Volume VI (2019) Issue 3

BRICS Law Journal

The journal's founder is

University of Tyumen
UTMN

ISSN 2412-2343 (Online)

ISSN 2409-9058 (Print)

Key title: BRICS law journal (Print)
Abbreviated key title: BRICS law j. (Print)
Variant title: BRICS LJ

Frequency of Publication:
four issues per year

Published by
LLC "Publishing House "Business Style",
119602, Moscow, Troparyovskaya St.,
Bldg. 4, Floor 2, Room 802.
www.ds-publishing.ru

Contacts: bricslaw@gmail.com

"BRICS Law Journal" is registered by the Federal Service for supervision of legislation in mass communications and cultural heritage protection (Russia). Reg. No. FS77-69105 of March 14, 2017.

BRICS LAW JOURNAL (BRICS LJ)

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Special Issue: Russian Constitutionalism: 25th and 100th Anniversaries of the 1993 and 1918 Constitutions

GUEST EDITOR'S NOTE

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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 Shakhray** and **Konstantin Krakovskiy** 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

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[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.

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[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*.

ARTICLES

FIVE GENERATIONS OF RUSSIAN CONSTITUTIONS: RUSSIA AS PART OF THE WESTERN LEGAL HERITAGE

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https://doi.org/10.21684/2412-2343-2019-6-3-13-21

The paper is devoted to the study of the relationship between the Russian constitutional history and Western legal traditions. The author argues the position according to which the constitutionalism has been a part of Russian legal history for centuries. On one view of Russian legal history, a written constitution remained an aspiration of the Russian people that was only partly realized in 1906. Marxist legal thought contemplated, or predicted, the "withering away of law" after a proletarian Revolution; adopting a constitution seemed counter-intuitive to this projected vector of history. This paper explores in general outline the five generations of the constitutions of Russia (1918, 1925, 1937, 1978, and 1993) and the maturing of a constitutional tradition in Russia which has led from a blueprint for communism to fully-fledged constitutional rule-of-law social State in which the constitution acts as a restraint upon the exercise of State power and performs the role that a constitution routinely performs as part of the western legal heritage. The author concludes the 1993 Russian Constitution is, for the first time, a living document that could be considered as a reaction against the Russian past, the embodiment of Russian experience, and the repository of Russian values and desires for its future.

Keywords: constitutional law; constitutionalism; Russian Constitution; legal history; western legal tradition.

Recommended citation: William Butler, *Five Generations of Russian Constitutions: Russia as Part of the Western Legal Heritage*, 6(3) BRICS Law Journal 13–21 (2019).

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Introduction

Constitutionalism has been a part of Russian legal history for centuries. This is so despite the fact that for much of its history, subject to certain exceptions, Russia is widely seen prior to 1917 as an absolute monarchy, notwithstanding attempts from at least the eighteenth century onwards to introduce, if not a constitutional monarchy, at least limitations on the exercise of absolute power by the Tsar.[1] Constitutionalism was an issue in Russian domestic policy from the successors of Peter the Great (1672–1725) onwards, figured in Catherine II's (1729–1796) proposals for reform embodied in her celebrated Nakaz (1767),[2] was embodied in various literary works from at least A.N. Radishchev (1749–1802) forward, was central to demands of the Decembrists, is believed to have played a role in the "golden age" and earlier of the Russian legal profession,[3] and achieved some level of recognition with the adoption of the "Basic Law" of the Russian Empire in 1906[4] (sometimes called a Russian Constitution). This aspiration for constitutionalism carried over into the Russian (RSFSR) constitutions of 1918, 1925, 1937, 1978, and 1993.[5]

On one view of Russian legal history, a written constitution remained an aspiration of the Russian people that was only partly realized in 1906. Marxist legal thought contemplated, or predicted, the "withering away of law" after a proletarian Revolution; adopting a constitution seemed counter-intuitive to this projected vector of history. But the Bolsheviks and their Menshevik allies, appreciating the

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[1] Vladimir A. Tomsinov, *The Constitutional-Monarchical Tradition in Russian Political Culture* in *"The Best in the West": Educator, Jurist, Arbitrator, Liber Amicorum in Honour of Professor William Butler* 103 (N.Iu. Erpyleva & M.E. Gashi-Butler (eds.), London: Wildy, Simmonds and Hill Publishing, 2014).

[2] *The Nakaz of Catherine the Great: Collected Texts* (W.E. Butler & V.A. Tomsinov (eds.), Clark, N.J.: Lawbook Exchange, Ltd., 2010).

[3] *See* Richard S. Wortman, *The Development of a Russian Legal Consciousness* (Chicago; London: University of Chicago Press, 1976); Gary M. Hamburg, *Russia's Path Toward Enlightenment: Faith, Politics, and Reason, 1500–1801* (New Haven & London: Yale University Press, 2016).

[4] Marc Szeftel, *The Russian Constitution of April 23, 1906: Political Institutions of the Duma Monarchy* (Bruxelles: Les Editions de la Librairie Encyclopedique, 1976).

[5] Russia is in the unusual position of having been subject to two constitutions simultaneously: its own, and those of the Union of Soviet Socialist Republics (1924, 1936, 1977), of which the RSFSR was one of the founding members pursuant to the Treaty of the Union of 30 December 1922. The RSFSR was itself a species of federation, as was the USSR after it was formed.

force of popular desire for a constitution, accommodated the powerful impetus in this direction. The constitutional drafting commission appointed in April 1918 proceeded slowly until Lenin actually took over chairmanship and quickly produced the document that was ultimately accepted.

One might say that violent revolution is part of the western legal tradition. Harold J. Berman pointed out that

> [e]ven the great national revolutions of the past – the Russian Revolution of 1917, the French and American Revolutions of 1789 and 1776, the English Revolution of 1640, the German Reformation of 1517 – eventually made peace with the legal tradition that they or some of their leaders had set out to destroy.[6]

Russia, in other words, was not the first country to take severe exception to the existing constitutional order, nor the last. But Russia was exceptional, at least at the outset, in proposing to replace State and Law with a society in which both would eventually "die out," and their respective "deaths" would come at the hands of those who achieved revolution. In the broadest sense, the five generations of Soviet/Russian constitutions in the course of the past century may be seen as a violent reaction against and a gradual return and restoration of the western legal tradition of which Russia has always been a part. The very ideology which guided the leaders of the Russian Revolution originated in Germany, matured in England, and was imported by Russians from Western Europe. The genesis of the violent reaction against the Imperial Russian legal order was generated in the European legal order.

If the ideology underlying the Russian Revolution was imported, its leaders were initially convinced that the ideology and the constitutional and legal institutions generated by the Revolution could be exported. Partly this was the belief that the Russian Revolution would "spark" a world revolution – which did not happen – but from the late 1950s the Soviet constitutional and legal model, it was believed, might be adapted by third world countries to their needs.

It may be said that to varying degrees all constitutions are based on express ideological principles. That is certainly true of the United States constitutional documents: "all peoples are created equal …" What differs with respect to the 1918 RSFSR Constitution is not the overwhelming presence of ideological positions based on Marxist-Leninist precepts *per se*, but the proposition that ultimately the State and its legal system were destined to disappear, with a return to a species of communism that resembled in many key respects the primitive communalism from which human society had progressed since its earliest days. Each Russian

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[6] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 5 (Cambridge, Mass.: Harvard University Press, 1983).

constitution thus represented a statement of goals and objectives – a blueprint for the development of society – and a reflection of the role of the legal system in that process; the first four constitutions ultimately failed in achieving that objective to the satisfaction of the Russian people; the fifth-generation constitution is an entirely different matter and appears to be working satisfactorily.

The RSFSR Constitution of 1918 received a decidedly mixed reception abroad. Some were surprised that a Constitution had been adopted at all in Russia; the classics of Marxism-Leninism said nothing about a constitution being necessary or even desirable in a dictatorship of the proletariat. Some feared that the constitution would become a restraint upon the revolutionary processes unleashed by the October revolution. Some believed the 1918 RSFSR Constitution was purely a propaganda exercise and had little in common with a "real" constitution. Yet others suggested that the draftsmen of the 1918 Constitution had borrowed heavily from Woodrow Wilson's Fourteen Points; they found much in common between those documents. Some emphasized the international (rather than the domestic) importance of the Constitution – the references to principles of self-determination, decolonization, equality of rights between States, the emphasis upon social rather than political rights, among others – and stressed the appeal of these principles to, especially, oppressed peoples elsewhere in the world. Or the contribution of the 1918 RSFSR Constitution in due course to subsequent discussions and codifications of international law and political recommendations adopted by, *inter alia*, the United Nations General Assembly. It is noteworthy that recent western evaluations sympathetic to the importance of the October Russian revolution to the development of law in the twentieth century say nothing about the role of the succeeding generations of Russian constitutions to this process.[7]

With the conclusion of Treaty of the Union of 30 December 1922 forming the former Soviet Union and the adoption in 1924 of the first Constitution of the USSR, attention abroad moved away from the 1918 RSFSR Constitution. Most western scholars ignored the 1918 Constitution; few regarded it as a document having normative force.

The 1924 USSR Constitution was not well-known outside the Soviet Union, and the text of the 1922 Treaty of the Union even less so. Both served as the basis of the RSFSR Constitution of 11 May 1925, which although more detailed than the 1918 text, was regarded as essentially a repetition of the 1922 Treaty and the 1924 USSR Constitution. This text was treated as a proper Constitution but accorded relatively little attention in foreign scholarly writings. With the creation of the USSR, doctrinal writings focused almost exclusively on the USSR constitutional documents and barely mentioned the RSFSR materials.

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[7] *See, e.g.*, John B. Quigley, Jr., *Soviet Legal Innovation and the Law of the Western World* (New York: Cambridge University Press, 2007).

The 1925 RSFSR, 1937 RSFSR, and 1978 RSFSR constitutions were regarded by western scholars as virtually verbatim clones of the 1924, 1936, and 1977 USSR constitutions respectively, as were all the other union and autonomous republic constitutions. Only the present writer produced English translations of all the 1978 constitutions of the union and autonomous republics.[8]

To express the position in another way, the 1924 USSR Constitution, but more especially the 1936 and 1977 USSR constitutions, were perceived in the West to be quasi-ideological documents and not "real" constitutions intended to restrain abuse of power on the part of parliaments, chief executives, governments, or the judiciary. The 1936 USSR Constitution in particular at the time was introduced to mark the transition of Russia and its sister union republics to the stage of societal development called "socialism," in contrast to the dictatorship of the proletariat which had prevailed previously. To be sure, this transition had immense practical and legal implications, but the 1936 USSR Constitution (and 1937 union republic constitutions) was serving as a record of this transition rather than the progenitor of that transition.

This meant that in Western eyes the Soviet Union, including the Russian Federation, had many formal trappings of constitutionalism (written constitution, parliamentary supremacy, separation of powers, collective chief executive (presidium), government, judiciary, procuracy, and so on), but counter-balanced these with others distinctive to Russia (Russian style of federalism, no checks and balances, democratic centralism, leading role of the Communist Party, nomenklatura, no judicial review of the constitutionality of legislation, supervisory powers of procuracy, and others). These were in most cases perceived abroad to detract from constitutionalism, or indeed even to be anti-constitutionalist.

The transition to the last generation of Soviet constitutions was an extended one, lasting from the early 1960s to 1977. In Western eyes, the 1977 USSR Constitution was notable for progress on human rights (the Soviet Union had ratified the 1966 human rights covenants in 1976) and for its detailed provisions generally. Indeed, with respect to the level of detail, the 1977 USSR Constitution was seen in the West as a trend noted earlier in Central European constitutions – also lengthy detailed texts. This generation of constitutions too marked a transition to a higher level of societal development – a socialist society building communism. In our view, this generation of constitutions introduced higher levels of centralization and federalism, more attention to socialist legality and due process, with the roles of State Arbitrazh and the legal profession being elevated, efforts to strengthen the judiciary, new approaches to ownership, among others. But as in earlier years Western analysts were more impressed by what they perceived as ideological changes and developments than by changes intended to strengthen the role of law.

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[8] *See* William E. Butler, *Collected Legislation of the USSR and Constituent Union Republics* (Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1979).

During the perestroika years, many of the reforms achieved took place in or were reflected in constitutional change. This means the changes, additions, and amendments to the 1978 RSFSR Constitution between 1988 and 1993 are of great importance. Many of them were incorporated in the 1993 Constitution of the Russian Federation. These changes, and the discussions which accompanied them, finally alerted Western observers to the importance of the Russian Constitution as such and not merely as a reflection of ideological reform.

This would suggest, in turn, that the 1993 Russian Constitution is truly the first "real" constitution in Russian history.

1. The Importance of Russian Constitutional History: Selected Themes

The distinctive features of Russian constitutionalism – originating in an absolute monarchy, first appearing in a State dedicated to witnessing the dying out of State and law, serving and underpinning a legal order in which the Constitution was not intended to restrain social progress or State actions – should not obscure the fact that Russian constitutionalism has raised important issues that transcend Russia itself and should engage the attention of those who investigate the impact of revolutions upon the course of legal history. We turn to some of these.

(1) *Revolutionary law and legal vacuums*. Revolutions are in part a violent reaction against the pre-existing legal order. The Bolsheviks were committed not merely in the long-term perspective to the dying out of State and law, but in the short-term perspective to a complete separation from Imperial law and legal institutions. History demonstrates that a "complete separation" is never realistic or even possible. The notion that a revolutionary movement can, on one hand, repeal all pre-existing legislation and abolish all pre-existing legal institutions without providing suitable replacements has been demonstrated by Russian revolutionary experience to be completely unrealistic and impossible. This may at least partly explain why the 1918 RSFSR Constitution took the form of primarily an ideological document with minimal normative provisions.

The term "revolution" is not used in connection with the dissolution of the Soviet Union on or about 25 December 1991, but arguably what transpired under perestroika might be characterized as a revolution, albeit one that occurred over several years. The outcome was a restructuring of the constitutional system, the introduction of changes and additions to the 1978 RSFSR Constitution that fundamentally altered the political configuration of the Russian Federation, and ultimately led to the 1993 Russian Constitution, which consolidated and advanced those reforms.

