

GUEST EDITOR'S NOTE

SERGEY SHAKHRAY,

Lomonosov Moscow State University (Moscow, Russia)

<https://doi.org/10.21684/2412-2343-2019-6-3-4-12>

Recommended citation: Sergey Shakhray, *Guest Editor's Note*, 6(3) BRICS Law Journal 4–12 (2019).

The twenty-fifth anniversary of the Constitution of the Russian Federation not only gave a new perspective for discussions on the unique historical, political and legal aspects of this document but also necessitated a discourse about the phenomenon of Russian constitutionalism and, more broadly, about Russian political and economic statecraft.

The history of Russian constitutionalism is dramatic, spectacularly interesting and quite illuminating, as emphasised by **Professor William Butler** whose insightful paper on the five generations of Russian Constitutions opens this issue of the *Journal*. For several centuries constitutionalism has been and remains part of the history of Russian law while Russia has been and remains part of the Western legal heritage and constitutional ideas.

Although Russia remained a monarchy until 1917, the ideas of constitutionalism have featured in Russia's home policy since the time of the successors to Peter the Great (1672–1725). For instance, some specialists regard the Supreme Privy Council's "Conditions" (*Konditsii*) limiting the tsar's power as the forerunner to the Constitution. It was that document that Empress Anna Ioannovna was forced to sign on 25 January 1730 before she ascended the throne, and "most graciously deigned to tear up" a month later. Constitutional aspirations are discernible in the reformist proposals of Empress Catherine the Great, who reigned from 1762 to 1796, as formulated in her famous "Instruction" (*Nakaz*) of 1767. These proposals were reflected in a number of literary works, e.g. in the writings of Alexander Radishchev (1749–1802), a writer and social critic.

The first written constitutional projects appeared in Russia around the same time as in the USA and Europe, i.e. in the last quarter of the 18th century. Thus, the

constitutional project by the Russian diplomat Count Nikita Panin (1718–1783) is well known; it was delivered to Emperor Paul I, who reigned from 1796 to 1801, after Count Panin's death.

The ideas of constitutionalism were realised most strongly and clearly during the reign of Emperor Alexander I, from 1801 to 1825. It was during his reign that the Constitution of Finland was confirmed to be in effect (1809), the Constitution of Poland was adopted (1815) and constitutional projects were developed for Russia. First and foremost, these projects were the "Plan of the State Transformation" (1809) by Count Mikhail Speransky (1772–1839) and the "State Charter of the Russian Empire" (1818) by Count Nikolai Novosiltsev (1761–1838). Speransky's original idea that allowed changing over to a constitutional monarchy and the separation of powers, while preserving the monarch's status and paramount importance by placing him beyond the system, is reflected in the Constitution of the Russian Federation of 1993.

Restricting absolutist power was also one of the Decembrists' demands. It is believed that constitutionalism played an important role during the golden age of Russian jurisprudence and gained some recognition after the revised "Fundamental State Laws of the Russian Empire" were adopted. This commitment to constitutionalism is reflected in all five of the Russian Constitutions (1918, 1925, 1937, 1978 and 1993).

However, as is often the case in Russia, the development of constitutionalism in our country, in line with the general trends, has been characterised by so many distinctive features, turns and stages that we may safely talk about Russian constitutionalism as a special kind of constitutionalism.

What distinguishes it most is the fact that the first constitutional reform actually implemented in Russia was the "Judicial Reform" (1864).

The "Great Judicial Reform of 1864," whose ideas and principles rose like a phoenix from the ashes, both during the Soviet regime and in the 1990s, had never been a shop-talk "thing-in-itself." From the start, this reform was closely intertwined with political changes. Actually, the point was that a relatively autonomous, strong judicial power was emerging within the bowels of the autocracy as one of the primal elements of an absolutely new political and legal system that was based on the principle of the separation of powers. From this standpoint, the 1840 "Judicial Reform" was a constitutional reform. What distinguishes state transformation in Russia is the fact that the constitutional monarchy in our country began with judicial power.

