The cycle embraces three main phases:

deconstitutionalization – the crisis of legitimacy of nominal constitutionalism in the Soviet Union (1989–1991) and then in Russia (1991–1993); constitutionalization – adoption of the new constitution on 12 December 1993; and reconstitutionalization – the third phase that has been developing since 2000. The question remaining is, What is the nature of the third phase and can the current constitutional cycle, like other ones, end up reproducing the authoritarian phase in one of its numerous forms?

Thus, constitutional crises in transitional societies provide very valuable material for a political theorist who wants to analyze the mechanisms of constitutional changes. The concept of constitutional cycles seems to be promising because it demonstrates a correlation between the main phases of constitutional processes during transition: crisis (loss of constitutional legitimacy), upset balance (political discourse on constitutional issues) and stability regained at a new level (consensus on the next constitution). The problem of constitutional dysfunction is manifest in a conflict between the notions of legitimacy and legality and in the way they are revealed in the process of constitutional modernization. The mechanisms of constitutional transformations can be understood through analyzing different types of constitutional crises, their developmental stages and the role of the constitution as a factor in social changes. Hence, the theory of constitutional cycles enables one to see the correlation between the broken political and legal tradition (in the form of constitutional crisis), consolidation of a new constitutional regime (solution to the crisis) and restored continuity.

In analyzing the cyclical evolution of Russian constitutionalism, we are going to address the following issues: the mechanisms of cycles – constituent power and constitutional power; decentralization and centralization of the political system – the evolving concept of federalism; transition from the separation of powers to their unification – the form of government and the type of political regime in Russia; the conflict of modernization and re-traditionalization – strategies for implementing constitutional reforms in today's Russia; and lastly, the third constitutional cycle and possibilities for its adjustment.

3. Real, Nominal and Sham Constitutionalism

The theoretical approach has allowed us to interpret Russian constitutionalism as an integral historical phenomenon of modern and recent times. Russian constitutionalism is specifically characterized by contradictions inherent in the modernization process. These are contradictions between the law and the necessity of rapid social changes; between the newly established democratic institutions and the consolidation of power needed for reform regulation; and, lastly, between the classical Western European models of constitutional development and the indigenous forms of political development. In the public consciousness of society or a part thereof, constitutional institutions are usually associated with the positive

participation of citizens in public administration. The regimes, which cannot and thus do not want to implement adequate legal norms or institutions of government, tend to use constitutionalist terminology in a demagogic way. Constitutional modernization in transitional societies may begin or continue with this terminology, which acquires a new meaning therein.[19]

To be clearer in the interpretation of the emerging gaps between notion and reality, it was important to find terminology for transitional processes (though, in reality, they sometimes imperceptibly evolve into one another). Hence, we describe nominal constitutionalism and real constitutionalism as two opposite poles divided by a changing space of conflicting interests and development. Like Max Weber, we call the space "sham constitutionalism." Weber, together with Russian liberals, studied the instability of sham constitutionalism using German constitutional law and drawing on the specific Russian experience of the early twentieth century. In particular, German and Russian liberals meticulously studied the prospects for implementing the right of universal suffrage in societies that are not ready for liberal thinking.[20] In the late nineteenth century and early twentieth century, Russian liberal philosophers focused on the issues linked to transition from the authoritarian regime to a constitutional system.[21]

For interpreting the political system, it is important to determine its attitude towards a transitional political system, as well as towards such interrelated phenomena as sham constitutionalism and nominal constitutionalism. In our systemic analysis of the transitional political system, these notions have the following meaning.

Nominal constitutionalism can be defined as a system where the constitutional norm is not effective at all. The classical principles of liberal constitutionalism which govern human rights and power relations (the separation of powers) are not entrenched in the political system. The constitution legalizes an unlimited power, a dictatorship, which is per se unconstitutional. Therefore, this system is constitutional in name alone. And it does not have constitutional norms for power restriction in reality. Nominal constitutionalism embodies new principles of legitimacy (the sovereignty of the people or classes) and establishes an authoritarian government (the dictatorship of the party in power).

Sham constitutionalism might be defined as the system where political decision-making is withdrawn from the sphere of constitutional control. This is accomplished through: (*a*) conferring vast legal powers on the head of state; (*b*) maintaining flaws or lacunas in the constitution; and, consequently, (*c*) adjusting these flaws or omissions

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19 Конституционные проекты в России XVIII–XX века [*Constitutional Projects in Russia of the 18th–20th Centuries*] (A.N. Medushevskiy (ed.), Moscow: ROSSPEN, 2010).

20 *Кокошкин Ф.Ф.* Избранное [Fedor F. Kokoshkin, *Selected Works*] (Moscow: ROSSPEN, 2010).

21 *Гессен В.М.* Основы конституционного права [Vladimir M. Gessen, *Fundamentals of Constitutional Law*] (Moscow: ROSSPEN, 2010).

depending on the actual balance of social and political forces. As an alternative option, a new form of authoritarianism may be established.[22]

The dialectics of sham constitutionalism and nominal constitutionalism makes it possible to better understand the logic of the Russian political system development in a comparative perspective.