Nonetheless, the spectre of a legal vacuum remained, and it was addressed in Russia and the other post-Soviet republics by retaining Soviet legislation unless it had been superseded by Russian legislation, expressly repealed, or was otherwise inconsistent with the values and normative acts of the new regime;

(2) *Reintegration into existing legal families*. In my view Russia has been throughout its entire legal history been an integral part of the Western legal heritage. Nothing was done in the Soviet period which would alter that perception. Whether during the Soviet era Russia continued to be part of the Romano-Germanic family of legal systems is another question entirely. In my view not, which simply suggests that within the Western legal tradition a new family of legal systems – socialist legal systems (now transitional legal systems) – was formed. It remains to be seen whether the transitional family of legal systems will lose, maintain, or add features which distinguish them from the Romano-Germanic family.

The Russian constitutions were and are an integral part of such an analysis. It is more in the field of public law, rather than private law, that socialist and transitional legal systems differed from the Romano-Germanic and Common Law families. This was an approach that traditional western comparative legal studies found difficult to accommodate; for them, private law was the domain within which one determined the affiliation of one country to a family of legal systems. They were unaccustomed to analyze public law materials, considering them to be more "political" than "legal" documents. One western analytical study of socialist constitutions which emphasized their importance for distinguishing the socialist legal tradition[9] was criticized for diminishing the significance of the traditional realm of private law; such an approach would require one to "abandon the philosophical pattern of two and one-half millennia and the comparative concern of a thousand years";[10]

(3) *Constitutions and the socialist planned economy*. For the moment, the Russian experiment with the socialist planned economy and its legal infrastructure is regarded as a failure, without a thorough diagnosis of why the experiment did not succeed. The second, third, and fourth Russian constitutions served as the infrastructure of this experiment. They were designed not to interfere with the planned economy, at a minimum, and to provide the necessary conceptual and institutional support for the planned economy, at a maximum.

Despite the ultimate outcome and fate of the socialist planned economy, no one should doubt the tremendous influence that experiment had upon other countries and their legal systems. Although western countries did not adopt central economic planning on the scale of Russia, they did introduce aspects of planning, especially in the form of national income accounting, balances of payments, five-year economic plans for targeted development, among others.

The interface between Plan and Law was always a difficult and sensitive balance in Soviet law and the residue of that relationship remains awkward in a legal system

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[9] John N. Hazard, *Communists and Their Law* (Chicago: University of Chicago Press, 1969).

[10] *See* Albert A. Ehrenzweig's review of Hazard, *supra* note 9, in 58 California Law Review 1005, 1007 (1971); noted in William E. Butler, *Russian Law and Legal Institutions* 1–2 (2nd ed., London: Wildy, Simmonds and Hill Publishing, 2018).

in transition to a market economy. Soviet law never found the proper formula to balance administrative command with the law of contract; it may well be that there is no proper formula. The civil law reforms of the past six years in Russia – which have done much to strengthen the transition to a market economy – have mostly been ignored abroad. These have not occurred in the form of constitutional change – they did not require constitutional amendments because the 1993 Constitution is already well-suited to their introduction. They have occurred at the level of changes in the Civil Code and in judicial practice – all within the constitutional framework;

(4) *Enhancement of the Russian legal profession*. It was always something of a puzzle as to why the Advokatura continued to exist throughout the Soviet period. Initially, the Soviet authorities reacted with suspicion and hostility to the advokat as a survival of the bourgeois past, but never took the step of abolishing the Advokatura or – as happened in China – assimilating the Advokatura to State employees. This in itself, in my view, was an indication that Soviet Russia remained within the western legal heritage. In due course the "right to defense" was given constitutional stature in Soviet constitutions and strengthened in the 1993 Constitution.

Any Advokatura is inherently a form of restraint upon the exercise of State power – an institution dedicated to resisting State abuses in enforcing its own laws and ensuring the proper representation of parties to other cases in courts and private arbitration. Even within the Planned Economy this constructive role for the Advokatura was recognized, legal education was expanded, the jurisconsult became an integral part of the administrative and economic system, and the role of law and legal institutions was enhanced. Rightly or wrongly, the development of the Russian and Soviet legal professions is seen not only as evidence of Imperial Russia, Soviet Russia, and modern Russia being an integral component of the western legal heritage, but as making a substantial contribution to Russian constitutionalism.

Conclusion

Real constitutionalism cannot be meaningful without a commitment to the rule of law, and a commitment to the rule of law means a commitment to the profession whose primary task is to uphold the law against the State, on behalf of the State, in relations between juridical persons and citizens.

The 1993 Constitution of the Russian Federation is doing precisely that. It is the first real Constitution in Russian history precisely because it is performing those functions. That Constitution, of course, will mature through application by the courts and by all concerned, and from time to time it may be considered desirable to make changes and additions. In this sense the 1993 Russian Constitution is a reaction against the Russian past, the embodiment of Russian experience, and the repository of Russian values and desires for its future. It is, for the first time, a living document rather than a mere restatement of programmatic provisions.

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CONSTITUTIONALISM AND POLITICAL CULTURE IN IMPERIAL RUSSIA (LATE 19TH – EARLY 20TH CENTURY)

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https://doi.org/10.21684/2412-2343-2019-6-3-22-48

This article analyzes the possibility of development of liberal constitutionalism in the Russian Empire during the post-reform period in the late 19th – early 20th century within the context of European history, of which Russia was an integral component. It argues that the Russian autocracy had the potential to transform itself into a constitutional monarchy during the period that followed the Great Reforms of the 1860s (1861–1881) and, second, during the Revolution of 1905–1906 and in its aftermath. This promising evolutionary process was cut short by World War I and rejected by the Soviet period of Russian history that followed. Obstacles to constitutional government were mostly objective in character, but perhaps the most significant problem was the fragmentation and insufficient development of Russian political culture, or better said, cultures that failed to produce the consensus required for effective creation and functioning of a constitutional regime. This failure was further exacerbated by an evolutionary radicalization of revolutions in modern European history that culminated in October 1917. The author concludes that the events of the late 1980s and the Revolution of 1991 changed the character of the Russian historical landscape and provided the potential for renewed development of a pluralistic political system and a strong civil society that is its precondition.

Keywords: autocracy; constitutional monarchy; liberal bureaucracy; Polizeistaat; Rechtsstaat; political culture.

Recommended citation: Theodore Taranovski, *Constitutionalism and Political Culture in Imperial Russia (Late 19th – Early 20th Century)*, 6(3) BRICS Law Journal 22–48 (2019).

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Introduction

At the turn of the 20th century, the Russian autocracy, as the last, most durable and therefore, arguably, most successful absolute monarchy in modern European history, was rapidly becoming an anachronism in the European state system. Not unlike other European regimes in the past, it faced major and growing political challenges to its continuation and even survival. These challenges were exacerbated by the rapid social and economic growth, starting in the late 1880s–1890s, that was causally linked with and complicated the resolution of political problems.

On the one hand, the Imperial government was confronted with increasingly vocal demands for significant reform. After an era of successful political repression that lasted some twenty years, the autocracy faced rising agitation for political liberalization and popular representation in government (constitutional reform) from within Russian society. These demands originated in the institutions of local self-administration (the *zemstvos* and municipal dumas) and were supported by growing elements of what can be characterized as the Russian urban middle class (the so-called "free professions" and the politically self-conscious elements within the business, industrial and commercial communities).

The oppositional forces within Russian society could have found potential allies among sympathetic members of the Imperial civil service. Members of the liberal bureaucracy had long hoped, following the precedent established during the drafting of the Emancipation Act of 1861, to extend the initiatives of the Great Reforms and to introduce some form of popular representation in the Council of State, the supreme institution of the Russian autocracy specifically entrusted with the function of drafting legislation. The members of the Council were mostly chosen personally by the tsar from the top officials of the central institutions of the state, former ministers, senators as well as some governors and military officials, reaching the end of distinguished careers, who for all practical purposes held tenure for life and had little fear of dismissal for incurring the displeasure of the Emperor (only two individuals were dismissed from the Council during the course of the 19th century). They were proud of their institution and their status as senior statesmen, and they took their official responsibilities seriously and conscientiously. The political significance and legislative role of the Council of State in the system of the Russian

government are often underestimated. For example, only "opinions" of the Council of State, sanctioned by the Emperor, could be designated as "laws" (*zakony*) and were formally distinguished from other governmental actions that had the force of law, such as, for example, Imperial decrees (*ukazy*), manifestoes, etc. However, the last Romanovs, from Alexander II to Nicholas II, regardless of their differences in intelligence, character or personality, were keenly jealous of their prerogatives. They repeatedly rejected such reform proposals as endangering and subverting the principle of autocratic rule and perceived them, not without some logic and reason, as the first step toward the creation of a Russian parliament with all the consequences that that would entail, and in this they could count on the support of the majority of the Imperial bureaucracy and the military. Thus, any hope for an incremental and evolutionary transformation of Imperial government with limitations on the power of the autocracy that could result in a constitutional polity required not only great political skill, persistence, flexibility and restraint on the part of the reformers, both inside and outside of government, but also the ultimate cooperation of the monarch, seemingly a Sisyphean task.

On the other hand, there was the alternative possibility of radical revolution that brought into question the very survival of the Russian autocracy. In the late 1890s and the early years of the 20th century, the Russian Empire witnessed a revival of the revolutionary movement that had its origins in the 1860s. Various revolutionary groups and parties, ranging from anarchists to Socialist Revolutionaries and Marxist Social Democrats, were growing in size and popularity, at least in part because their social base was also expanding, along with the rise and diversification of the middle class. The revolutionaries came from all walks of life, from hereditary nobles to teachers, students and commoners, from privileged estates to the radical urban intelligentsia of mixed social origin. They sought mass support from within the peasantry and the industrial working class with some success. Indeed, the years before 1905 were marked by peasant disturbances and workers' strikes motivated both by revolutionary agitation and by the growing realization of their own interests by the masses themselves, who were proving capable of playing an independent role in the political process. The modernization of the Russian economy and society were creating consequences that were coming into conflict with the traditional political order.

To be sure, it is difficult, even today, to evaluate the historical significance and real strength of the Russian revolutionary movement, leaving aside the more difficult and ultimately more interesting problem of the social and political consciousness of the masses themselves. Throughout the 20th century, many Western and especially Soviet Marxist historians focused on and extensively studied various 19th-century revolutionary figures, circles and organizations, often very small in numbers and ineffective in action, and even the much more significant movements of the first decades of the 20th century, not only within the context of the contemporary historical

situation but also through the prism of the Revolution of 1917 that followed. In fact, it is possible to claim that Russian history as a whole, from the early Muscovite period onward, is sometimes perceived as a trajectory leading to the Revolution and the creation of the Soviet system as we know it. What actually happened had to happen (this historiographic tendency is not uncommon and was also present, for example, in many Western monographs on the origins and causes of World War I). Historians concentrated their research efforts and powers of analysis on those historical factors and tendencies that seemed to represent causal factors pointing toward 1917 at the risk of neglecting alternatives and potentialities that were also present at the time. This inclination toward the concept of historical inevitability is both tempting and natural, and we simply cannot conceive how we would have evaluated the historical significance of the Russian revolutionary movement had the Revolution not taken place, other than to say that it would have likely been quite different. What we can say with a considerable degree of certainty is that the Russian government was greatly alarmed over revolutionary activity, and with good reason, given, for example, the terrorism of the People's Will and the Socialist Revolutionary Party. In fact, the Russian autocracy was inordinately worried about any and all expressions of political dissent and did its best to suppress them, often with considerable success. Whether a more measured approach that could have driven a wedge between liberals and revolutionaries in Russian society, especially in moments of crisis, would have been more effective is difficult to tell. All the same, the specter of revolution, whether real or imagined, haunted the Russian Empire.

As we all know, the revolutionary option, first manifesting itself in 1905–1906, ultimately won out in 1917, but the question remains as to whether a constitutional system was a possible alternative in Russian history. Could the Russian Empire have been transformed by peaceful evolution into a modern constitutional monarchy and developed a pluralistic political system? Before discussing this question, it would be instructive to look at the nature and content of liberalism itself and the constitutional experience of other major European countries, since Russia was and remains an integral part of modern European history.

1. A Comparative Perspective: Liberalism and Constitutionalism in Europe

As a general proposition, it may be argued that the doctrine of classical European liberalism, and its twin, constitutionalism, originated in the late 17th century (John Locke), developed an economic component in the 18th century (Adam Smith) and culminated in the first half of the 19th century as the ideology of the middle class, championing its political, social and economic interests and opposed to the monarchical, aristocratic and mercantilist (cameralist) structure of the European *anciens régimes*. The philosophy of liberalism basically contained three

complementary but, in some respects, also contradictory elements. The first was the idea of inherent and inalienable human rights, founded in natural law, that belonged to each individual *qua* individual (the assumption of atomistic individualism) and included the rights to life, liberty and property (Locke), as well as the right, among others, to freedom of conscience, religion, speech, the press, petition and assembly as enshrined, for example, in the U.S. Constitution. Perhaps the clearest expression of this emphasis was J.S. Mill's famous essay "On Liberty." This aspect of liberalism also included the principle of equality under the law for all members of society that was, to say the least, unevenly applied through much of the 19th – early 20th century, for example in regard to women. The idea of equality under the law was primarily aimed at the legally defined and hierarchical social organization (estates) of the old order, with its system of unequal privileges and obligations.

The second, and for the purposes of this paper the least relevant, element of liberalism was economic and based on the theories of classical economists, with the major exception, of course, of their last major figure, Karl Marx. Liberal economic theory can be pretty much identified with the patterns and practices of industrial capitalism and *laissez-faire* economics of the late 18th – first half of the 19th century. It was based on the labor theory of value, private ownership of capital and the means of production, sale of wage labor, free trade and individual competition, and the idea of a self-regulating free market that, by operations of an "invisible hand," reconciled the pursuit of selfish private interest by individuals to produce societal economic progress and prosperity. Although the state was not deprived of a positive role in economic life, its main function was primarily negative and limited. The role of government was to permit autonomous functioning of the economy with a minimum of intervention, restraint and regulation. Of course, somewhat contradictorily, the state was also to be proactive in protecting private property rights and creating conditions and institutions that would benefit the growth of capitalism and the interests of the new middle class. For example, the state was expected to prohibit labor unions and strikes because they represented a restraint on trade in liberal philosophy. Later on, as the problematic social consequences of unbridled capitalism became clear and popular discontent rose, liberal reformers began championing policies designed to aid and protect the lower classes of the new industrial society as early as the 1840s.