Moreover, the 1864 "Judicial Reform" happened to be closely intertwined with the history of Russian parliamentarism. It became a kind of active acupoint, affecting that which would ensure revitalising and normalising the entire social organism. The experience of Russian history has demonstrated many times that, in our country, it is "revitalisation" and the increasing effectiveness of judicial power that always leads to "revitalisation" of representative power. Apart from the action of legislative activities, these become better synchronised with the actual needs of the state and society.

Even though the first Russian parliament came along four decades after the proclamation of the judicial statutes and despite its short-lived, pre-revolutionary

history (only eleven years), the parliament nevertheless made an important contribution to the restoration of a number of institutions, principles and norms captured in the statutes and outlined the paths to take in order to return to the ideals of judicial reform. This incredibly interesting and important period in the history of Russian parliamentarism is still fraught with many discoveries, not only for researchers into the state and law phenomena, but also for specialists in other social sciences.

Another distinguishing feature of Russian constitutionalism is the fact that only some of the political elite shared these ideas. Even centuries later, the philosophy of constitutionalism failed to become predominant in Russian political culture. In his paper "Constitutionalism and Political Culture in the Russian Empire (Late 19th – Early 20th Century)," **Professor Theodore Taranovski** maintains that the Russian autocracy was probably the most successful and long-lived among the European absolute monarchies that gave way to constitutional regimes under the pressure of the rising middle class and capitalist economy. The reason behind this was a huge layer of the civil service bureaucracy. Working for the government provided career advancement opportunities to non-noble persons who could acquire a rank of nobility in state service and were thus personally interested in preserving Russian absolutism. With the growth in the number of civil service bureaucrats, and with their role in the administration of governmental functions becoming more prominent, they developed their own political culture that regarded constitutionalism as contrary to the principles of good governance.

Taranovski writes that rather than serving society, the bureaucrats served the state, embodied in the person of the autocrat. The ideology of bureaucratic conservatism was conducive to public servants' secretiveness, discretionary exercise of their powers and professional arrogance.

The lack of unity among the political elites impeded constitutional reforms in tsarist Russia. In the end, it rendered impossible the evolutionary path of transformation of the absolutist regime. While political elites and the best jurists of the time engaged in discussions about the Constitution, revolution erupted in the country.

Arguably, only two Constitutions in our country were adopted to upend the existing social order: the RSFSR (Russia's) 1918 Constitution that transformed the old Russia into the country of the Bolsheviks; and the 1993 Constitution that ensured the transition from the Soviet political regime to modern democracy.

Not one but two papers in this issue of the *Journal* are devoted to Russia's 1918 Constitution that even a century later remains the subject of close inquiry for jurists.

A joint paper by **Professors Sergey Shakhrai** and **Konstantin Krakovski** is devoted to the contribution of Mikhail Reisner – a lawyer who, at Vladimir Lenin's suggestion, headed the department of legislative proposals at the People's Commissariat of Justice – to the creation of the project on the first Soviet Constitution. Particular emphasis is placed on his confrontation with Joseph Stalin over the issue

of federation in the Constitutional Commission. While Stalin believed that the Soviet Federation should be built based on the national state principle, Reisner saw this approach as bourgeois. He proposed to abandon the national principle and build the Federation of Russia as a multilayered Federation of Soviets.

Stalin's idea prevailed. In the end, however, it was Stalin's national principle underlying the Soviet Federation that proved to be the time bomb which blew up the USSR and triggered its collapse. Reisner's idea of abandoning the national state principle in the construction of the Federation, an idea ahead of its time, became one of the cornerstones of the new Russian Constitution of 1993.