4. Implementation of Five Constitutional Principles in Comparative Perspective

The principle scientific expertise of the project under consideration is the elaborated program of constitutional monitoring, i.e. the systematic investigation and measurement of constitutional processes on the base of Russian material and, in perspective, on the material of regional and even global constitutional processes (because the method provides the possibility to do this). The empirical ground of monitoring is based on the material of expert inquiries, which should be realized periodically on the basis of the same program with fixed questions (which are listed in a sociological form). After sociological elaboration (in tables of different types), this data base becomes the object of substantial research and commentaries by a special group of legal analysts. In the framework of the pilot stage of monitoring (in the spring of 2013), more than 300 questionnaires were distributed; seventy-six respondents returned answers in the completed forms. That makes it possible to speak of the mathematical representative character of the sociological research. The generalized analysis is represented in tables of results of sociological inquiry and in tables of the coefficients of constitutional deviations which become the object of further analytics work in order to understand the foibles of Russian constitutional development.[23]

Comparative implementation of all five selected fundamental principles shows the uneven character of their implementation. All analyzed principles (and related spheres of constitutional regulation) scheduled according to the level of deviance in their implementation could be scaled as follows: pluralism (F-0.39); separation of powers (0.39); federalism (0.53); independence of judicial power (0.53); and guarantees of political rights and freedoms (0.62). The research gives the possibility to differentiate three areas of constitutional regulation: rather positive (pluralism and the separation of powers), rather negative (federalism and the independence of judicial power) and absolutely negative (guarantees of political rights and freedoms).

At the same time, comparative analysis of the implementation of principles according to zones of constitutional practices (legislation, judicial system, other organs of state power and informal practices) showed those of them that are mostly responsible for constitutional dysfunctions. The general logic of constitutional

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[22] Medushevskiy 2006.

[23] *Constitutional Monitoring*, *supra* note 3.

dysfunctions is represented: in the growth of deviance in the transition from broader and more general principles to sub-principles and concrete norms; from legal regulation to enforcement of the law; and from formal norms and procedures to informal practices.

Two principles posed in the area of relative positive regulation – pluralism and the separation of powers (F<0.5) – are characterized as more abstract and normatively stable; their legal regulation includes a lower rate of manipulation. That does not mean, however, that regulation of these principles is absolutely protected from disproportions and erosion of their original sense. Rather, this erosion, as was demonstrated in the research, has an indirect character and goes through other (more concrete) principles and application of legislation. These general trends were demonstrated clearly by the analysis of disproportions among separate constitutional principles.

A comparison of the realization of principles over the zones of constitutional practices makes it possible to concretize the failures of constitutionalism. The principle of pluralism in its important elements has been presented in all mentioned areas of constitutional practices – in legislation, court decisions, the activity of organs of state power and in informal practices. But the degree of this realization varies according to the rate of constitutional deviations: if on the level of legislative and judicial practices it is not high, the opposite is true on the level of institutional practices. A similar picture is presented for the principle of the separation of powers, the highest rate of deviations is registered in the areas of executive power and informal practices. The investigation concretizes the character of these deviations – they are concerned with the extra-constitutional influence of the president (and his administration) on the elections in the State Duma, the formation of the Council of Federation and their legislative activity as well as on judicial power in particular cases which are important for the protection of the existing political interests of the ruling group.

Two principles posed in the area of relative negative regulation – federalism and the independence of judicial power (F=0.5) – are confronted with the problem of constitutional dysfunction already on the level of legal regulation. In spite of the position of the majority of experts (respondents), the analytics in their commentaries does not mirror this rather optimistic picture. The principle of federalism, regulated in the Russian Constitution in rather ambivalent form (which opens different strategies of the principle's interpretation), is beginning to be neutralized on the legislative level, which brings into question the adequacy of the principle's adequate implementation as such. The contradictions in legislative regulations, the insufficiency of independent judicial control and the trends of political practice in the regions make evident the process of federalism's deconstitutionalization and the predominance of the centralist vector of its interpretation. In this prospect, the position of judicial power appeared to be rather contradictory: on the one hand, thanks to the activities of constitutional judges in recent years the system of basic laws for the protection of independent and impartial justice was created in the country; on the other hand, in

the process of further legal changes (known as 'judicial contra-reform') and especially in the process of the expansion of the formal and informal administrative control over the courts, the independence of the courts and their role in constitutional control was substantially reduced.

A comparison of the two above-mentioned principles (spheres of constitutional regulation) over the zones of constitutional practices shows similar trends in the increase in deviations in turn to the institutional and administrative aspects of regulation. The principle of federalism has been eroded in the direction of growing legislative as well as factual revision of the status of the subjects of the federation. As a result of these changes, the constitutional model of the distribution of prerogatives in the area of the common or competitive competences lost practically all of the characteristics of cooperative federalism in terms of a broad interpretation of the federal central competences in the areas of legislative, administrative and financial regulation. The methods of administrative regulation overwhelmed the constitutional one. The role of the legislative positions of the Constitutional Court appeared to be controversial in the area of constitutional control of federalism relations. For the horizontal as well as the vertical dimensions of the separation of powers design, the growth in the rate of constitutional deviance is obviously contra-productive and progressively expanded in turn from the central to the regional level.

The conclusion about implementation of the principle of the independence of justice corresponds with the mentioned trends in the area of the separation of powers: the most prominent constitutional deviations here have taken place in the implementation by the courts of their control functions and principles of competitiveness and neutrality, the presumption of innocence and the right to impartial justice in criminal and administrative proceedings, i.e. in those areas of jurisprudence where the public power is one side in the judicial dispute. The high level of deviations is fixed in the area of communications between the chairmen of the courts and other public functionaries as well as between the chairman and the judges of the court itself. The level of deviations in these areas is rather higher in comparison with a general medium range of deviations presented in the zone of the independence and autonomy of the courts. The result of this trend, according to the analysts, is a general decrease in citizens' trust in the courts as the institutes of neutral and impartial justice. The important part of this tendency is the erosion of the control functions of the courts which corresponds with the general enfeeblement of the principle of the separation of powers implementation as well as with the trend towards the monopolization of power by regional elites.[24]

The revealed trends in the implementation of basic constitutional principles has been concentrated in the sphere of the constitutional guarantees of political rights and freedoms which are disposed in the area of absolutely negative realization

[24] Стандарты справедливого правосудия: международные и национальные практики [*Standards of Fair Justice: International and National Practices*] (T.G. Morshchakova (ed.), Moscow: Mysl, 2012).