The third and final element of classical liberalism was political. Political philosophy of liberalism was based on the principle of popular sovereignty, limited franchise, separation of powers, a representative government with either a unicameral or bicameral legislature and an independent judiciary enforcing the rule of law and the civil and political rights of the citizens. These principles were usually embodied in a written constitution that defined the form, powers and institutions of a given state and government. Constitutions were usually constructed by some form of an elected popular assembly, but sometimes granted by the ruler. For most of the

19th century, the majority of European states, whether liberal or authoritarian, were constitutional monarchies, with, of course, the major exception of the Russian Empire. It is sometimes forgotten that as late as 1914 only one major European state, France, was a republic (there were indeed three other republics, the minor states of Portugal, San Marino and Switzerland). In this, as in other respects, the old political order gave way only gradually and reluctantly.

One should note here, however, that liberal constitutionalism had to deal with challenges of its own in the second half of the 19th century. It faced growing demands for extension of the franchise and political representation to include additional social forces, and it had to adjust to the growth of socialism and the self-organization of the working class and the industrial proletariat. In the 20th century, liberalism became fully democratized and adopted the program of the so-called "welfare state" in order to compete not only with the social democrats and communists but also with the phenomenon of fascism. In short, liberalism kept evolving ideologically and programmatically so that today modern liberals, in places such as the United States, prefer to style themselves as "progressives" and champion ideas once characteristic of socialist parties. In fact, there is by now a world of difference between classical and modern liberalism, the former actually appearing to belong on the conservative side of the contemporary political spectrum in the United States and Western Europe.

Be that as it may, liberal constitutionalism in Europe developed primarily in countries with a strong middle class and a developed industrial economy. It originated in and depended on a well-organized civil society with which it stood in a symbiotic relationship. Thus, the influence of liberalism varied in direct proportion to the strength of these factors in different countries and the vitality of the traditional monarchical political and social order that it strove to supplant. By the second half of the 19th century it was victorious in the West, weaker in Central and Southern Europe, and marginally present in the East and the Balkans, and in Russia.

Thus, European liberal and constitutional regimes manifest considerable variety in terms of origin, timing and form. The British constitution, for example, originated in the English Civil War (1640–1660) as a political conflict between royal authority and Parliament that was interrupted by the Restoration of the monarchy and regained momentum only with the so-called Glorious Revolution of 1688. The issue of royal absolutism vs. parliamentarism was decided by the beginning of the 18th century, well before the advent of an industrial society. The product of an oligarchic and deferential society, the British constitution integrated the rising middle class into parliamentary government with the Reform Bill of 1832, and further extended the franchise in 1867. It assumed more democratic forms only in the late 19th century and 20th century, while continuously maintaining its core principle of the supremacy of Parliament. Despite its revolutionary origins and periods of radical popular agitation, the British constitution is essentially incremental and evolutionary in character and has never been formalized in a single document, in part because of its early

origins and in part due to the willingness of the monarchy and the traditional elites ultimately to compromise with demands for sharing political power.

The modern French political system, however, while also originating in a pre-industrial and hierarchical society, began with a political and social revolution in 1789 consciously intended to establish a constitutional regime. Three essentially failed written constitutions (1791, 1793 and 1795) transformed what was originally a constitutional monarchy into a radical republic in conditions of increasing violence and conflict that ended with Napoleon's dictatorship. The tradition of revolutionary radicalism greatly influenced French political history of the 19th century and engendered considerable political instability. Other constitutions and regimes followed Napoleon. Bourbon restoration was followed by the classical liberal constitutional monarchy of Louis Philippe (1830–1848) that was also overthrown by revolution. The revolution of 1848 within four short years led to Napoleon III's regime that hid authoritarian rule behind a constitutional façade. Napoleon III's Empire, according to some historians, manifested and anticipated a number of features of 20th-century dictatorships, and represented an anomaly in the world of 19th-century European monarchies. Thus, it can be argued that the French system of republican and representative government was stabilized only in 1871 with the emergence of the Third Republic. In comparison with Great Britain, French liberalism, although ultimately victorious, and perhaps more democratic in character, had a rocky road to travel.

The experience of Central and Eastern Europe was equally different and the impact of liberalism less than in the West. There, popular demands for constitutional government came later and were shaped and constrained both by strong traditions of royal absolutism and by the later development of the capitalist middle class and industrial economy. As a result, constitutional demands and revolutionary uprisings (for example, in 1848) were generally not successful, and liberal goals had to be compromised and only partially attained. Written constitutions were mostly granted by the existing governments to serve their own purposes or as concessions in response to major policy failures.

For example, the German Constitution of 1871 was engineered by Bismarck to maintain the dominance of Prussia and its military and bureaucracy over the newly formed German Empire. Despite the fact that it had a federal constitution, bicameral legislature and universal manhood suffrage, Imperial Germany was politically authoritarian and only economically liberal. Bismarck, bolstered by the military victories of the 1860s and the successful creation of the Second *Reich*, operated from strength and could use the appeal of German nationalism to gain his objectives. German liberals were torn between their original pacifist and anti-militarist tendencies and the rising tide of nationalism. Moreover, the liberal parties in Germany had to compete with a strong socialist movement and so made common cause with the conservative forces to keep the socialists out of the government before 1914, although the German Social Democratic Party eventually became

the largest single party in Imperial Germany. Bismarck and his successors knew how to manipulate the system to their advantage, and the German liberal political parties had to share power with the monarchy and the traditional Prussian elite, the Junkers. The German Empire was and remained an authoritarian state, despite some democratic trappings, until its demise in 1918.

On the other hand, some states had relatively little to fear from liberalism and introduced constitutional concessions only to save the existing dynasties and governments after major military defeats. For example, the Austrian Empire, after trying to maintain royal absolutism as late as the 1850s, had to grant constitutional concessions after defeat in the Austro-Prussian War of 1866 and was reorganized as Austria-Hungary by the *Ausgleich* of 1867. The Russian Empire made its first constitutional concessions only after defeat in the Russo-Japanese War of 1904–1905. Despite being in the throes of a revolution, the autocracy issued the October Manifesto in 1905 and promulgated the Fundamental Laws of 1906 by unilateral action and without public participation, an action with significant political consequences.

One should also recognize that a constitution is not only a document or an event but also a process. Whatever the constitutional provisions of a given political system, they would have little effect unless supported and implemented by an appropriate and generally shared political culture. Political culture is here defined in broad terms as comprising not only the formal conceptualization of the nature, scope and purposes of government but also the unspoken attitudes and assumptions about proper forms and limits of political action and behavior. In fact, successful constitutionalism requires a general consensus among the key political actors and factions, a political, and not only political, *Weltanschauung* (*mirovozzrenie*), characteristic primarily of countries with well-established civil societies, whether oligarchic or democratic. The government and its officialdom had to share a common political culture with society at large and tacitly had to agree to observe its norms and behavioral habits to make the system work successfully. All of these factors, when considered together, help us understand the significant differences in the constitutional evolution of Western, Central and Eastern Europe, and Russia.

2. Polizeistaat and Rechtsstaat

Given the relative strength of royal absolutism and its bureaucratic apparatus in Central and Eastern Europe and corresponding weakness of liberal forces, the development of liberal constitutionalism in those areas, of necessity, relied less on formal documents, guarantees and legislative bodies than on the Germanic concept of *Rechtsstaat* (the legal state), a political and legal theory developed by jurists and liberal thinkers in Central Europe. This approach postulated an independent judiciary and political culture that would restrain royal power and the operations and behavior of the administrative apparatus by legal norms. It downplayed the

principle of popular sovereignty and relied on the authority of the legal system to establish limits on state power and to promote civic rights. The idea of "the legal state" (*pravovoe gosudarstvo*) represented the mainstay of this kind of liberalism.[1] It was intended to reconcile the reality of the traditional political and social order with the constitutional aspirations of liberalism. However, the idea that law was the foundation of good government pre-dated the theories of *Rechtsstaat* and can be traced to much older political traditions and practices generally subsumed under the term *Polizeistaat* during the 16th–18th centuries.

Before discussing the meaning and content of the concept of the *Polizeistaat* itself, a brief terminological and definitional analysis is in order. The concept of the police state, developed in the 1930s, is relatively new to political science. It refers to states

> characterized by repressive governmental control of political, economic and social life … by an arbitrary exercise of power by the police and esp.[ecially] secret police in place of the regular operations of the administrative and judicial organs of government according to established legal processes …[2]

This usage reflects the modern definition of "police" as pertaining to the agencies of law enforcement that appeared in Europe in the first half of the 19th century and, of course, to modern organs of state security. Until then, throughout the 16th – early 19th century, the concept of "police" embraced the totality of governmental administrative and regulatory activity and was synonymous with "public order," "proper administration" or even "good government" in all European languages, including English. For Sir William Blackstone, for example, the term "police" meant "the due regulation and domestic order of the kingdom."[3] The vestiges of the older English usage remain today only in phrases such as "the police powers of Congress," i.e. the regulative authority of the United States legislature, or the expression "policing the grounds," which means keeping an area clean and in good order. That is why the term *Polizeistaat* is preferable in order to distinguish the traditional from the modern police state.

The traditional *Polizeistaat* (sometimes referred to as "regulative," "regular" or even "welfare state") represents a specific form of European absolute monarchy that originated in the 17th century, flowered in the 18th century and was replaced, except in Russia, by modern forms of government in the 19th century. It reached its apogee in the Prussian monarchy of the 17th and 18th centuries, but its ideas and

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1 Leonard Krieger, *The German Idea of Freedom* (Boston: Beacon Press, 1957).

2 *Webster's Third New International Dictionary of the English Language* (Cambridge, Mass.: Riverside Press, 1961).

3 *Palgrave's Dictionary of Political Economy* 124 (H. Higgs (ed.), 3rd ed., London: Macmillan, 1926).

practices were adopted by the European states in general, especially during the era of so-called "enlightened despotism." It originated in the greater power and authority that European kings and princes were beginning to exercise over their territories in the early modern period, starting in the 16th century, and was legitimized by the new conceptualization of natural law that placed primacy on reason and utility as guiding the forms and actions of government. Political theory was secularized and divorced from the "idea of society as the will of God,"[4] and became a rational, abstract speculation about the principles of natural law, the nature of man, and the form, content and purposes of government. Sovereignty, the distinguishing attribute of the state and, by definition, absolute and indivisible, was vested in the person of the ruler, who functioned as its first servant. Thus, natural law empowered the monarch to exercise wide discretionary, and even arbitrary, authority to provide for the common good and general welfare of the realm as a whole and all of its inhabitants. The monarch, guided by reason but wielding absolute power, and his agents would exercise paternalistic tutelage over society for its own good in order to promote progress. The monarchy would "police" the realm by ordinances, edicts and regulations that would be administered by a rationalized and bureaucratized administration guided and constrained in its actions by standardized and uniform legal rules. In practice, this entailed the wide-ranging and unprecedented expansion of state power and authority over all aspects of political, social and economic life. Social, economic and moral legislation, ranging from family and personal life, control of vagabondage and sumptuary laws to church affairs and religion, education (primary, secondary and university), culture, public health, urban organization and public works, sanitation, fire, and police protection, promotion of trade, regulation of mining, forestry, markets and fairs, manufacturing and agriculture, taxes and tariffs, affecting rich and poor alike, all were grist for the mills of government activity designed to discipline and improve society but, lest we forget, primarily for the interests of the absolute ruler and the state, not for the benefit of the individual subject.[5] The people were the clay to be shaped by an authoritarian but benevolent and paternalistic order whose duty was to "embitter" (*oblagodetel'stvovat'*)[6] the people and promote their spiritual and material well-being. As the favorite maxim of Charles III of Spain put it:

> Everything for the people, but nothing by the people.[7]

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[4] John B. Wolf, *The Emergence of the Great Powers, 1685–1715* 301 (New York: Harper & Row, 1962).

[5] Brian Chapman, *Police State* (London: Macmillan, 1970); Reinhold A. Dorwart, *The Prussian Welfare State Before 1740* (Cambridge, Mass.: Harvard University Press, 1971).

[6] *Ивановский В.В.* Учебник административного права [Viktor V. Ivanovsky, *Administrative Law Textbook*] 18 (4th ed., Kazan: Typolithography of V.Z. Eremeev, 1911).

[7] R.J. White, *Europe in the Eighteenth Century* 195 (New York: St. Martin's Press, 1965).

The grandiose scope and objectives of the traditional *Polizeistaat* have tempted some scholars, for example R. Dorwart, to compare it with the modern "welfare state" with its ever-expanding power and jurisdiction, interventionist policies, social engineering and promotion of economic development and progress. While it is true that the traditional police state and the modern welfare state have many features in common, and stand in contrast to the ideas of progress, social improvement and methods of governance championed by classical liberalism that separated them chronologically, there are also significant differences. In theory, the monarch was given absolute power to pursue the common good and general welfare because, "He who holds absolute sovereignty is not understood to be able to will anything but what sane reason can discover to be appropriate for that end" and could, therefore, "rightfully force citizens to do all things which he [judged] to be of any advantage to the public good."[8] In reality, the power of the absolute monarch was used to promote personal aggrandizement, defend one's dynastic interests and permit territorial expansion. The monarchical economic policies were influenced by theories of Central European cameralism, a broader version of the doctrine of mercantilism that went beyond economic and fiscal concerns to embrace the entire sphere of public administration, including political economy, law, legislation and 'police' activity of government to create a full blown theory of statecraft. Such theories were represented, for example, in the works of Veit Ludwig von Seckendorff (1626–1692), Christian Wolff (1679–1754), Johann Heinrich Gottlob von Justi (1717–1771) and Joseph von Sonnenfels (1732–1817). Cameralist policies, however, were primarily applied to benefit the royal treasury, to fund a powerful military force and to pay the expenses of the royal court, usually the two largest items in the budget of the 18th-century monarchy.