Professor Adam Bosiacki from Poland believes that although the RSFSR 1918 Constitution focused on the model of the totalitarian state rather than on the implementation of the idea of constitutionalism, the ideological origins of this document demand a more in-depth study. According to the author, the 1918 Constitution reflects Vladimir Lenin's fascination with the ideas of direct democracy drawn from the experiences of the Paris Commune and the French Revolution after 1789, in particular, the perception of the idea of unlimited supreme power, one and undivided but, at the same time, federal, i.e. based on free communes. In regard to theory, the Bolsheviks used nothing more original than Jean-Jacques Rousseau's concept of national sovereignty. The practical implementation of utopian ideas, however, resulted in the creation of a totalitarian system called by its contemporaries "state despotism," more powerful than the despotism of the Russian Empire.

All subsequent Constitutions of the Soviet era are, rather, of historical-political, technical, legal and linguistic interest, as the constitutional ideas expounded in these documents had little to do with real life. And it is the inconsistency in the texts of the Constitutions with real life that is both the level and the measure of a sham Constitution.

All of the institutions and public authority mechanisms established by the Soviet Constitutions were at variance with real ones. It should be admitted, however, that such a split between what must be and what is emerged in the history of Russia time and again. Perhaps the only institution that managed to avoid such inconsistency was the head of state regardless of his official title, be it Tsar, General Secretary or President.

In the history of the Russian state and law, the most extreme and conspicuous split between the "written" and actual power is the example of the Soviets and the Communist Party of the Soviet Union (CPSU). In the early 1990s, the "All power to the Soviets!" slogan unexpectedly became very popular at the rallies that attracted hundreds of thousands of demonstrators. Today it seems strange, but at the time it was truly revolutionary, because it meant taking a stand against the omnipotent Communist Party in favour of handing power over to the bodies that were meant to exercise it according to the country's Basic Law.

If we examine the levels of the sham Soviet Constitutions, perhaps the 1977 Constitution only made an attempt at bringing the legal text into consistency with

“real life.” I am referring to Article 6, which was devoted to the Communist Party of the Soviet Union, “the leading and directing force of the Soviet society, the core of its political system, its governmental and non-governmental organizations.”

Interestingly, an entire section in Nikita Khrushchev’s constitutional project that was never brought to life was devoted to the subject of the CPSU and its true role in the state and society. Moreover, one of the norms declared that the CPSU should act in accordance with the Constitution. This attempt to bring reality into the constitutional framework could have been one of the reasons behind Khrushchev’s ouster from the position of First Secretary of the Central Committee of the CPSU (the head of the USSR) in 1964.

History has shown that Khrushchev, with his attempt to “constitutionalise” the CPSU, was right. When the CPSU trial took place in 1992, it was not the crimes committed by the Party that determined the verdict but the fact that it assumed the roles of public authorities. As stated in the sentencing part of the judgment of 30 November 1992 handed down by the Constitutional Court of the Russian Federation,

Establishing the fact that the governing structures of the CPSU and CP RSFSR actually exercised – contrary to the then effective Constitutions – the functions of state power means that their dissolution is lawful and their restoration is inadmissible.¹

It is well known that a discrepancy between the formal and the actual Constitutions can result in profound socio-political upheavals. When the gap between the actual Constitutions and the text of the Basic Law becomes too wide, it means that a constitutional crisis has erupted and a new Constitution must be adopted. New, because no amendments can solve the problem. This conclusion was confirmed by Russian history of the early 1990s.

The First Congress of the RSFSR People’s Deputies (16 May – 22 June 1990) almost from the start set the objective to draft a new Russian Constitution. However, while the new Basic Law was being developed, the deputies were amending the then current Constitution, trying to bring it into consistency with the rapidly changing reality. All the same, in addition to being inadequate to serve as a stabilisation tool, the multi-amended 1978 Constitution itself became a source of conflict.