(F>0.6). The general situation and prospects in this sphere of legal implementation were critically appreciated in the context of the apparent divorce between legislative norms and trends in the practical activity of the state organs and informal practices in use. The highest level of constitutional deviations is represented in the following practices: the different methods of regulation of the activities of political parties; the recruiting of political elite sets; the extra-constitutional practices of executive power organs used for the indirect violation of constitutional norms; and the use of different informal instruments of influence and pressure (which in many respects are anti-constitutional). The key element of the political pluralism principle – the equal status of political parties and civil unions and the neutrality of the state in dealing with them – is brought into question. The political system progressively diminishes the reciprocal connections with society and, being put outside effective social control, becomes less open to reform.

Thus, the dysfunctions of constitutionalism are represented over all five principles, cover all zones of constitutional practices, but demonstrate the highest rate in institutional and informal practices. The overlapping character and inter-connection of constitutional deviance over different principles and zones of practices makes it possible to speak of their cumulative effect.

5. Mechanisms and Parameters of Constitutional Dysfunctions

The general dynamics of constitutional deviations could be underlined according to the following lines of interpretation: (*a*) the quantitative increase in deviations in the temporal perspective covers mostly the period of the past decade; (*b*) the general trend of their expansion goes from broader constitutional regulations to concrete ones, elements (sub-principles) of each investigated principle (as a result, the general legal formula is quite stable, but the structure and sense changes substantially); (*c*) the deviation rate increases progressively by moving from the more formalized modes of practices (legislative and judicial) to the less formalized ones – institutional and informal; (*d*) the most visible qualitative increase in deviations is fixed in the area of transition from the federal level of legislation to legal regulation and notably to enforcement of laws at the regional and local level (the phenomenon of the monopoly of different branches of power in the hands of regional elites).

The process of investigation has shown some important legal disproportions which are mostly sensitive to constitutional deviations in terms of the use of informal practices. Included among them are the exploitation of vagueness (or ambiguity) of some constitutional norms for their political-oriented interpretation in favor of executive power; the inadequate contra-posing of one group of constitutional rights against others in the judicial assessment of the balance of norms hierarchy; the broad and unclear regulation of the notion of "security" and competences of appropriate structures; the selective use of norms by the courts; the diffusion of

the strict border lines between constitutional and administrative law, which opens the way for the broad interpretation of delegate prerogatives of administration; the enfeeblement of justice via the bureaucratization of the courts; the selective use of criminal repression (and treatment of criminal process procedures) and the application of the examined informal practices for the "correction" of legal norms and their revision in law-adoption practices.

These factors and technologies bring into question not only the functional adoption of constitutional principles, but also includes the possibility of progressive substitution (and narrowing on a semantic level) of the mentioned principles – the rejection of the constitutional spirit in favor of the letter of the law. The result of this transformation could be the appearance of the phenomenon of "constitutional parallelism" or para-constitutionalism – the sharp divorce between formal and informal constitutional regulation, or pretended constitutionalism.[25]

As has been shown in the research under consideration, the system of informal practices appeared to be the central issue of the contrasting positions of the respondents. As the table of coefficients of contrasting expert opinions demonstrates, the highest level of diverse positions is presented in the appreciation of informal practices in the area of positive regulation (pluralism and the separation of powers) as well as in the area of negative regulation (guarantees of political rights and freedoms from the overbalanced administrative control and limitation). This means that the contrast of the respondents' opinions cannot be explained by the simple fact of the uneven fulfillment of different principles, but rather considered as an empirically proved general misbalance of Russian constitutional development and the growing polarization of the expert community regarding this phenomenon.

The rationales for the understanding of contrasting expert visions of informal practices could be found in three main hypotheses. The first is the general indefinite character of the notion: informal practices cover different relations – constitutional, extra-constitutional and anti-constitutional (the logic plurality of the notion makes different ways of its interpretation possible). The second is the professional priorities of the respondents (mostly teachers of law at Russian universities) combined with their social profile (modernists versus traditionalists) which stimulates them to definite treatment of informal practices (theorists versus practitioners). The third is the ideological split inside the expert community (pessimists versus optimists) which probably reflects the growing political polarization in society.

6. Re-Traditionalization in Russian Constitutional Development

Theoretically, a conflict between the new legal regulation and the existing social reality can be settled in favor of either the former via constitutionalization

[25] Thomas Carothers, *The End of the Transition Paradigm*, 13(1) Journal of Democracy 5 (2002).

or the latter via reconstitutionalization. The quest for the rationality of law replaces the search for its efficiency. Therefore, constitutional revolutions are followed by constitutional counter-revolutions or reconstitutionalization which re-enforces the legal norms or practices preceding the newly adopted constitution. Thus, due to the difficulties of constitutionalism, an unprepared society (where the constitution lacks grass-roots support, only elite groups are involved in politics, constitutional norms are not protected by the courts and adequate administrative reform is needed) might encounter constitutional re-traditionalization occurring directly or indirectly, in one of the ways described below.