Even more important are the differences regarding the role and significance of the law under royal absolutism. Public law in the *Polizeistaat* was essentially an expression of the monarchical will, a royal command. It was identified almost exclusively with administrative law and represented government *through* law rather than *the rule of law*, characteristic of 19th- and 20th-century liberal governments. Public law was intended to augment the power of the monarch by introducing uniformity, standardization and greater efficiency in the operations of royal administration as well as to define and circumscribe the jurisdiction and authority of the bureaucracy lest it employ its own discretion[9] and endanger the exercise of royal authority. Law was the lever for the exercise of royal power, not the protector of the subjects against an arbitrary government or its servants. It was a mechanism of efficient and consistent rule. That is why monarchs such as Joseph II of Austria and Tsar Alexander I

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[8] Samuel Pufendorf, *De jure naturae et gentium libri octo* II 1012, 1077 (C.H. & W.A. Oldfather (trans.), Oxford II 1934) as cited in Krieger 1957, at 53, 58.

[9] Hans Rosenberg, *Bureaucracy, Aristocracy and Autocracy: The Prussian Experience, 1660–1815* 46–50 (Cambridge, Mass.: Harvard University Press, 1958).

of Russia could speak of constitutions or fundamental laws for their realms without any sense or presence of contradiction.

This situation also fundamentally shaped the nature, role and behavior of the bureaucracy that administered and enforced the monarch's will. Royal officials were, first and foremost, dynastic servants of the monarch, not servants of the public. They were recruited from various social categories, from nobility to commoners, and they included both military officers and civil functionaries, but they owed their primary loyalty to the ruler, despite considerable social and institutional rivalries and competition from within. Eventually, the civil and military bureaucracies became more clearly distinguished and, in Prussia, they emerged as separate occupational social groups (estates) – the civil bureaucracy (*Beamtenstand*) and the corps of military officers (*Officiersstand*). Especially in the civil bureaucracy, their social status was eventually derived from and depended on their professional training and rank in the official hierarchy, regardless of their social origin, and there, as in Russia, they were keenly aware of the significance of the civil service career ladder and their position and place on it. The top layers of the Prussian bureaucracy were reasonably well remunerated for their service and could materially benefit from it as well. Gradually, they also acquired professional expertise, usually consisting of legal training, and developed an esprit de corps.[10] Their authority and self-esteem were derived from their function as the agents of the absolute monarch and they acquired some of the aura of his power. In fact, according to Rosenberg, the Prussian officialdom in the early 19th century emancipated itself from monarchical authority and developed its own bureaucratic absolutism (*Beamtenstaat*).[11]

The Russian autocracy, starting with Peter the Great, adopted the ideology, institutions and ethos of the *Polizeistaat* as characterized above. While the modernization of Russia had begun already in the 17th century, it is difficult to underestimate the significance of the Petrine revolution for the Russian state, society and culture. It is true that many of his reforms were not clearly thought through and were driven by the exigencies of constant warfare and the needs of the moment, that some proved unrealistic and had to be abandoned soon after his death, and that he lacked human and material resources available to Western absolutism, but it is also true that he accomplished as much as an individual could hope to achieve in a lifetime. While retaining some features of the traditional Muscovite order, for example the principle of compulsory service of the gentry that Prussian monarchs, for instance, would never dare institute, Peter adopted the political theory of royal absolutism based on natural law, the European (primarily Germanic and Scandinavian) organization of absolute government (collegial system), formally structured and hierarchical bureaucracy (Table of Ranks), and even the inquisitorial system of justice administration and

[10] Rosenberg 1958, at 57–136.

[11] *Id*. at 175–228.

many of its legal norms. The ethos and program of the *Polizeistaat* were followed, more or less consistently, by his immediate successors, endorsed by Catherine II and maintained by the 19th-century Romanovs, even after the Great Reforms of the 1860s, until the Revolution of 1905–1906, while its echoes could be felt right up until 1917.[12] The Russian Empire was not fertile soil for the propagation of liberal and constitutional ideas, so that alternative means were necessary to champion change and reform.

The Romanov tsars saw autocracy as the natural and fundamental principle of Russian statehood and were prepared to defend it at all costs. In this, they were supported by most of the officialdom, military and much of the Russian public. It is sometimes forgotten how close informational and other links were between Europe and the Russian Empire. The Emperors and their government keenly followed political, social, economic and cultural developments in the West and were prepared to anticipate and forestall what they saw as any unwelcome influences penetrating into the Russian Empire. Although liberal and even radical ideas and sentiments were present in Russian society at large, no Russian statesman, at least starting with the reign of Nicholas I, could espouse liberal ideas or propose reforms that had even a whiff of constitutionalism about them, and the Imperial civil servants were acutely aware of this fact. Their own views, of necessity, had to be internalized, disguised and couched in conventional rhetorical forms, all of which presents problems in analysis of the political culture of the autocracy and its officialdom. And yet, the necessity of reforming the Russian government and society, for a variety of reasons, was becoming ever more apparent as the 19th century progressed, especially after the debacle of the Crimean War. Thus, it stands to reason that any constitutional reform and possible limitation of tsarist autocracy was much more likely to follow the Central European rather than the Western model.

The initial impetus for reform dates, interestingly enough, to the reign of Nicholas I and was based on pragmatic and utilitarian grounds. It produced the codification of Russian law by Michael Speransky and efforts to improve the administration of justice by the creation of the Imperial School of Jurisprudence in 1835. The elite school, comparable to the Lyceum of Tsarskoe Selo, was established with the express purpose of training individuals from the hereditary nobility of modest means, many on state scholarship, to serve in the Ministry of Justice, the Senate and the courts for a minimum of six years after graduation. Given the scarcity of trained jurists of any kind in the Imperial bureaucracy, its graduates were recruited by many other institutions of the central government and played a role out of proportion to their relatively

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[12] *Сыромятников Б.И.* «Регулярное» государство Петра Первого и его идеология. Ч. 1 [Boris I. Syromyatnikov, *The Regulatory State of Peter the First and Its Ideology. Part 1*] (Moscow: Publishing House of the USSR Academy of Sciences, 1943); Marc Raeff, *The Well-Ordered Police State: Social and Institutional Change Through Law in the Germanies and Russia, 1600–1800* (New Haven, Conn.: Yale University Press, 1983).

small numbers during the reigns of Alexander II and Alexander III in formulating the policies of the Russian autocracy. Other officials, such as Nicholas Milyutin, were also acutely aware of the unsatisfactory state of affairs in the provincial administration that could not be trusted to provide accurate and relevant information to the central government for its decision-making process. The Crimean War convinced Alexander II that more radical steps were required, including the abolition of serfdom, military reform, reorganization of local and municipal government, etc. All of this gave an opening to reform-minded officials in the central government to develop a strategy that would bring Russia closer to Europe, but without any ostensible undermining of the principle of autocracy. The concept of *Rechtsstaat*, without ever being formally articulated within the ranks of the Imperial civil service, became the tool, as will be discussed below, for attainment of their goals.[13]

The first step in this direction, possibly unintentionally, had already been taken. The Russian Codex of Laws (*Svod zakonov*) was compiled in the 1830s under the aegis of Speransky. Article 1 of the Fundamental Laws in the first volume defined the attributes of the tsar's power. The All-Russian Emperor was described as an autocratic/absolute (*samoderzhavnyy*) and "unlimited" (*neogranichennyy*) monarch, whose authority was "ordained by God himself." Article 47 defined the method by which his authority was exercised and formalized the principle of "legality" (*zakonnost'*):

> The Russian Empire is governed on the firm basis of positive laws, establishments, and statutes emanating from the autocratic power.

These principles represented two key attributes of the European *Polizeistaat* and de facto recognized the Germanic doctrine of the auto-limitation of the monarch in the Russian autocracy. The two articles, when taken together, proclaimed that the Russian autocrat governed not despotically but through legal means, which meant that he had to observe the laws promulgated by his authority until and unless they were modified by him through formally established procedures. The tsars tacitly accepted this principle as, for example, when Alexander II wanted to dismiss Senator M. Lyuboshchinsky for an impolitic public speech and was told by the Minister of Justice that he could not do so because the senator served in one of the two departments of the Senate which were part of the judicial reform of 1864 that provided judges with tenure for life (*nesmeniaemost'*). The problem, of course, was one of how to implement this principle fully and consistently in practice for the Russian government as a whole. The liberal civil servants hoped to achieve this goal by broadening the conceptualization of "legality" and institutionalizing it throughout the scope and functioning of the Russian autocracy. As a result, de

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[13] William B. Lincoln, *In the Vanguard of Reform: Russia's Enlightened Bureaucrats 1825–1861* (DeKalb: Northern Illinois University Press, 1982); Richard S. Wortman, *The Development of Russian Legal Consciousness* (Chicago: University of Chicago Press, 1976).

facto constitutional limitations on the Russian autocracy could be implemented by institutional and legal reform without any overt reference to constitutional order. It goes without saying, however, that Russian reformers faced monumental obstacles in this attempt to establish the Russian variant of *Rechtsstaat* on Russian soil.

To begin with, there were serious structural impediments to the development of liberal constitutionalism in the Russian Empire. The prerogatives of the Russian tsars were greater than those of the Western monarchs, and their control over their bureaucratic apparatus and the military firmer, at least after 1825. They had little to fear from an organized society although they relied heavily on the landed gentry for both political and administrative support, and their government was seen by many as necessary to control the vast masses of the potentially volatile peasantry.

However, the Russian autocrats lacked the requisite human and material resources for effective governance to match those of Western absolutism and European governments in general, a problem apparent already to Peter the Great and his 18th-century successors. Paradoxically enough, even the allegedly mighty militarized and bureaucratized autocracy of Nicholas I could barely administer its domains, much less meet the ambitious goals and program of the *Polizeistaat*. A significant part of the problem was that Russian society, in comparison with the West, simply lacked sufficient numbers of educated individuals to staff a large state apparatus, especially those with legal and technical training that were becoming prerequisites for a successful bureaucratic career elsewhere in Europe. Furthermore, Russian law did not set any qualifications, other than social background, as required for state service, although formal education was becoming a necessity for a successful civil service career during the first half of the 19th century. An effort sponsored by Speransky to require educational qualifications for entering the Table of Ranks in the reign of Alexander I proved exceedingly unpopular and was soon abandoned. The lack of proper governance was felt especially in the provincial government, as well as in the administration of justice (interestingly enough, the latter was successfully resolved by state sponsorship of legal education and the reform of the judicial administration in 1864). In the view of one American historian, the Russian Empire in the 19th century was simply "undergoverned." To illustrate his point, he estimated that in mid-19th century the Russian Empire had the ratio of somewhere between 1.1 to 1.3 civil servants per 1,000 of the population, while liberal Britain had 4.1 and France 4.8.[14] While one can quibble about what to include in the definition of civil servants or government officials, the contention in this argument rings true.

The scope of state activity was expanding in Russia as well as in the rest of Europe during the 19th century and demanded a more numerous and more professionally trained bureaucracy, especially after 1861 when the government could no longer

[14] S. Frederick Starr, *Decentralization and Self-Government in Russia, 1820–1870* 48 *passim* (Princeton: Princeton University Press, 1972).

rely on the gentry landlords to police the peasantry. The *zemstvo* reform of 1864 and the municipal reform of 1870 attempted to address this problem. However, the main difficulty with the new institutions was that they embodied features that reflected the traditional autocratic conceptions of the relationship between the state and society. They were less institutions of self-government as understood in Europe and more organs of self-administration, echoing a pattern that can be traced back to the Muscovite autocracy and the reforms of Catherine the Great. They were empowered to deal only with "local" (*mestnye*) and "economic" (*khozyaystvennye*) matters and had no right to involve themselves in "matters of state" (*obshchegosudarstvennye dela*) that remained the exclusive preserve of the bureaucracy. The autocracy and its servants retained full control over "state" (*gosudarstvennye*) or "governmental" (*pravitel'stvennye*) affairs. *Zemstvos* and municipal Dumas lacked full jurisdictional and fiscal autonomy, performed many duties mandated by government and were under the close supervision of the Ministry of the Interior. In the minds of many Russian bureaucrats imbued with the ethos of the *Polizeistaat*, as well as the law, they were only empowered to deal with "societal" (*obshchestvennye*) not "governmental" affairs. This situation produced tension and conflict between the "State" (*gosudarstvo*) and "Society" (*obshchestvo*). It should be stressed that these are not just technical terms but also code words that represent the subtext of political discourse and reflect differing political cultures of 19th-century Russia. Nevertheless, despite its inadequacies, the reform of local government as well as the judicial reform of 1864 proved to be the most successful of the Great Reforms and introduced what has been characterized as "germs of constitutionalism" in the Russian autocracy.[15]

Second, the Russian monarchy had a powerful social base in the military and the Imperial civil service. The growth of the civil service bureaucracy began in the reign of Catherine the Great, especially after the provincial reform of 1775 (for much of the 18th century many administrative functions were performed by military officers), and intensified in the reign of Nicholas, although the size of the Russian bureaucracy was still relatively modest. As late as the 1860s, the top three ranks of the civil bureaucracy in the Table of Ranks numbered only a few hundred individuals. However, the growth of the civil service, and its rising importance in the Imperial government in comparison with the traditional role of the military, had profound social and political consequences. By law, only hereditary noblemen, or children of individuals in state service (*gosudarstvennaya sluzhba*), could enter service and progress through the Table of Ranks. In practice, many state servitors, especially in the provincial bureaucracy, were recruited from non-noble social groups and eventually (sometimes generationally) rose to the estate of hereditary nobility

[15] Marc Szeftel, *The Form of Government of the Russian Empire Prior to the Constitutional Reforms of 1905–06* in *Essays in Russian and Soviet History in Honor of Geroid Tanquary Robinson* 105–119 (J.S. Curtiss (ed.), New York: Columbia University Press, 1963).

through state service. Equally important was the fact that many state officials were not only well-to-do gentry, but also came from the poor landed or even landless nobility who could not support themselves and their families from their estates only.[16] This situation gave rise to a distinct and growing social subgroup comprised primarily of landless state servitors who depended on the government for both their social status and their income and comprised a significant portion of the civil service officials, not only in the provincial government but also in the central government in St. Petersburg. They were professional, career bureaucrats who also had a collective interest in the maintenance and survival of Russian absolutism.