During the period from November 1991 to December 1992 only, more than 400 often conflicting amendments were made to its text. As a result, any of the political opponents could convincingly substantiate their directly opposite positions, drawing on the currently effective constitutional norms. The Constitution’s imperfections

¹ Постановление Конституционного Суда Российской Федерации от 30 ноября 1992 г. № 9-П // Собрание законодательства РФ. 1993. № 11. Ст. 400 [Judgment of the Constitutional Court of the Russian Federation No. 9-P of 30 November 1992, Legislation Bulletin of the Russian Federation, 1993, No. 11, Art. 400].

started to provoke serious political crises. The lack of means for overcoming these crises in the Basic Law prompted political opponents to use forcible, rather than constitutional, methods for resolving conflicts, which was fraught with the real danger of civil war.

The deepening constitutional crisis led to a situation of power duality.

On the one hand, the popularly elected President enjoyed broad authority. Under the Constitution, the Government that directly exercised socioeconomic administration in a time of crisis was accountable to him.

On the other hand, in crucial situations including the implementation of economic policy, the RSFSR President found himself to be controlled by the RSFSR Supreme Soviet and the Congress of People's Deputies as, according to that very Constitution, the RSFSR Congress of the People's Deputies and Supreme Soviet were the supreme agencies of state power, vested with the authority to take cognisance of any issue concerned with state-building, which included changing the Constitution. The Supreme Soviet was actively exercising this right, carving and re-carving the Basic Law, particularly in the part concerned with the distribution of authorities.

Such an interpretation of the principle of separation of powers was legally invalid, as the popularly elected President was no less legitimate than the Congress and Supreme Soviet of the USSR. In such cases – which is recognised by international constitutional theory and practices – the head of state, buttressed by popular mandate, is not subject to control on the part of the Parliament.

After the tragic events of the autumn of 1993, Boris Yeltsin wrote in his book "The President's Notes,"

What is the force that has drawn us into this dark streak [of misfortunes]? First and foremost, the constitutional ambiguity. Swearing on the Constitution, the President's constitutional duty. And at the same time, a complete restriction of his rights.²

In fact, it was the effort to overcome this "constitutional ambiguity" that ultimately led to the birth of the new Constitution of the Russian Federation.

Thus, 12 December 1993 became the turning point in a complicated process of interplay between the legal and actual Constitution. Until that moment, it was the legal Constitution that was being changed and the content of the amendments was dictated by the political and socioeconomic reality; after this date, the new legal Constitution became the standard according to which the transformation to reality began. From the chaos and havoc of the 1990s, a new model of the state was assembled, with new institutions that were immersed in social reality and formed the framework for reformatting society.

² Ельцин Б.Н. Записки Президента [Boris N. Yeltsin, *The President's Notes*] 269 (Moscow: Ogonyok, 1994).

At the time the new Russian statehood, new institutions and new relationships were being built, the 1993 Constitution was more than real. At this developmental stage, the legal Constitution was creating the material Constitution. Today, however, in the early 21st century, the question of consistency of Russian reality with the constitutional model is raised once again.

In his paper, **Professor Andrey Medushevskiy** presents the results of an analysis of the implementation of basic constitutional principles (pluralism, separation of powers, federalism, judicial independence, guarantees of political rights and freedoms) across different spheres of constitutional practice such as legislation, constitutional justice and administration, and in informal practices. The author compares the levels of constitutional deviations in each of these spheres and concludes that rather than the dilemma of constitutionalism vs. its negation, the true choice faced by modern society is between real and sham constitutionalism with a broad variety of intermediate options separating these two. It is this particular area that the author defines as a transitional type of constitutionalism, the field where different political forces collide.

The problem of quality relating to the practical implementation of the ideas contained in the 1993 Constitution of the Russian Federation served as a stimulus for the authors of the paper devoted to the analysis of temporal characteristics of the constitutionalisation of Russian law based on the federal legislation statistics for 1994–2018. Researchers in the field of political and legal processes **Svetlana Popova** and **Andrey Yanik** maintain that the question of correlation between a democratic constitution's longevity and quality as well as the irreversibility of a social system's democratic transformations remains open. The facts suggest that even a "rigid" democratic constitution can become more "elastic" with time because its ideas and meanings can be "stretched" so as to be applied to the needs of political practice without current constitutional norms having to be amended.