The 1993 Constitution became a turning point in the movement towards civil society and a law-based state, which marked the beginning of the transition from nominal constitutionalism to a real one. Comparative study into the adoption of the Constitution, the specifics of its contents and subsequent developments allows us to make a number of general observations. The historical role and, in a way, teleology of the Russian Constitution should be recognized as its distinguishing feature. The Constitution was drafted and delegated under the stark confrontation of the old regime forces with the nascent new regime. No matter what specific goals and objectives the instigators of the coup pursued, their historical legitimacy involved democracy and the struggle against totalitarianism. The Constitution's authoritarian nature and way of adoption were referred to as forced measures against the conservative supporters of the old regime's restoration (who were termed neo-Stalinists).[26]

Contradictory views on the Constitution and its historical significance are typical of both contemporary literature and society at large. Some authors state that the Constitution is liberal in nature and forms a solid basis for the new Russia. Others assert that the Russian Constitution is "nominal rather than real" and treat it as a document of the transitional period "because of the debatable legitimacy of its promulgation and the president's unrestricted right to issue decrees."[27] While some of them consider the principles of human rights, federalism, the separation of powers and the multiparty system declared in the Constitution to be a real thing and a safeguard of democracy, others doubt that the declared principles are a fait accompli and a guarantee against the restoration of authoritarianism. The majority of researchers claim the Constitution is to some extent inconsistent and stress its conformity with the objectives of Russian authoritarian modernization.[28]

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[26] Конституция Российской Федерации: Проблемный комментарий [*The Constitution of the Russian Federation: Problem Comment*] (V.A. Chetvernin (ed.), Moscow: Institute of Law and Public Policy, 1997).

[27] Гражданское общество и правовое государство как факторы модернизации российской правовой системы [*Civil Society and the Rule of Law as Factors of Modernization of the Russian Legal System*] (St. Petersburg: Asterion, 2009).

[28] Конституционные права в России: дела и решения [*Constitutional Rights in Russia: Cases and Decisions*] (Moscow: Institute of Law and Public Policy, 2002).

Contemporary literature on legal issues provides many ways of constitutional revision (some of them are unlawful, of course) that can be arranged in decreasing order of their sweeping nature, as shown below:

First, through a constitutional revolution or a coup (when a constitution randomly changes without resorting to revision procedures enshrined therein; for example, the adoption of the Russian Federation (RF) Constitution in 1993).

Second, through the revision of the entire RF Constitution when chapters 1, 2 and 9 are modified by the Constitutional Assembly (this practically means a radical constitutional reform).

Third, by altering the Russian Constitution through introducing amendments (under the procedure prescribed by the Constitution, decisions of the RF Constitutional Court and the Federal Law of 4 March 1998 "On the Procedure of Adoption and Enactment of Amendments to the Constitution of the Russian Federation").

Fourth, by revising the Russian Constitution through its interpretation by the RF Constitutional Court (particularly while considering lacunas, omissions and discrepancies in the Constitution resolving conflicts between the Constitution and federal constitutional laws).

Fifth, through revision of the RF Constitution by adopting new constitutional or federal laws that, as known, can transform the scope of basic constitutional definitions and the hierarchy of their values.

Additionally, it can be done not necessarily by an individual law but by the totality of laws. These changes, implemented without a formal revision of the Constitution, have already resulted in a virtually parallel constitution. Russia's current constitution has undergone substantial modification in all of its most important sections (by federal constitutional laws).

These changes are made along the following lines: vertical separation of powers (transition from contractual federalism to a centralized one, the creation of a new administrative and territorial system, changing the status of subjects of the Russian Federation and their role in the interpretation of federalism in general); horizontal separation of powers (changing of the functioning of the upper chamber through a radical revision of its formation procedure, institution of the State Council which is not envisioned by the Constitution, reform of the judiciary and procuracy, giving more powers to the president for reinforcing the vertical hierarchy of power, etc.); relationships between the state and society (revision of the status of social organizations and political parties, an incipient restructuring of the electoral system, etc.). It is asserted that the real prerogatives of presidential powers are to be drastically increased (the model of the imperial presidency).[29]

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[29] Административно-территориальное устройство России: история и современность [*Administrative and Territorial Structure of Russia: History and Modernity*] (A.V. Pyzhikov (ed.), Moscow: Olma-Press, 2003).

Sixth, by implementing the presidential "decree" law and modifying legislation through the revision of law application (up to changing completely the political regime, for example, by delegating powers to the courts and to the administration or imposing a state of emergency, etc.). Incidentally, it is precisely the simple laws that had changed the Weimar Constitution. Therefore, the Russian Constitution is in principle not protected against facing again a situation where radical constitutional changes could be introduced by the decisions of parliament or the RF president.

Seventh, by changing the actual conditions of life without revision of the law (it is possible, in particular, to provoke such actual conditions). These changes in their totality (e.g. new public ethics and ideology, regime of administrative structures, media and business) transform the whole spectrum of constitutional norms, including those enshrined in the sections on fundamental rights, federalism, the system of state power and the form of government. To some extent these changes reflect a tendency towards reconstitutionalization, implying a return to the discussions held on the eve of adoption of the RF Constitution in 1993.