However, the Russian bureaucracy was more than just an occupational group. It was a significant social category in its own right, with its own loyalties and interests that cut across the official structure of the Russian system of estates. This category overlapped with but cannot be identified with the traditional landed gentry (*pomestnoe dvoryanstvo*) nor with the estate of hereditary nobility (*potomstvennoe dvoryanstvo*), many of whose members were no longer involved in state service and could be said to belong, socially and economically, to the urban middle class. Therefore, the autocracy no longer had to rely primarily on the landed gentry for political support and government service, as it had for centuries.[17] It created its own social base in the Imperial civil service and the officer corps, although by this time the military played no active role in Russian politics. In my opinion, that is one reason, along with the traditional fear of peasant revolt and growing recognition of the iniquity of servitude, why the abolition of serfdom, impossible to attain in the 18th century, was accomplished peacefully in 1861. The tsar and his bureaucracy ultimately put the interests of the state above the interests of the noble landlords and overcame what was in any case a lukewarm defense of serfdom, both inside and outside of government. In this connection, it is worthy of note that the democratic United States, with a much stronger civil society and a constitutional, limited and representative government, fought a bitter civil war over the issue of slavery at the same time. The Russian experience with the abolition of serfdom, paradoxically enough, testifies to the continuing power and prestige of the autocracy in the 19th century.

As their numbers grew and their role in the administration of the state became ever more prominent, the majority of the civil service officialdom adhered to the

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[16] Walter M. Pintner, *The Social Characteristics of the Early Nineteenth Century Russian Bureaucracy*, 29(3) Slavic Review 429 (1970).

[17] *Тарановский Т.К.* Особенности российской самодержавной монархии в XIX столетии // Российская монархия: вопросы истории и теории: Межвузовский сборник статей, посвященный 450-летию учреждения царства в России (1547–1997 гг.) [Theodore K. Taranovski, *Distinguishing Features of the Russian Absolute Monarchy in the 19th Century* in *The Russian Monarchy: Questions of History and Theory: Interuniversity Collection of Articles Dedicated to the 450th Anniversary of the Establishment of the Kingdom in Russia (1547–1997)*] 157 (Voronezh: Istoki, 1998).

traditional ethos of the *Polizeistaat*.[18] What could be termed the conservative wing within the Russian bureaucracy was situated mostly in the Ministry of the Interior, the largest and most important institution of the Imperial civil administration, and in the provincial bureaucracy under its control. The conservatives supported the personalized and bureaucratized absolutism embodied in the Emperor, and saw themselves primarily as the dynastic servants of the sovereign monarch who partook of the aura of his power. They were not public servants in the modern sense of the term. Only the Emperor and his bureaucracy were capable of serving the common good and the general welfare of the state and the nation as a whole. The entire sphere of what can be called politics, the formulation and implementation of public policy, was not only the exclusive monopoly of the Imperial government, it was also shrouded in official and legal secrecy. Society and public opinion, unlike in the rest of Europe, were formally excluded from participation in this process. The people were subjects, not citizens. In the view of the bureaucracy, people outside of government simply lacked the information and breadth of vision necessary to promote state purposes. They were only capable of pursuing selfish and narrow private interests. In terms of social policy, the conservatives supported the system of Russian estates and maintenance of the traditional social hierarchy, with the leading role of the gentry and its control over the now emancipated peasantry. They were suspicious of European modernity, and saw it, not without reason, as potentially threatening the survival of the Russian political and social order. In practice, conservative bureaucrats often exercised discretionary and even arbitrary authority, and exhibited personal and professional arrogance and disdain for the public.

These ideological principles and patterns of behavior, reflective of the traditional *Polizeistaat*, were perhaps more pronounced in the case of the Russian autocracy than elsewhere in Europe and certainly seemed so within the cultural and political context of the 19th century. The political culture of the autocracy was often subsumed under the term "arbitrariness" (*proizvol*) by the reformers in government and its critics in society. It was another code word that was juxtaposed and counterpoised with its ideological opposite, "legality" (*zakonnost'*), whose meaning was broadened to become the leitmotiv of the newly emerging political culture of liberalism within the Imperial civil service. The law was now perceived as embodying normative standards and values. This culture was related both to the Anglo-Saxon notion of the rule

[18] Theodore Taranovski, *The Politics of Counter-Reform, Autocracy and Bureaucracy in the Reign of Alexander III, 1881–1894* (1976) (unpublished Ph.D. dissertation, Harvard University). This work analyzes government institutions of the 19th century, the relationship between the tsar and the civil service, the evolution of bureaucracy and its ideologies, and political conflicts within the autocracy. Since this work is not readily available, the author's more accessible publications are cited at appropriate points in this article. *See Тарановский Т.К.* Судебная реформа и политическая культура царской России // Великие реформы в России. 1856–1874 [Theodore K. Taranovski, *Judicial Reform and Political Culture of Tsarist Russia* in *The Great Reforms in Russia, 1856–1874*] 301 (L.G. Zakharova et al. (eds.), Moscow: Moscow State University Press, 1992).

of law and to the Germanic notion of *Rechtsstaat* and arose primarily within the elite levels of Russian administration by the middle of the 19th century. The liberal civil servants were primarily jurists by profession, mostly graduates of the School of Jurisprudence, strategically situated in the judiciary and key institutions of the central government such as the Senate and the Council of State, and patronized by powerful individuals such as the Grand Duke Konstantin Nikolaevich and the Grand Duchess Elena Pavlovna. Arising from pragmatic and utilitarian impulses, bureaucratic liberalism acquired in time a more coherent ideological content.

The liberals, although always a minority in the Imperial civil service, were the shapers and organizers of the Great Reforms of the 1860s, beginning with the emancipation of the serfs. They recognized the dignity of man and assumed the existence of human rights. They wanted further rationalization of the autocracy by introducing representatives of "society" into the operations of the Imperial government, starting already in the 1860s. This effort culminated in 1881 with M.T. Loris-Melikov's proposal to enlarge the Council of State by introducing a limited number of representatives from the *zemstvos* and municipal Dumas and giving some formal role to the public in drafting legislation. The proposal was rejected by Alexander III, and, in my view, his decision marked the end of the first attempt to create a Russian *Rechtsstaat* and introduce elements of constitutionalism in the Russian autocracy.

The liberals not only drafted the judicial statues of 1864 but also supported the Ministry of Justice in its perennial conflict with the Ministry of the Interior that lasted for the rest of the 19th century. They created an independent judiciary and separated it from the executive, with the Emperor retaining only the power of pardon, and introduced the irremovability of judges, trial by jury, public trials, and oral and adversary procedure.[19] They successfully managed to derail the proposed judicial counter-reform, initiated in 1894, both because of the death of Alexander III and because of the resistance of jurists to the specifics. They supported the *zemstvo* and municipal reforms of 1864 and 1870 and, on the whole successfully, defended their principles against the conservative counter-reforms of 1890 and 1892. They could not, however, defeat the effort to replace justices of the peace with the land captains in 1889 that undermined the liberal principle of separation of administrative and judicial power, as the tsar intervened directly to override the decision of the Council of State and side with the conservatives.

In terms of social policy, the liberal bureaucrats wanted to emancipate society by ensuring equality under the law for all of its members. In their view, this could be done by breaking down the "estate" characteristics of Russian institutions (*soslovnost'*) by moving them first toward the equality of estates (*vsesoslovnost'*) in terms of composition and membership, and eventually adopting the principle

[19] Samuel Kucherov, *Courts, Lawyers, and Trials Under the Last Three Tsars* (New York: Frederick A. Praeger, 1953).

of "non-estatism" (*bessoslovnost'*). This would amount to the legal recognition of equal citizenship in the Russian body politic. They supported civil emancipation of the Russian peasantry and opposed what they perceived as the constraints of the peasant commune, favoring the advantages of free labor. In short, they wanted further expansion of the principles of the Great Reforms in the Russian government and society. The main underpinning of this ideology, as already indicated, was the principle of legality that required further limitations on the power of the monarch, curtailment of the discretionary authority of the administrative apparatus, and supervision of strict enforcement of the law by the organs of regular and administrative justice. The liberal bureaucrats increasingly conceived of themselves not only as servants of the state, but also as servants of the public.[20]

The conservatives may have won most of the battles during the so-called era of reaction, but they did not win the war. This outcome was, at least in part, the product of the systematization, professionalization, bureaucratization and institutional evolution of the Imperial government that became more complex and arguably more efficient during the course of the century. For example, by the late 19th century, the organs of the central government had developed their own "institutional points of view" that were recognized as both legitimate and necessary within the bureaucracy as a whole and by the Emperor himself. This provided an opportunity for the liberal officials to defend and promote their views. As a result, liberal resistance to the program of the counter-reforms produced a certain stalemate, and even stagnation in the formulation of the internal policy of the Empire, as neither side could carry the day. This was not a desirable outcome at a time when decisive action was needed to manage rapid social and economic changes that were bound eventually to present significant challenges to the political order as well.[21]

Another equally important impediment to the emergence of constitutional government in Russia was the unbalanced and underdeveloped structure of Russian society that was slowly evolving to approximate the European pattern. It has been noted that constitutionalism and liberalism in the 19th century depended on a strong civil society and middle class. Russian society as late as 1914 was 85 percent agrarian and only 15 percent urban, one of the greatest imbalances in all of Europe.[22] The Russian peasantry, while it had concrete social and economic interests, lacked

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[20] *Зайончковский П.А.* Российское самодержавие в конце XIX столетия [Peter F. Zayonchkovsky, *The Russian Autocracy at the End of the 19th Century*] (Moscow: Mysl, 1970); *Захарова Л.Г.* Земская контрреформа 1890 г. [Larisa G. Zakharova, *The Zemstvo Counter-Reform of 1890*] (Moscow: Moscow State University Press, 1968); Theodore Taranovski, *The Aborted Counter-Reform: Murav'ev Commission and the Judicial Statutes of 1864*, 89(2) Jahrbücher für Geschichte Osteuropas 161 (1981).

[21] Theodore Taranovski, *Alexander III and His Bureaucracy: The Limitation of Autocratic Power*, 26(2–3) Canadian Slavonic Papers/Revue Canadienne des Slavistes 207 (1984).

[22] Россия 1913 год. Статистико-документальный справочник [*Russia in 1913: Reference Book of Statistics and Documents*] (St. Petersburg: Institute of Russian History, 1995).

a coherent political agenda. Russian businessmen and merchants on the whole were slow to become politicized, and the social groups that could be characterized as middle class were too few in number. Liberalism within Russian society was espoused primarily by segments of the landed gentry represented in the *zemstvos* and by the free professions in the cities. However, today it is widely recognized that a civil society had evolved in Russia by the end of the 19th century.[23] The plethora of civic and charitable organizations, scholarly and learned societies, professional unions, meetings and congresses amply testify to this fact. This phenomenon boded well for the future of constitutionalism and liberalism in Russian history.

The Empire was also plagued by a persistent and growing revolutionary movement which had an impact on Russian politics that was much greater than its numerical strength. In the minds of some scholars, the assassination of Alexander II in 1881 was a fateful step in Russian history. It took the topic of political liberalization off the agenda for more than two decades, it delayed and undercut the possibility of further modernization of the autocracy and it helped revive bureaucratic conservatism. The Russian populists who assassinated the tsar undermined the achievements of the liberal bureaucracy and effectively helped end the first effort to establish a *Rechtsstaat* on Russian soil.[24]

Finally, the multiethnic and religiously diverse character of the Russian Empire posed significant obstacles to creating a constitutional government that would meet the aspirations of all of its inhabitants. The Imperial government, well aware of the problems presented by the sprawling Empire, created separate administrative regimes for the borderlands (*okrainy*) as it extended its sway over the Caucasus and Central Asia during the course of the 19th century. It paid attention to local conditions and culture and tried to avoid conflict, with some major exceptions. Such accommodation was becoming difficult as the century progressed. The pre-modern ties of dynastic loyalty and Imperial patriotism were undermined by the rising tide of nationalism in Europe that also affected the Russian Empire. Attempts to control the situation through the policy of Russification, another manifestation of nationalism, were counter-productive and provoked growing hostility even in previously unproblematic areas

[23] Joseph Bradley, *Subjects into Citizens: Societies, Civil Society, and Autocracy in Tsarist Russia*, 107(4) American Historical Review 1094 (2002).

[24] Author's note: In 1968–1969, I was a graduate student at Moscow State University, where my advisor was the late Professor Peter Andreevich Zayonchkovsky. On one occasion, while walking together in downtown Moscow, right by the building that eventually housed the Russian State Duma, Peter Andreevich discussed his ongoing research (he shared his manuscript of *Rossiyskoe samoderzhavie* … with me even before publication, although we were working on the same topic) and made the observation that the murder of Alexander II by the populists was a huge mistake. He had reached the conclusion that if Alexander II had lived, the tsar would have finally accepted reform projects then under consideration. That decision would have opened the way to the evolution of a constitutional monarchy in Russia, and the country would have avoided revolution. I have always considered his statement to be an act of civic, intellectual and moral courage, even though it could not be, of course, voiced publicly or in print in the Soviet Union.

such as Finland by the early 20th century. The full impact of the "national question," however, did not become apparent until much later.

3. The Second Chance and Partial Success

One can argue that these impediments to constitutionalism could have been overcome by an evolutionary process, originating within the government itself, even if under pressure, that started by the mid-19th century, after the Crimean War exposed the weaknesses of the Russian state and society. This did not occur, and time was not on the side of the reformers. After the turn of the century, the rising unrest within the peasantry and an expanding working class, the revival of the revolutionary movement, and the growing militancy and political organization of the Russian liberals, especially after Nicholas II dismissed their aspirations as "senseless dreams" in 1895, combined with the disaster of the Russo-Japanese war, clearly threatened the survival of the Russian autocracy. The demands for a fundamental reform of the political system could no longer be contained by police measures. Tension was pent up, and evolution was becoming increasingly less likely than revolution, which finally took place in 1905–1906. Even so, one should not forget that revolutions could also lead to constitutions, France being a prime example.

The last attempts at governmental reform failed to produce any concrete results. Prince P.D. Svyatopolk-Mirsky's attempt to revive Loris-Melikov's proposals in 1904, after the war had already started, was sabotaged by Nicholas II, and the indirectly elected and consultative so-called Bulygin Duma of 1905, now endorsed by the government and sanctioned by the Emperor, was a classic case of too little too late political concession. With their backs to the wall, Nicholas II and his government, now led by S. Witte, issued the October Manifesto and eventually promulgated the Fundamental Laws in 1906 that signified the end of the traditional *Polizeistaat* and marked the creation of a constitutional monarchy, despite the monarch's insistence on retaining his title and many levers of real political power. The expansion of the franchise, the creation of the State Duma and the appearance of formal political parties, as well as a series of other legislative acts, represented the most radical step toward constitutionalism in Russian history. Could this second chance for constitutional government have been made to work in practice and expand on the framework provided by the admittedly inadequate Fundamental Laws? The answer is a qualified yes.