Perhaps the inconsistencies between the constitutional "reality" and the physical reality that came into view prompted political actors with surprising regularity to raise the question of amendments to the existing Constitution of the Russian Federation and even of developing a new Constitution. One of the latest initiatives of this kind was a proposal to assess the effectiveness of constitutional norms.

I think that such a formulation of the question is strange, because for constitutional norms to be implemented appropriate mechanisms are needed. If some constitutional provisions have not been codified in the laws and the institutions envisaged in the Constitution do not operate at their full potential, this question should be addressed to the legislators and government authorities rather than to the text of the Basic Law. Perhaps the initiatives to change the current Constitution are associated with a pressing popular need in a state, economic and social order that differs from that established in the Constitution. If this is true, one should begin with discussing the basic principles underlying the new models and only then think about the procedure for legitimising the popular demand for changes.

Finally, a few positions I am entitled to express as a co-author of the current Constitution of the Russian Federation and as its researcher.

First. Figuratively speaking, any Constitution is a double-purpose technology. It is capable of not only creating but ensuring the legitimacy of power. If poorly or negligently handled, it can “bury” both the legitimacy of power and the power itself.

Second. One should bring into public discourse the question of alternatives to the current Constitution only when the facts clearly indicate the *onset of a constitutional crisis*. That is to say, when the level of the legal Constitution's sham nature becomes so great that the gap between the constitutional plan and real life cannot be eliminated by means of the Constitution itself.

It must be admitted that, as opposed to what is written in the Constitution, parallel institutions for the actual (real) exercise of power – practically the reverse mirror-image of each other – are operating in Russia lately. I am referring to the State Duma and the Civic Chamber, the Federation Council and the State Council, the Government and the Presidential Administration.

Society senses a certain ambiguity in what is happening, which results in a desire to make it right. As it is difficult to “rectify reality,” the desire to “rectify the Constitution” is getting stronger. The facts, however, indicate that the gap between the constitutional plan and reality is not disastrous yet. However, in order to bring the situation back to normal, the correct diagnosis should be made. Rather than *the crisis of the Constitution*, the diagnosis of what is happening now is *the crisis of the legitimacy of power* that can be overcome in a short time, using the possibilities provided by the Constitution.

At this point, the Constitution itself can offer many effective recipes and mechanisms to use to rectify the situation. First and foremost are the instruments such as adoption of federal constitutional laws on the Presidential Administration and Federal Assembly, amendments to federal constitutional laws on the Government, the judicial system and the Constitutional Court.

Third. Is it necessary to call the Constituent Assembly to discuss the options for further development of constitutionalism? I am firmly convinced that no, it is not, although the ghost of the Constituent Assembly has been haunting Russia for over a hundred years.

The question of the Constituent Assembly had arisen both during the 1917 February Revolution and in the early 1990s. Formally, this mechanism for adopting a new Basic Law appears quite democratic and practical but, in practice, the level of legitimacy of the new Constitution and the power based on such a Constitution will always be insufficient. In 1993, another mechanism was used, a national referendum on the draft Constitution in which the foundations of the new power and state were expounded. As a result, the gap in continuity was overcome in a constitutional and maximally legitimate way.

Analysing the present stage in the development of Russian constitutionalism, characterised by the rise of revisionist tendencies in regard to the current Constitution,

I think it is important to remind colleagues that it is necessary to apply Occam's razor and not multiply entities without necessity. The history of Russia tells us that the only alternative, the antimatter of a Constitution, is revolution, "Russian mutiny, senseless and merciless." Therefore, as in the early 1990s, it is worthwhile to adhere to a simple but, nevertheless, effective principle, *An imperfect Constitution is always better than a perfect Revolution.*