7. Form of Government, Separation of Powers and Political Regime in Transitional Society

Contemporary scholars argue about the form of government existing in Russia. According to one opinion, Russia is a mixed republic whose nature is referred to as semi-presidential, semi-parliamentary and even "non-preparliamentary" (this is rather a journalistic term expressing striving to an extended parliamentarism).[30] The most immediate analogue of this system could be seen in the Fifth Republic in France. It was termed a mixed form of government, though the very formula is quite ambivalent, as it covers political regimes featuring different trends (from the trends close to parliamentary to those close to "republican monarchy").[31] Another point of view treats the Russian form of government as a presidential republic. The nearest analogue here is the U.S. presidential model (though sometimes the concept of "presidential republic" is interpreted in broader terms and includes also the French model, which may function as a presidential republic). The main arguments of this standpoint stress the legal and actual precedence of presidential power in Russia. It is precisely where the proponents of the mixed form of government in Russia see the proof of its presence (as components of constitutional accountability of government) that its opponents find confirmation of their case (in the form of the weakness of these components). And, finally, still another opinion defines the Russian model as

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[30] *Шейнис В.* Власть и закон: политика и конституции в России в XX–XXI веках [Victor Sheynis, *Power and Law: Politics and Constitutions in Russia in the XX–XXI Centuries*] (Moscow: Mysl, 2014).

[31] Maurice Duverger, *A New Political System Model: Sem-Presidential Government*, 8(2) European Journal of Political Research 165 (1980).

a super-presidential republic. It is specific in that, given some (earlier formal) attributes of the presidential system, it lacks a real separation of powers, for the president is vested with huge executive and legislative powers. The concept of the super-presidential system was developed as applied to regimes in Latin America. Numerous dictatorship regimes (in Argentina, Brazil, Venezuela, Uruguay, Chile) elevated this power to an absolute level. Some of its essential components were retained, however, upon transition to democracy. It is important to note, in a comparative perspective, that the real presidential powers are far from always arising directly from constitutional provisions. In reviewing the Mexican Constitution of 1917, the term "meta-constitutional power of the president" is used. Mexican scholars generally use the term *presidencialismo* so as to concurrently define the presidential system of government and stress the exceptional concentration of power (constitutional and all other power) in the hands of the Mexican president.[32]

Indeed, the Russian political system is designed such that the RF president is above the system of the separation of powers, acts as an umpire between the branches of power and is the guarantor of the Constitution. This construction bears a strong resemblance to the system of constitutional monarchy pursuant to the fundamental law of the Russian empire of 1906; the empire was subject to controversy as to whether the system was really a restriction of monarchical power. In due time, we suggested to interpret the system as "sham constitutionalism," meaning a specific etymological sense of this concept in the course of the transition from absolutism to a law-based state in the form of a constitutional monarchy.[33] This is, no doubt, a transitional model capable of evolving in different directions and expressing an unstable balance between democracy and authoritarianism. Authors refer to it as a "hybrid form of government,""dualistic regime,""proto-democracy,""post-totalitarian democracy,""delegated democracy,""presidential democracy,""controlled democracy," etc. This regime could be defined as "authoritarian democracy" were this notion not a sort of *contradicio in adjecto*. All the definitions amount to expressing a subtle idea made up of a unique combination of democracy and authoritarianism, whose contradictory relations are each time dialectically reproduced at a new convolution creating a similar synthesis. On this basis, there can emerge and exist various forms of restricted democracy and authoritarianism.

Russia's president is above the system of the separation of powers, performing the functions of guarantor of the Constitution and umpire (in the broadest sense of the Gaullist term "arbitration"). Quite applicable to the Russian system, therefore, are the notions expressing the different ways of power concentration in democratic

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[32] *Presidentialism and Democracy in Latin America* (S. Mainwaring & M.S. Shugart (eds.), Cambridge: Cambridge University Press, 1997).

[33] *Reformen im Rußland des 19. und 20. Jahrhunderts: Westliche Modelle und russische Erfahrungen* (D. Beyrau et al. (eds.), Frankfurt am Main: Vittorio Klostermann, 1996).

states, which in different times were suggested for defining the head of state: the Weimar Republic – "ersatzkaiser" (Hugo Preis), Gaullist France – "republican monarch" (Michel Debre), the United Kingdom – "elected dictator" (Lord Hailsham). All of these are combined in a highly ready-witted notion of "President of All Russia" designating a synthesis of democratic and monarchical powers. The power of the RF president calls to one's mind the constitutions of the eastern European monarchical states at the turn of the nineteenth-twentieth centuries with their sham constitutionalism.[34] Yet, in relation to the acts of Russia's president (who is formally the head of state, but not the head of executive power) no institute of countersign is envisioned, which distinguishes him from the constitutional monarch and earlier closer to the "republican monarch." As a matter of fact, the institute of checks and balances is present in American-type presidential republics where, given a rigid separation of powers, the president is the head of executive power, but is missing from French-type mixed republics, where the president is the head of state.[35] Hence, the following conclusion is valid: the power of Russia's president (apart from the virtually unfeasible impeachment procedure) is really limited (and in this it differs from the monarchical one) only by the term of office and non-hereditary nature of power devolution.

What is more, normative definitions fail to explain the specifics of the regime, which are associated with extra-constitutional and extra-legal clout and have always been strong. It is impossible to understand the nature of the Russian presidential regime of the post-Soviet type if no account is taken of the meta-constitutional power of the president including a set of symbolic and real powers not directly fixed in the Constitution.[36] In describing the political and legal regime in Russia it would, therefore, be reasonable to use political science rather than formal legal terms. Thus, the scientific legal literature makes mention of a "hybrid" form of government, "latent monarchy" and dualistic form of government (these notions have also been borrowed from the history of European constitutionalism of the monarchical period), and some authors give up the task of typology, defining the Russian model as an "atypical" form of government[37] or a defective democracy.[38]

In a comparative perspective, the modern Russian political regime has acquired a number of key attributes of democratic Caesarism. If the plebiscite democracy

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[34] *Diskurse der Personalität: Die Begriffsgeschichte der 'Person' aus deutscher und russischer Perspektive* (A. Haardt & N. Plotnikov (eds.), Munich: Wilhelm Fink, 2008).