The creation of a constitutional regime was bound to produce immediate conflict between the executive and legislative branches of government. Only a shared political culture favoring pragmatism and compromise could assure success, but such a culture was unlikely to manifest itself in the fervor of a revolutionary situation, whether in 17th-century England, 18th-century France or 20th-century Russia. In fact, the absence of such consensus and the presence of divergent and competing

political cultures in the Russian state and society was another key element that worked against successful implementation of constitutionalism in the Russian Empire, both before and after the Revolution of 1905–1906.

The main impediments to Russian constitutionalism were not so much the shortcomings and inadequacies of the Fundamental Laws themselves as the fragmentation, disunity and polarization of the Russian political spectrum in the early 20th century. The Emperor and the conservative wing of his bureaucracy were unwilling to make concessions or give up the reins of power at least in part because of the radical nature of the demands placed upon them, and they were suspicious of the new institutions from the start. To be sure, the Russian bureaucracy had blurred some of the ideological distinction between the conservatives and the liberals and had become more pragmatic and flexible in search of solutions to Russia's problems.[25] It could produce reformers such as Witte and Stolypin, but the generation of the civil service liberals of the 1860s–1880s was largely gone from the historical scene. The conservative bureaucrats, supported by a recalcitrant tsar, even if they were no longer as steeped in the ethos of the Russian *Polizeistaat* as their predecessors had been, were unlikely to accommodate the demands of Russian society as expressed by the State Duma. Finally, Nicholas II lacked the leadership skills and political common sense, such as exhibited by the British monarchy, to preside over the process of the weakening and further transformation of the Russian autocracy.

On the other side, the liberal forces, initially coalescing around the Constitutional Democratic Party in the elections for the First Duma, were not the classical liberals of 19th-century Europe, espousing limited government and *laissez-faire* economics. They had become radicalized and politically well-organized already before the revolution, but their tactical and political differences made it difficult to create a united front and to accept Witte's offer of cooperation. Moreover, the 1905 program of the Kadet party went far beyond political and civil rights to embrace major social and economic demands and envisioned an active role for liberal government that foreshadowed the platforms of 20th-century democratic and socialist parties.[26] In my opinion, the Constitutional Democrats were in many ways ahead of their time; but they also overplayed their hand, which should not be surprising, and lost much of their political influence at a time when they had the best chance of becoming the leading political force in Russian society.

This only benefitted the revolutionary parties, whose leaders often came from the radical intelligentsia, and who simply wanted to overthrow the established political, social and economic order. The elections to the Second Duma provided

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[25] Richard G. Robbins, Jr., *The Tsar's Viceroys, Russian Provincial Governors in the Last Years of the Empire* (Ithaca, N.Y.: Cornell University Press, 1987).

[26] *Programs of the Russian Political Parties* in *Imperial Russia: A Sourcebook, 1700–1917* 438–444 (B. Dmytryshyn (ed.), 3rd ed., Fort Worth, TX: Holt, Rinehart & Winston, Inc., 1990).

them with parliamentary immunity and a propaganda platform and shifted the political spectrum further to the left. Unfortunately, the Russian intelligentsia that dominated Russian cultural life from the 1860s to the 1890s and eventually played a significant role in Russian politics was ill-equipped to adopt a positive role in the construction of a constitutional political system. Its materialist intellectual and maximalist political outlook, derived from the most radical tendencies of progressive European thought, was always a form of messianic utopianism. To be sure, visions of Russian exceptionalism were also to be found in religious and conservative thought that pursued its own version of "the Russian idea." However, the political culture of the radical intelligentsia, from the nihilists and revolutionary democrats of the 1860s to the Socialist Revolutionaries and Social Democrats, represented primarily a destructive rather than a constructive force in Russian life and saw Russia as a laboratory in which to create its own vision of a political and social paradise. The revolutionaries, on occasion, could gain sympathy from the broader strata of Russian society, for example in the 1870s. By the early 20th century they also appealed to the peasant and working class masses. However, they were intellectually both unable and unwilling to engage in the political compromise, gradualism and pragmatism that is the stuff of constitutional government. They lived theory and revolutionary activism and had little practical experience of actual politics. The Russian intelligentsia has been admired in pre-revolutionary, Soviet and post-Soviet times, but a note of caution is called for. The 19th- and early 20th-century radicals, along with their supporters who adopted the attitude of "no enemy to the left," bear heavy historical responsibility before the people of Russia for the ultimate failure of the second constitutional experiment in 1917 and for the history that followed it.

Nevertheless, one can still reasonably argue that the new political system, established in 1906–1907, had a fighting chance of success. By the elections for the Third Duma, the political system showed signs of stabilization. The government was learning how to operate under new circumstances. The independent judiciary established in 1864 had survived the "era of reaction" and the role of the judiciary continued to rise in importance. The judicial institutions were tentatively beginning to use precedent in reaching their decisions, an activity expressly forbidden by the Russian and Continental norms of positive law, but characteristic of the common law system in Great Britain. A system of "administrative justice" designed to resolve disputes between executive organs of royal administration as well as between the government and institutions of society and even private individuals to protect their rights was also in the process of development.[27] Terrorism and armed struggle had been overcome, and the revolutionary parties largely marginalized by 1914. The

[27] История Правительствующего Сената за двести лет. Т. 4 [*The History of the Ruling Senate over 200 Years. Vol. 4*] 141–142, 176 (St. Petersburg: Senate Printing House, 1911); *Корф С.А.* Административная юстиция в России [Sergei A. Korf, *Administrative Justice in Russia*] (St. Petersburg: Printing House Trenke & Fusno, 1910).

electoral system, although not truly representative, provided certain stability and was dominated by moderate political forces, including the Cadets who had lost much of their original revolutionary zeal. The Stolypin agrarian reform was making progress, although it was far from complete. In short, by 1914 one could expect that the political, social and economic problems facing the Russian state and society were susceptible to purely political resolution. Russia needed more time, but history failed to provide it.

Conclusion

There is a tendency among historians and social scientists to neglect or downplay the role of contingency, of fortuitous and accidental development or an event that rearranges the order and balance of the usual probabilities and potentialities of the course of human history. A political assassination in 1914 and the war that followed were one such accident with profound significance for the history of the world as well as for the future of the Russian state and society. It was primarily the stress of World War I and the inability of the Russian monarchy and society to overcome the ramifications that afflicted all of the combatants in World War I to a greater or lesser degree, especially the huge loss of life and the economic suffering. This failure produced the revolutions of February and October 1917 but also, lest we forget, a revolution in Germany as well. It is the height of irony that a prescient prediction of the consequences of Russia's entering the war was made by one of the most conservative Russian statesmen, Peter N. Durnovo, in a memorandum submitted to Nicholas II in February 1914.[28]

One additional observation may prove useful in this discussion of Russian constitutionalism and revolution. When one looks at the history of major European revolutions as a whole during the modern era, one can discern a definite pattern. As we approach the 20th century, European revolutions, like modern war, grow in their scope and intensity, a phenomenon clearly linked with the modernization and democratization of European states and society. The English Revolution was primarily a political struggle between elites, although the religious aspect played a significant role. The French Revolution was not only more violent but characterized by both political and social conflict that ultimately produced the victory not only of a new political system but also of a new dominant class in French society. The Russian Revolution was the culmination of these trends. It involved the spheres not only of politics and social structure, but also of the very nature of the economic order. It strove to reshape and create a completely new brand of humanity and establish a totalitarian system based on a single world-view that did not shrink from the most

[28] *Documents of Russian History, 1914–1917* 3–23 (F.A. Golder (ed.), E. Aronsberg (trans.), New York and London: Century Co., 1927).

violent means of accomplishing its goals. The victory of the October Revolution destroyed pre-revolutionary efforts to establish constitutionalism in Russia, as well as many other features of the past, and the "total" character of the Soviet state and society made it highly unlikely that such efforts could be renewed or succeed under the new political regime.

However, the events of the late 1980s and the Revolution of 1991 changed the character of the Russian historical landscape. The links between the past and the present can never be entirely severed, only attenuated. The political and juridical heritage of pre-revolutionary liberalism provides evidence that the evolution and establishment of constitutional government was possible and was taking place in the Russian Empire before 1917, and that it had a certain logical progression and trajectory. Starting in the 18th century among some aristocratic circles, constitutional ideas also arose within the elite levels of government bureaucracy in the 19th century, paralleling the development of liberalism within society at large.[29] There is no reason why such a process could not be renewed in the post-Soviet historical environment in the conditions of political, social and economic change that are taking place in contemporary Russia. The final result could well be a Russian pluralistic and deeply rooted constitutional political system, supported by a strong civil society, which is its precondition.

Acknowledgements

The author wishes to thank Professor Jonathan W. Daly, University of Illinois at Chicago, for his helpful and constructive suggestions and criticisms in the preparation of this article.

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[29] Vladimir Leontovitsch, *Geschichte der Liberalismus in Russland* [*History of Liberalism in Russia*] (Frankfurt am Main: Vittorio Klostermann, 1957); George Fischer, *Russian Liberalism: From Gentry to Intelligentsia* (Cambridge: Harvard University Press, 1958).

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ON THE WAY BETWEEN UTOPIA AND TOTALITARIANISM. THE BOLSHEVIK CONSTITUTION OF 1918 AS A MODEL OF SOCIALIST CONSTITUTIONALISM

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https://doi.org/10.21684/2412-2343-2019-6-3-49-77

Although Russian constitutionalism has a rich past and present, its place on the global map of the history of constitutional thought is not clearly defined yet. This paper contributes to the analysis of the early stages of development of Russian constitutionalism. The first Russian act resembling a "true" Constitution was the Constitution of the RSFSR of 1918. It was aimed not at the realization of the ideas of constitutionalism, but at the formation of a model of a totalitarian state. It sanctioned radical social changes and led to the liquidation of the concept of the division of power and the omnipotence of the non-constitutional organs (like VChK, various "tribunals"). However, this act and its ideological sources deserve a more in-depth analysis. First of all, its utopian ideas about the new social system have to be identified and examined. The analysis shows that the 1918 Constitution reflects Lenin's fascination with the ideas of direct democracy drawn from the experience of the Paris Commune and the French Revolution after 1789. In particular, it is about the perception of the idea of unlimited supreme power, undivided and combined, and at the same time federated in the form of loose communes. If we consider the range of constitutional ideas, the Bolsheviks adopted nothing more original that the concept of Rousseau's national sovereignty. However, the implementation of utopian ideas ended with the creation of a totalitarian system, which contemporaries called "state despotism," more powerful than the despotism of the Russian Empire.

Keywords: legal history; Bolshevism; Soviet Russia 1918–1921; 1918 Constitution of the RSFSR; totalitarianism; war communism; direct democracy; radical democracy; Lenin.

Recommended citation: Adam Bosiacki, *On the Way Between Utopia and Totalitarianism. The Bolshevik Constitution of 1918 as a Model of Socialist Constitutionalism*, 6(3) BRICS Law Journal 49–77 (2019).

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Introduction

Russian constitutionalism, or its establishment, is still a little-researched public law card. In spite of the short attempts to make such a statement, the constitutional institutions discussed in this country are quite rich, despite the obvious defeats of building constitutionalism, defined as a sham constitutionalism.

In the Soviet and later Russian historiography, the view prevails that the basic laws of October 1905 and April 1906 were not a constitution. The self-governing power of the Russian emperor was preserved, and his influence on lawmaking, including the veto potentially solving any legislative initiative, was legally significant.

Disagreeing with this thesis, it is worth noting that the essentially indicated constitutional laws of 1905–1906 did not constitute a constitutional monarchy, although the question is obviously whether Russia could become such a monarchy as a result of it and against the will of the emperor. Against this background, the first Soviet or Bolshevik Constitution was more like a legal act of this type, assuming, of course, that it shaped the model of a totalitarian state from which Lenin as a leader of such a state and as a lawyer obviously had to be aware. This Constitution, in particular, sanctioned very radical social changes after the Bolshevik Revolution in October 1917: attempts to abolish the property right, in the form of the so-called socialization of land and the abolition of real estate in cities, so-called the nationalization of industry and banks, state terror without legal grounds, or even the abolition of institutions of inheritance.

However, later in the historiography of the Stalinist era, the first Soviet Constitution of the USSR in 1924 was treated as the first Soviet one, where the issue of the state came to the fore. For this reason, the first Constitution of the new state (the Russian Soviet Federative Socialist Republic) is also worth a deeper analysis from the point of view of utopian visions of the social system. However, assuming – as it was stated – it sanctioned and enabled the construction of a totalitarian system, taken from the beginning of the Bolshevik state.

1. On the Way to the 1918 Bolshevik Constitution

After the overthrow of the monarchy, the postulate of choosing the Constituent Assembly (*Uchreditel'noe sobranie*), capable of enacting the constitution, contained

programs of all, including anarchist, important political parties. Along with the setting of the crisis of power, visible especially in the second half of 1917, the Provisional Government was striving to pass a new constitution. Also in a formal sense, this authority was to exercise power (after the dissolution of the Provisional State Duma Committee not only executive) only until the new basic law was passed.

Due to many delays, the convocation of the constituent did not take place before the Bolsheviks took power. The State Duma, albeit, adopted a relevant law in this matter, on the basis of which the Provisional Government in the second half of September 1917 published a detailed electoral law. By virtue of the regulations, electoral districts were established throughout the country. Constituent Assembly elections were to be five-adjectives, and all political, national and social groups were allowed to participate in them, with the exception of the anarchist organizations banned under the Act. The latter, *ex definitione*, were defined as anti-state.[1]

After the seizure of power, the Bolsheviks consistently declared their attachment to the idea of the Constituent Assembly. Therefore, the new government, like the previous one, described itself as temporary (*Vremennoe raboche-krest'yanskoye pravitel'stvo*). In the resolution of the Second All-Russian Congress of Soviets of Workers' and Soldiers' Deputies (peasant congress held separately), written by Lenin on the day of taking over power, there was a sentence from which it appeared that the cabinet would rule until the summoning of the Constituent Assembly. The Bolsheviks also reserved the right of the Assembly to repeal the Decree on Peace proclaimed at that time by the congress. Also before the takeover of power, the Bolsheviks were fighting the Provisional Government, among others under the slogan of the struggle to find a Constituent Assembly, and Lenin, as having been accused of opposing the idea of the *Konstytuanta*, repudiated it as nonsense and delusion. However, the political reality after the Bolshevik coup denied these claims.