[35] Yves Mény, *Politique comparée* (5th ed., Paris: Montchrestien, 1996).

[36] Конституционный суд как гарант разделения властей [*The Constitutional Court as the Guarantor of the Separation of Powers*] (Moscow: Institute of Law and Public Policy, 2004).

[37] Margareta Mommsen & Angelika Nußberger, *Das System Putin: Gelenkte Demokratie und politische Justiz in Rußland* (Munich: C.H. Beck, 2007).

[38] *Ясин Е.* Приживется ли демократия в России [Eugene Yasin, *Will Democracy Take Root in Russia?*] (Moscow: New Literary Review, 2012).

regime is characterized by legitimation through plebiscites (referendums), then democratic Caesarism no longer needs it. It maneuvers between the forces of the previous system, craving for revenge, and the forces pushing for modernization. Its characteristic manifestations come to be a dual legitimacy (democratic and authoritarian-paternalistic), limited parliamentarism, distrust of political parties, centralism, super-party technical government, bureaucratization of state machinery and the concept of strong presidential powers.[39] Being an objective consequence of complex processes in the transitional period, any centrist political regime can rely on different social forces and, hence, has a choice of political trajectory. Democratic Caesarism is a qualitatively new phase in regime consolidation, which is built in the conditions of limited and controlled democracy.[40] In Russia, this situation emerged in the wake of the elimination of the dualism of parliament and president, the creation of a new party in power, neutralization of public organizations and regional opposition and the beginning of agrarian reform. At present, these tendencies are rationalized, institutionalized and, so to speak, symbolically manifest themselves in the concept of the imperial presidency. If there is the need for a uniform formula, illustrating the evolution of Russian constitutionalism over the past ten years, then it is as follows: from plebiscite democracy to democratic Caesarism.

8. Positive Law and Legitimacy: The Contribution of Constitutional Justice in the Construction of Legal Reality

The contribution of constitutional justice to the framing of legal reality in post-Soviet society can be illustrated by the interpretation of fairness, equality and proportionality principles in the decisions of Russia's Constitutional Court.[41] The concept of fairness, as shown in the research of the Institute of Law and Public Policy, has not received a meaningful doctrinal rationale in the Constitutional Court's decisions. It can be uneven in scope and ambiguous in substance, as seen in a number of different trends.

The *first trend* is towards interpreting the principle of fairness in terms of its distributive meaning. In this sense, it modernizes the concept of equality as defined by Article 19(1) of the Russian Constitution: "All are equal before the law and the court." However, this gives major significance to different meanings acquired by the references to the equality concept. First, in a wide range of matters the Constitutional Court's decisions define fairness as a formal equality before the law and unfairness

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[39] *Острогорский М.* Демократия и политические партии [Moisey Ostrogorsky, *Democracy and Political Parties*] (Moscow: ROSSPEN, 2010).

[40] Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (Basingstoke: Palgrave Macmillan, 2002).

[41] *The Constitution in Decisions of the Constitutional Court of Russia*, *supra* note 13.

as inequality which may be caused by various factors ranging from deficiencies in the law itself to the self-contradictory and uncertain nature of its provisions to their arbitrary interpretation, and so on. Accordingly, unfairness is a result of the departure from the principle of formal equality. Second, in treating fairness as equality before the law, the Constitutional Court often goes beyond the formal interpretation of equality to address issues from the perspective of actual material inequalities between the parties to the dispute. In this sense, fairness not only represents the formal equality of all before the law but also acts as its actual safeguard. Third, fairness can be understood as the opposite of formal equality, that is, a conscious departure from the principle of formal equality for the sake of factual circumstances; yet, such departure is not recognized as a principle by the Constitutional Court.[42]

The *second trend* in understanding the principle of fairness involves its legalist interpretation, i.e. the interpretation which is based on the law but is modified along the lines of proportionality. This approach is mostly applied by the Constitutional Court when deciding on matters of human rights and freedoms restrictions and their boundaries within the meaning of Article 55(3) of the Constitution. Any legislation that goes against the established norms and principles will be found unfair and unconstitutional precisely by reason of its *disproportionality*.[43]

The *third trend* in interpretation of fairness (in the light of constitutional values and traditions) probably can be seen in various interpretations of the concept of proportionality. But the question remains, To be proportionate to what? – constitutional values and other principles (the principle of fairness, in the first place)? standards or purposes? and, What kind of purposes? The Constitutional Court often uses in its decisions the formula of proportionality with regard to "constitutionally important objectives."[44] Finally, we should emphasize the significance of not only substantive but also procedural fairness. This concept, as formulated in Article 14 of the International Covenant on Civil and Political Rights, includes the right to "fair and public hearing by a competent, independent and impartial tribunal established by law." The combination of the principles of fairness, proportionality and legality may vary depending upon the situation (the factual circumstances of a case). However, within the existing set of solutions it is difficult to distinguish between values, principles and standards of constitutional regulation, to determine their

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[42] Andrey Medushevskiy, *Power and Property in Russia: The Adoption of the Land Code*, 11(3) East European Constitutional Review 105 (2002); Andrey N. Medushevskiy, *Agrarian Reform: Difficulties in Implementing Land Legislation at the Current Stage* in *The Transformation and Consolidation of Market Legislation*, *supra* note 14.

[43] Верховенство права как фактор экономики [*The Rule of Law as an Economic Factor*] (E. Novikova et al. (eds.), Moscow: Mysl, 2013).

[44] Конституция Российской Федерации в решениях Конституционного Суда России [*The Constitution of the Russian Federation in Decisions of the RF Constitutional Court*] (Moscow: Institute of Law and Public Policy, 2005).

hierarchy in the decision-making process and, most importantly, to understand their relationship in the reasoning part. Given the continued high level of uncertainty in the understanding of such principles as fairness, equality and proportionality, the Constitutional Court faces a credibility problem as regards its decisions in the context of the principle of a "specific, clear-cut and unambiguous legal norm" (i.e. ruling out any constraints that distort the essence of the law).[45]

The lack of a full-fledged doctrine for legitimizing judicial decisions on acute economic and political matters results in legal difficulties and psychological conflicts in the transitional society: inflated legal expectations (created by a high rating of constitutional justice resulting from its previous role in legislative liberalization) are confronted with unpredictable, contradictory and groundless decisions which cannot be explained to the society using a single logical formula. Bridging the gap between the key principles of fairness, proportionality and legality in post-Soviet society should be sought through the reconciliation of reason and tradition, ideal and reality, solidarity and supremacy, legal norm and virtue, legitimacy and legality, the ethics of public law, legal doctrine and overall effectiveness of the law; in other words, by consistently fulfilling the mandate of democratic modernization with the help of a science-based policy of law.

Conclusion: Aims of Constitutional Modernization

For comparative study, it is important to assert that there are two models of transitional processes: one is based on contract (the consensus model) and the other on the disruption of consensus (essentially, the (rupture) model of delegated constitution). While the former may imply a better expression of the will of the people (via political parties), the latter may boil down to a situation where a victorious side (a party, a state or even a foreign power) imposes its will on the defeated. The consensus model is preferred to the rupture model in terms of stability, legitimacy and continuity of legal development. The rupture model is best suited for introducing the principles of democracy, modernization and constitutionalism into a traditional authoritarian society.[46]

The Russian Constitution was adopted in the heat of political confrontation. It embodied both the merits and the demerits of the continuity rupture model. In particular, the merits of the Constitution are its liberal stance on human rights, commitment to a market economy and pro-Western orientation.[47] However, Russia,

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45 Medushevskiy 2012.

46 Право и общество в эпоху перемен [*Law and Society in an Era of Change*] (V.G. Grafsky & M.M. Slavin (eds.), Moscow: Institute of State and Law of the Russian Academy of Sciences, 2008).

47 Конституция Европейского Союза: Договор, устанавливающий конституцию для Европы (с комментарием) [*Constitution of the European Union: Treaty Establishing a Constitution for Europe (with*

as Bruce Ackerman put it, did not miss its "constitutional moment" (the culmination of a national and social crisis calling for the adoption of a constitution corresponding to the true aspirations of society and to the level of national development). The Russian Constitution resulting from the rupture of legal continuity, a genuine constitutional revolution, in this sense did not mean implementation of the contractual (consensus) model of transition from authoritarianism to democracy, but implied the delegated method of transition (virtually it was given from above by the victorious side). The conflict between the new legitimacy and the old legality was resolved in favor of the former. Hence, there emerged a legitimacy deficit and the necessity of the long subsequent legitimation for the Constitution. The main contradiction of this transitional process – the adoption of a democratic constitution by non-democratic means – is not unique to Russia in recent times. Nevertheless, Russia's transitional process has most clearly revealed the fundamental inconsistency of modernization – between goals (declaration of a law-based state) and means (strengthening of authoritarianism in the form of a plebiscite democracy).

Currently, the political regime of the Russian Federation displays the distinct features of transitional regimes. This regime took shape in an underdeveloped civil society whose shaky foundations were destroyed by the subsequent regime at the outset of the twentieth century.[48] Democratic transformations, which had not been properly prepared in advance, led to an acute crisis of legitimacy and split the ruling elite at the end of the twentieth century. The process of legitimation, implemented initially on the basis of former legitimation (nominal Soviet constitutionalism), revealed sharp social conflicts that could be resolved solely through radical (revolutionary) transformation of a legitimating underpinning of the entire political system.[49] Unlike some countries of Southern and Eastern Europe, Russia's transition to democracy was based not on the contractual model, meaning consensus among social movements and political parties, but on the model of legal continuity rupture. Eventually, the Constitution of the Russian Federation was adopted in 1993 not as a result of constitutional reform but as an outcome of constitutional revolution (according to its formal legal assessment) in which course the victorious side

Commentary)] (Moscow: Infra-M, 2005); Имплементация решений Европейского суда по правам человека в практике конституционных судов стран Европы [*Implementation of the Decisions of the European Court of Human Rights in the Practice of the Constitutional Courts of Europe*] (Moscow: Institute of Law and Public Policy, 2006); Единое правовое пространство Европы и практика конституционного правосудия [*The Common Legal Space of Europe and the Practice of Constitutional Justice*] (Moscow: Institute of Law and Public Policy, 2007); Европейский Союз: основополагающие акты в редакции Лиссабонского договора с комментариями [*European Union: The Fundamental Acts in the Wording of the Lisbon Treaty with Comments*] (S.Yu. Kashkin (ed.), Moscow: Infra-M, 2008).

48 *Civil Society and the Rule of Law*, *supra* note 27.