It is difficult to completely reconstruct the discussions on the shape of the constitution in 1917 after the Bolshevik takeover of power. It is known, however, that the new authorities tried to influence the course of the election campaign. The freedom of agitation of individual groups was limited; in general, however, the elections were considered democratic.[2]

At the same time, however, the Bolsheviks in a short time made a real delegation of political parties and the press, apart from the Bolshevik and leftist factions of the

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[1] Some thoughts in this chapter have been quoted earlier in the work Adam Bosiacki, *Utopia, władza, prawo: Doktryna i koncepcje prawne "bolszewickiej" Rosji 1917–1921* [*Utopia, Power, Law: Doctrine and Legal Concepts of "Bolshevik" Russia 1917–1921*] (Warsaw: Liber, 1999).

[2] Oliver H. Radkey, *The Election to the Russian Constituent Assembly of 1917* 50 (Cambridge, Mass.: Harvard University Press, 1950). M. Heller and A. Niekricz even determined the elections to the Legislative Assembly as the most democratic in the history of Russia. Michail Heller & Aleksander Niekricz, *Utopia u władzy. Historia Związku Sowieckiego. T. 1* [*Utopia in Power. History of the Soviet Union. Vol 1*] 34 (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1989).

Socialist-Revolutionist Party. The relevant Decree in this case, signed by Lenin, was one of the first normative acts of the Bolshevik state.[3]

The idea of the Legislative Assembly met with the support of the Bolsheviks,[4] because they probably believed that it was certain to gain a large majority of seats in the Constituent Assembly. A month before the election, the Council of People's Commissars even issued a resolution on the establishment of the All-Russian Constituent Assembly Election Commission (*Vserossiyskaya po delam o vyborakh v Uchreditel'noe sobranie komissiya*[5]).

The Commission, which, according to its name, was to prepare the elections, was obliged to cooperate with the Council of People's Commissars. Moisei Solomonovich Uritsky (1873–1918), who was also the chairman of the *Petrograd Extraordinary Commission to Fight with the Counter-Revolution and Sabotage* (VChK), was appointed the coordinator of these contacts. The Commission consisted of fifteen members and their six deputies. They were all completely unknown as in the later history of the USSR.[6]

Even before the election, rumors spread about the intention of the Bolsheviks not to allow the opening of the assembly. In response to similar rumors, the Council of People's Commissars issued a special Decree, which promised that such a situation would certainly not take place. According to *Decrees of the Soviet Authorities*, the document was adopted no later than 5(18) December and published in the daily press.[7] It did not find himself in the official journal, or, of course, in the indicated re-edition of the Bolshevik documents that began to be published after Stalin's death.

Elections to the Constituent Assembly took place on 12 November and covered almost all territories of Russia, including the front lines. In such areas, the vote took place earlier, in some later. However, the entire voting was carried out until 14 November. The Socialist Revolution Party (39.5%) received the most votes, to which 19.1 million voters voted. The Bolsheviks were in second place; they gained 22.5% of votes, and 10.9 million of them voted. A further number of votes was obtained by constitutional democrats (4.5% from 2.2 million votes cast) and Menshevik (3.2% from 1.5 million votes). Other voices were won by local groups (including conservatives

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[3] Декрет от 28 октября 1917 г. «О печати» // Собрание узаконений и распоряжений Рабочего и Крестьянского правительства. 1917/1918. № 1. Ст. 8 [Decree of 28 October 1917 "On Press," Collection of Laws and Orders of the Workers' and Peasants' Government, 1917/1918, No. 1, Art. 8].

[4] *Cf.* Oleg Znamienski & Walery Szyszkin, *Lenin, ruch rewolucyjny i parlamentaryzm* [*Lenin, Revolutionary Movement and Parliamentarism*] 149 (Warsaw: Książka i Wiedza, 1981).

[5] The quirkiness of the name caused the word "committee" to be translated at the end of the phrase.

[6] Text of the resolution in Декреты Советской власти. Т. 1 [*Decrees of the Soviet Authorities. Vol. 1*] 167 (Moscow: State Publishing House of Political Literature, 1957).

[7] *Id.* at 184.

and Cossack groups),[8] but the total of liberal groups, led by the Constitutional and Democratic Party, gained a total of 16.4 per cent.[9] During the elections, minor inaccuracies occurred: no data were collected from two electoral districts in the country, and the voting time was extended.

The election results clearly showed the radicalization of society. It became clear, however, that the Constituent Assembly might prove to be not susceptible to the Bolshevik postulates, in a more or less formative way. The functioning of the Constituent Assembly also put into question the existence of the institution of Bolshevik power, first of all the All-Russian Central Executive Committee (VTsIK) and the government (Council of People's Commissars). It could also lead to the repetition of the situation of the dual power of both parliaments, just as before October 1917. After the election to the highest authority, which many pre-revolutionary oppositionists dreamed about, the shawl would probably tilt the Bolsheviks to their disadvantage.

Probably that is why the day before the opening of the session, the executive organ of the congressional parliament (VTsIK), in which the Bolsheviks obtained an advantage more or less from August 1917, issued a resolution in which it was stated that

> [t]he Constituent Assembly can play a salutary role in the development of the revolution only if it stands firmly and unconditionally on the side of working classes, approves decrees on land, workers' control, nationalization of banks, grants the rights of all nations of Russia to self-determination and approves the foreign policy of the councils aimed at achieving the democratic peace as soon as possible.[10]

This was already a clear ultimatum which, if it were fulfilled, would incorporate the constituent into a Bolshevik system of exercising power. It is not known whether a similar situation could last a long time. It is also not clear what role VTsIK would play in the resulting situation.

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[8] *Протасов Л.Г.* Учредительное собрание: прерванный опыт становления демократической представительной власти // Представительная власть в России: история и современность [Lev G. Protasov, *Constituent Assembly: Interrupted Experience of Democratic Representative Power* in *Representative Power in Russia: History and Modernity*] 343, 361 (Moscow: ROSSPEN, 2004).

[9] Heller & Niekricz 1989, at 34.

[10] Резолюция ВЦИК о созыве Третьего Всероссийского съезда Советов рабочих и солдатских депутатов и Третьего Всероссийского съезда крестьянских депутатов от 22 декабря (4 января) 1918 г. [Resolution of the All-Russian Central Executive Committee on the Convening of the Third All-Russian Congress of Soviets of Workers' and Soldiers' Deputies and the Third All-Russian Congress of Peasants' Deputies of 22 December (4 January) 1917] in *Decrees of the Soviet Authorities. Vol. 1*, *supra* note 6, at 276.

The first and at the same time, as it turned out, the meeting of the Constituent Assembly was held on 23 December 1917 (5 January 1918). The elected parliament consisted of four hundred deputies.[11]

The balance of power after the elections enabled the Bolsheviks to rule in a coalition with the Socialist Revolutionary Party (but only less with its left wing). Lenin, however, had no intention of sharing power in this way and there are credible testimonies that the dissolution of the Constituent Assembly was decided by Lenin directly after the lost elections.[12] On the other hand, a month earlier, the opening of the Assembly was announced by the adoption of a separate Decree of the Council of People's Commissars.[13]

The immediate pretext for the dissolution of the Assembly was the refusal to approve, at its first meeting, adopted by VTsIK two days earlier the Declaration of Rights of Working and Exploited People, having the rank of a constitutional norm.[14] The prepared Declaration was published in the journals *Pravda* and *Izvestia*, but did not appear in the official journal.[15] According to one of the authors, adoption by the Constituent Assembly of the Declaration of Rights would be the acceptance by her of all new rights that have been passed by the Bolshevik government so far.[16]

The factual description of the dissolution of the Constituent Assembly, also referred to in multilingual literature[17] is not of course the object of investigation of the presented study. Let us note only that on the opening day of the Assembly, the Bolshevik faction made a declaration at its first meeting

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[11] Постановление о сроке открытия Учредительного собрания от 20 декабря (2 января) 1918 г. [Resolution on the Date of Opening of the Constituent Assembly of 20 December 1917] in *Decrees of the Soviet Authorities. Vol. 1*, *supra* note 6, at 266.

[12] *Бонч-Бруевич В.Д.* На боевых постах Февральской и Октябрьской революций [Vladimir D. Bonch-Bruevich, *On the Battle Stations of the February and October Revolutions*] (Moscow: Federation, 1931); Heller & Niekricz 1989, at 34;

[13] *Decrees of the Soviet Authorities. Vol. 1*, *supra* note 6, at 159.

[14] Hubert Izdebski, *Rewolucja a prawo w Europie w XX wieku. Część II: Rewolucja a prawo dawne i nowe: tradycja prawna i środowisko prawnicze w obliczu rewolucji* [*Revolution and Law in Europe in the Twentieth Century. Part II: Revolution and Old and New Law: Legal Tradition and Legal Environment in the Face of Revolution*], 39(1) Czasopismo Prawno-Historyczne [Legal and Historical Journal] 111, 118 (1987).

[15] The text of the document is quoted in *Decrees of the Soviet Authorities. Vol. 1*, *supra* note 6, at 321–323.

[16] *Cf.* David R. Marples, *Historia ZSRR. Od rewolucji do rozpadu* [*History of the USSR. From Revolution to Decay*] 60 (Wrocław: Ossolineum, 2006).

[17] Heller & Niekricz 1989, at 35–36; Richard Pipes, *Rewolucja rosyjska* [*The Russian Revolution*] 424 ff. (Warsaw: Magnum, 1994). *Cf.* Ludwik Bazylow & Paweł Wieczorkiewicz, *Historia Rosji* [*History of Russia*] 386–387 (Wrocław: Ossolineum, 2005); Marples 2006, at 61–62.

> demanding recognition of the gains of the Great October Revolution, Soviet decrees on land, peace, workers' control, and above all the recognition of the power of the Soviets of Workers', Soldiers' and Peasants' Deputies.[18]

The Bolsheviks also stressed the fact that

> [t]he Constituent Assembly in its current composition is the result of a balance of power that was formed before the Great October Revolution,

stating, moreover, that the majority of the assembly is counter-revolutionary, which was not only a feature of political blackmail. After reading the declaration, written by Lenin, the Bolsheviks and leftist Social Revolutionaries left the meeting, which was continued, despite the fact that the commander of the Assembly guard – in the words of the Bolshevik leader – the particularly dedicated team of seafarers – all the time directed the chairman of Viktor Chernov's machine gun rounds.[19]

At Lenin's command, however, the dissolution of the Constituent Assembly took place without bloodshed. The day after the commencement of the debates the deputies were not allowed to enter into the building. It was a repeat of the procedure used in the dissolution of the State Duma of the second term in 1907. The same situation was repeated in the period of probably the most serious constitutional crisis in Russia in 1993.

The issue of the fate of the Constituent Assembly was resolved during the first day of the session at the session of the Council of People's Commissars. The leader of the Bolsheviks appeared with him on the draft decree regarding the assembly. In the document, he suggested that the only bodies of state power should remain the councils of delegates. In the draft containing the justification of the decree, Lenin contrasted "the parliamentary bourgeoisie with the Soviet type of state."[20] He also outlined a scheme for the evolution of the Bolshevik system.

> The Republic, he argued, is higher than the republic with the parliament with the Constituent Assembly. The council's republic is higher than the republic with a legislative assembly. A republic of the complete socialism stands higher than the republic of councils. The communist society is higher than the socialist republic.[21]

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[18] The text of the Declaration in the Polish translation in Włodzimierz Lenin, *Dzieła wszystkie. T. 35* [Vladimir Lenin, *The Complete Works. Vol. 35*] 223 (Warsaw: Książka i Wiedza, 1988).

[19] Heller & Niekricz 1989, at 35.

[20] Znamienski & Szyszkin 1981, at 153.

[21] Lenin, *The Complete Works. Vol. 35*, *supra* note 18, at 427; Znamienski & Szyszkin 1981, at 153.

It follows from the argument that parliamentarism ceases to exist from the stage of liquidation of the legislative assembly. Lenin suggested that bourgeois parliamentarism would be replaced by a new form of parliamentarism based on a system of councils.[22] However, one could have the impression that the institution of the parliament would disappear in an evolutionarily in the Bolshevik state.[23]

The document also repeated, well-known from Lenin's earlier statements, strictly political arguments, arguing for the dissolution of the constituent.

> The Constituent Assembly – wrote Lenin in the draft decree – selected on the basis of the lists arranged before the October Revolution, was an expression of the old political power system, when in power were conciliators and cadets. By voting for the candidates of the SRs, the people could not choose between right-wing Socialist Revolutionaries, supporters of the bourgeoisie and left-wing supporters of socialism. Thus, the Constituent Assembly, which was supposed to be the crowning of the bourgeois parliamentary republic, had to become a hindrance on the path of the October Revolution and the Soviet power ... Working classes had to convince themselves, on the basis of the experience that the old bourgeois parliamentarism had survived, completely incompatible with the tasks of realizing socialism.[24]

Later in the decree, the Bolshevik leader sought to justify his stance on the Constituent Assembly, which in his opinion served as *a cover for the counter-revolutionary struggle for the overthrow of Soviet power.*[25] Lenin was keen to ensure that the proposed draft decree was formally adopted by the VTsIK, not only by the Council of People's Commissars, i.e. by the executive. That is why the adopted Decree of the Council of People's Commissars contained a sentence stating that *the Constituent Assembly was dissolved by the All-Russian Central Executive Committee*. The VTsIK has indeed approved the Decree written by the Bolshevik leader at the meeting convened, probably specifically for this purpose, on the night of 6 to 7 January.[26] According to the official communication, Lenin's draft was adopted by a majority (two deputies were against, five abstained). Like the previous regulations, the VTsIK Decree was published the next day in the press. In official journals no normative act adopted in connection with the institution of the Constituent Assembly has been published.