49 Эпоха Ельцина. Очерки политической истории [*The Yeltsin Era. Essays on Political History*] (2nd ed., Moscow: The Boris Yeltsin Presidential Center, 2011).

imposed its will on the defeated. Therefore, the Russian Constitution is characterized by a number of significant features.[50]

As a result of the research project, recommendations were made to fulfill a complex of the first-rate aims which according to the expert pool opinion are at the same time necessary and realizable in a short-time perspective. They can be divided into three main groups concerning the policy of law, mechanisms of the separation of powers and institutional functioning.[51]

In the framework of *the first group of recommendations*, it was proposed, firstly, to deliberate constitutional deviance not as a combination of separate events but as a structural problem of Russian constitutionalism. In the sphere of public law, it is important to overcome the logic of double standards in the interpretation of pluralism and to reject the undeclared existence of special reservations for executive power making it free from constitutional control. This aim could be realized by the creation of a new public ethics, the revival of the independence of justice (the judiciary) in the control of the constitutionality of laws and the practice of their implementation. Secondly, it was proposed to change the policy of law in the direction of the authentic functional implementation of the basic constitutional principles. That means the necessity to return the competitive atmosphere in political life, put in action the constitutional system of checks and balances in the areas of vertical and horizontal separation of powers, to nullify the legal shortages and bureaucratic deformations of the recent past. The revival of the five analyzed constitutional principles as proposed should be realized by way of constitutional modernization, and termination of new tendencies towards conservative political romanticism and related constitutional contra-reforms[52] by institutional and administrative procedures. Thirdly, it was proposed to bridge the gap between formal and informal practices and differentiate the informal practices for the elimination of their anti-constitutional substrate especially in evidence of their role in the growth of constitutional deviance over all principles. For the achievement of this goal, it is recommended to use purpose-oriented legal regulation, institutional reforms and especially the enforcement of the independence of judicial power, strict juridical definition and limitation of delegate prerogatives of administration, in the creation of administrative justice.[53]

In the framework of *the second group of recommendations*, it was proposed, firstly, to rethink the dominant doctrine of the separation of powers principle treatment,

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[50] Конституционное развитие России: задачи институционального проектирования: Сборник статей [*Constitutional Development of Russia: Tasks of Institutional Design: Collected Papers*] (N.Yu. Belyaeva (ed.), Moscow: Higher School of Economics, 2007).

[51] *Constitutional Principles and Ways of their Implementation*, *supra* note 5.

[52] Power and Legitimacy, *supra* note 16.

[53] Andrey Medushevskiy, *Problems of Modernizing the Constitutional Order: Is It Necessary to Revise Russia's Basic Law?*, 52(2) Russian Politics and Law 44 (2014).

which in reality binds its functional realization with the predominant role of the supra-arbiter – presidential power. Key importance in this list of priorities should be: the termination of conditions which provide the possibility for presidential power to realize unconstitutional influence on the process of State Duma elections and the adoption of laws in the Duma and Council of Federation, and to put the courts under informal pressure in cases where the political interest of the executive branch is present.

Secondly, it was proposed to make radical reinterpretation of the existing treatment of the federalism principle which actually presumes the predominance of the centralist tendency. For that it is prescribed to revise the norms of the federal legislation which in reality substituted for the federal Constitution, the constitutions of the republics and federation subject's statutes in definition of their legal status in the area of the division of the common and competitive competences. The important aim is to avoid the overburdening bureaucratization and administrative centralization of the subjects of the Federation in the areas of regional budget prerogatives, institutes and their functions, to realize at the regional level the principles of political pluralism, multiparty system and direct democracy, to strengthen the authority of the Federation Council as a chamber of regions of the Russian parliament. The termination of disproportions in the system of checks and balances at the regional level has acute importance in the prospect of effective constitutional control over the informal practices in the work of organs of executive power. Actually, the power of the regional leaders is so great that it makes possible (thanks to the uneven character of civil society and the insufficient character of control over administration in regional media) to put under their dominance local parliaments and courts, though the last ones (with the exception of justices of the peace and local constitutional courts) stay formally under federal control.

Thirdly, the important aim of constitutional modernization is to de-bureaucratize the judicial system and exclude legal norms and institutional shortages which created the special judicial bureaucracy (nominated court chairmen), and monopolized in fact the decision-making process in the courts and the professional judicial community. For strengthening the constitutional foundation of independent justice, it was proposed to modify the status of court chairmen and to enforce the independence of the courts via organs of self-regulation of judges, the strengthening of the procedural control over the quality of judicial decisions, institutional and functional judicial control over the proceedings in criminal jurisprudence and the enforcement of the extra-territorial organization of the court districts (which should not be combined with the existing administrative districts).

In the framework of *the third group of recommendations*, it was proposed to undertake the legal reforms capable of stimulating real multiparty competition and substantive guarantees of political rights and freedoms of the citizens. The aim of these reforms should be the full-fledged implementation of the constitutional principles – protection of the freedom of speech and the abolition of informal censorship,

implementation of norms on the rights in respect of assembly and demonstrations. The actual character has the proper implementation of electoral legislation and independent public control over democratic electoral practices, the protection of norms on equality of public unions in the area of law and constitutional guarantees for the activity of political opposition from their unconstitutional deformations. An important role could be played by the independent public TV-channel.

To summarize, it was recommended to destroy the artificial barriers between society and the state, create a system of inter-connections between citizens and political power by using constitutional institutes and procedures in their proper sense and by protecting and developing new forms of democratic civil activities. This means the abolition of the whole system of deformations in the implementation of fundamental constitutional principles. These deformations appeared as a result of the public law policy that was conducted in the last ten years in order to build a system of limited pluralism and authoritarian modernization. The prolongation of these tendencies means the blockade of basic constitutional principles in terms of political stagnation and bureaucratization of the system.

The essence of the recommendations resides in the proposal to change the policy of law in the area of the implementation of the constitutional principles towards the fulfillment of real political competition, the separation of powers and independent judicial control to find clear and reasonable answers to this challenge.

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