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22 Znamienski & Szyszkin 1981, at 153.

23 *Cf. Id*. at 163.

24 Lenin, *The Complete Works. Vol. 35*, *supra* note 18, at 229–230.

25 *Id.* at 231.

26 *Id.* at 460, nt. 96.

2. Work on the Creation of the Bolshevik Constitution

After the dissolution of the Constituent Assembly, it became clear that the legal right of three months before the coup had to be taken by another institution. Perhaps the Bolshevik leader also came to the conclusion that the legitimacy of the system being created would ensure an act of the constitutional rank, the adoption of which was to be the main task of the Constituent Assembly in the past. The adoption of the written constitution could also end the creation of the foundations of the new system.

The Third Congress of Soviets, which began the proceedings on 18 January 1918, became an occasion to start work on the Bolshevik Constitution. Ten days earlier, at the VTsIK meeting (6–7 January 1918), Lenin gave a speech devoted to the issue of the Constituent Assembly dissolution. In the speech he repeated the arguments presented earlier in the Decree of his authorship.

In a more systematic form, he stated that since 1905 the socialists were aware that the council system was a new form of state, different from the parliamentary system. He also pointed to the inevitability of the conflict between the Constituent Assembly and the institutions of councils.[27]

Lenin's speech did not contain any mention of the need to draft a new constitution. However, this happened at the congress. According to the first chronicler of the Bolshevik Basic Law, the rise to the problem of the new Basic Law gave the statement of the VTsIK chairman, Yakov Sverdlov, on the need to create "all-Russia power" in the state. Recalling the casus of the dissolved constituent, the assemblers agreed with the proposal of Leon Trotsky that the new system could have nothing to do with the former bourgeois form of government. Delegates also stated that

> ... the Third Congress was called to become the full Constituent Assembly of the victorious proletariat.[28]

The leftist Socialist-Revolutionaries insisted on writing the constitution, who, however, reportedly, according to Bolsheviks, did everything later, not to take part in the work on its formulation.[29]

During the meeting, two documents were accepted, which were considered part of the future constitution. It was the Declaration of Rights of Working and Exploited People (*Deklaratsiya prav trudyashchegosya i ekspluatiruyemogo naroda*) adopted by VTsIK on 3(16) January and the VTsIK Decree on Federal Institutions of the Russian

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[27] *Cf.* also Znamienski & Szyszkin 1981, at 148–155.

[28] *Гурвич Г.С.* История Советской Конституции [Gregory S. Gurvich, *History of the Soviet Constitution*] 1 (Moscow: Socialist Academy Edition, 1923).

[29] *Id.* at 5.

Republic adopted already during the convention (*Dekret o federal'nykh uchrezhdeniyakh Rossiyskoy Respubliki*).[30] The first of the documents, written entirely by Lenin, announced the new state of the Republic of Soviets of Workers', Soldiers' and Peasants' Deputies, based on the principle of free association of free nations. This relationship was first defined as a federation. In addition, the document confirmed the existence of many institutions previously adopted in the decrees of the RKL. Thus, he constituted the main goal of the state is the elimination of human exploitation by a human, the division of society into classes, the final liquidation of exploiters and the "realization of socialism in all countries." The Declaration also confirmed the previously introduced in the Bolshevik legislation the abolition of private land ownership, the introduction of workers' control over production, the nationalization of banks. For the first time, the obligation to work (*trudovaya povinnost'*) was established in the document, then codified in the Labor Code (*Kodeks zakonov o trude*) and in the Constitution of the RSFSR. *General armaments of all workers* and a *complete break with the adventurous policy of bourgeois civilization* were also proclaimed.

Probably for the first time in the Declaration it was stated *expressis verbis* that

> at the moment of the decisive struggle of the people with its exploiters, there can be no place for any exploiters in any organ of power.[31]

In the Bolshevik Constitution, this principle was later extended to several categories of the population, applying the criterion of origin or profession to the deprivation of rights. This principle was in contradiction with the social system projected in the same Declaration. It set itself the goal

> ... to create deeply free and voluntary, and hence, a more complete union of the working classes of all the peoples of Russia ... united on the principles of full voluntariness.

As the addressee, the Declaration mentioned the dissolved Constituent Assembly. However, unlike the Constituent Assembly, which was established two weeks earlier, it accepted the proposed regulations without reservations.

The second of the issued normative acts, being the federal authorities, confirmed the existence of three central institutions of the Bolshevik state: the Congress of Soviets, its Executive Committee (VTsIK) and the Council of People's Commissars, which also had wide legislative powers, according to the *Decree on the Procedure of Passing Laws*.[32]

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[30] Gurvich 1923, at 2. Text of the Declaration in *Decrees of the Soviet Authorities. Vol. 1*, *supra* note 6, at 341–343.

[31] Part IV of the Declaration. *Id.*

[32] *Id*. *See* also *Исаев И.А.* История государства и права России [Igor A. Isaev, *History of State and Law of Russia*] 262 (Moscow: Yurist, 1995).

Prior to the adoption of the Constitution, other regulations were also included in constitutional statutes. Because of the significance and changes in ownership relations, they actually included Decrees on Land and Peace, and even the Decree on the Socialization of the Land from February 1918.[33]

In addition to Trotsky and Sverdlov, participation in the work on the constitution of the Third Congress of the Council entrusted to the People's Commissar for Nationality, Joseph Stalin. It was Stalin who proposed the term central authorities as federal.[34] He also proposed that the constitution should pass the next congress of councils.

After the congress, for unknown reasons, the work on the new basic law was stuck. A similar condition lasted over two months. According to official publications, the reason for postponing the topic was the involvement of many Bolsheviks in the matter of swift commencement of peace negotiations, which ultimately led to the conclusion of peace in Brest (March 1918).[35]

Work on the new constitution has gained pace since 1 April 1918. On that day, the VTsIK chairman, Yakov Sverdlov, spoke at the parliamentary meeting with the lecture "On the Need for a Strict Separation of Functions Between Different Authorities."[36] Based on the nominal occurrence of the head of state, it can be concluded that the need to initiate work on the basic law was caused by the competence clash of the new authorities and administration. It resulted directly from strictly formal reasons.

After the Sverdlov's speech, a resolution was passed immediately on establishing a Commission for the Development of the Constitution of the Republic of the Soviet Republic.[37] The first meeting of the commission took place on 5 April 1918.

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33 Izdebski 1987.

34 Gurvich 1923, at 2–3.

35 *Cf.* Lenin, *The Complete Works. Vol. 35*, *supra* note 18, at 530, nt. 13; *Портнов В.П., Славин М.М.* Этапы развития Советской Конституции (историко-правовое исследование) [Victor P. Portnov & Marc M. Slavin, *Stages of Development of the Soviet Constitution (Historical and Legal Research)*] 12 (Moscow: Nauka, 1982); Romuald Wojna, *W ogniu rosyjskiej wojny wewnętrznej 1918–1920* [*In the Heat of the Russian Internal War of 1918–1920*] 20, 39 (Warsaw: Panstwowe Wydawnictwo Naukowe, 1975).

36 О необходимости строгого разграничения функций между различными органами власти // Известия. 2 апреля 1918 г. [On the Need for a Strict Separation of Functions Between Different Authorities, Izvestia, 2 April 1918]. *See* also Gurvich 1923, at 5.

37 Gurvich 1923, at 5. On the basis of the archival data cited later, the name of the commission was *Komissiya po vyrabotke proyekta konstitutsii Sovetskoy Respubliki pri Vserossiyskom Tsentral'nom Ispolnitel'nom Komitete* [Commission on Drafting the Constitution of the Soviet Republic Under the All-Russian Central Executive Committee] (ГА РФ. Ф. 6980. Оп. 1. Д. 1–18 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 1–18]). G.S. Gurvich instead, used the name consistently *Komissiya dlya razrabotki Konstitutsii Sovetskoy Respubliki* (Commission for Drafting the Constitution of the Soviet Republic). This is probably the colloquial name.

The commission consisted of fifteen people representing several ministries and three political groups: the Bolsheviks, left-wing Social Revolutionaries and the most radical faction of the latter – the so-called Socialists-Revolutionaries Maximalists.[38]

The only non-Bolshevik member of the commission was the deputy and closest associate of the people's commissar of justice, Isaac Steinberg, A.A. Shreyder (around 1894–1930).

The first draft of the constitution was prepared in early April by the People's Commissariat of Justice. Three days before the committee was formally appointed, during a meeting of the VTsIK, it was decided to delegate to the commission on behalf of the head of the Department of State Law, Mikhail Reisner,[39] to the commission. He was considered the actual creator of the draft constitution.[40]

At the beginning of the committee's meeting, attention was paid to the need to develop a solemn preamble, which is a form of agitation under the Soviet regime.[41] It was also stated that the constitution should not be issued by the "working class of Russia" as proposed, but the Congress of Soviets as a formal authority. Reisner, who from the beginning of the committee's work set the tone of the meeting, also proposed to make VTsIK absolutely the supreme body in the state. According to him, this body had the role of a third instance in relation to all issued normative acts, decisions or court judgments.[42]

Attention was also paid to the agitation repercussion of the constitution. Reisner's proposal was also approved in order to replace the word "state" (*gosudarstvo*) in the original text of the constitution with the expression "socialist republic."[43]

On 10 April 1918, at a meeting of the Committee, Reisner gave a lecture on the basic principles of the new constitution[44]. Such principles were federalism, democracy and Soviet power (*sovetskaya vlast'*). Reisner declared the federal type state free of any nationalist tendencies. He defined democracy as a direct and representative

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38 ГА РФ. Ф. 6980. Оп. 1. Д. 17. Л. 1а [State Archive of the Russian Federation, F. 6980, Op. 1, D. 17, P. 1a] (the list comes from 8 April 1918).

39 ГА РФ. Ф. 6980. Оп. 1. Д. 17. Л. 2 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 17, P. 2].

40 This is suggested by the author himself, *Гойхбарг А.Г.* О Советской конституции // Пролетарская революция и право. 1918. № 3/4. С. 3–14 [Alexander G. Goikhbarg, *On the Soviet Constitution*, 3/4 Proletarian Revolution and Law 3 (1918)]. Cited in *Гойхбарг А.Г.* Пролетариат и право [Alexander G. Goikhbarg, *Proletariat and Law*] 26 (Moscow: Publication of the People's Commissariat of Justice, 1919).

41 ГА РФ. Ф. 6980. Оп. 1. Д. 12 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 12].

42 *Id.* at 5.

43 *Id.* at 13.

44 Доклад члена комиссии М.А. Рейснера об основных началах Конституции РСФСР // ГА РФ. Ф. 6980. Оп. 1. Д. 12. Л. 97–97а [Report of the Member of the Commission M.A. Reisner on the Basic Principles of the Constitution of the RSFSR, State Archive of the Russian Federation, F. 6980, Op. 1, D. 12, P. 97–97a].

participation in governing the country, to which, however, only working workers and peasants were entitled in the Soviet Republic. The principle of Soviet power consisted in a uniform structure of organs of authority, based on the principles of direct democracy at the local level. According to Reisner, the state ruled on the Soviet principles did not need the institution of the division of powers, and it could also have happened without the organs guaranteeing the observance of civil rights. These functions, like all other ruling activities, were served by councils.

On 10 April, the second draft of the constitution was also prepared by the communists commissar for the nationalities, Joseph Stalin, who already had far-crystallized assumptions of the future constitution. Unlike all other proposals, the project of the future dictator of the USSR consisted of only three points, occupying less than half a page of the typescript.[45] According to the literature, the document was published only in the late nineteen nineties by myself.[46]

The Stalin project, as titled at the committee meeting, consisted of a miniature preamble and three "points" defining the basic features of the Soviet state. In the first part, the author, like the basic act later passed, stated that the constitution is of a temporary character and its primary purpose is

> ... establishing the dictatorship of the urban and rural proletariat ... in order to completely suppress the administration of the bourgeoisie, the liquidation of human exploitation by man and the establishment of socialism in which there will be neither class oppression nor state power.

Stalin also stated that the Russian Republic is a free socialist society for all working Russia. In the seemingly voluntary organizational structure, however, there was a definite rigor: the entire organization of society was to rely on the system of councils. The difference, however, was in the very nomenclature: unlike all the other

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[45] ГА РФ. Ф. 6980. Оп. 1. Д. 1. Л. 5–6 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 1, P. 5–6]. After the departure from legal nihilism, Stalin's project was discussed as a thesis "On the Type of Federation of the Russian Soviet Republic" (title as of the original). *Вышинский А.Я.* К истории Советской Конституции [Andrey Ya. Vyshinsky, *On the History of the Soviet Constitution*] 11 (Moscow: Partizdat, 1937). However, this is an obvious untruth.

[46] The full text of the constitution draft by Stalin was as follows:

"The basic task of the RSFSR Constitution in the current transition is to establish the urban and rural dictatorship of the proletariat and impoverished peasants, in the form of the All-Russian Soviet Authority for the total suppression of the bourgeoisie, the liquidation of human exploitation by man and the establishment of socialism, in which will not be either class oppression or state power.

1) The Russian Republic is a free socialist society of all working Russia, joining the city and rural councils.

2) Circuit councils are distinguished by a separate subjectivity and national composition – they combine into autonomous peripheral unions, led by peripheral conventions of deposed councils and their executive bodies.

3) The Soviet peripheries are united in the Russian Soviet Republic, headed by the All-Russian Congress of Soviets, and in the period between the congresses, the All-Russian Central Executive Committee."

regulations of wartime communism in the Stalin project, the councils received the names of the unions (*soyuzy*). The preservation of the current name of the People's Commissar for Nationalities predicted only for VTsIK.

The Stalin project deserves to be presented primarily because of the originality, the person of the designer and the ideological determinants of the era. In the last aspect, there are strong nihilist tendencies. It is all the more interesting that Stalin, as it is known, never belonged to the group of nihilists, moreover – he was a strong opponent of similar ideas.

It is also interesting that the Stalin Project resembled the Constitution of Nicholas II. Both documents were equally short, and on the first one, implicitly, they tried to build Russian constitutionalism. The Constitution of 1905–1906 was certainly known to Stalin. It is also difficult to suppose that the People's Commissar for Nationality could have known many constitutional acts.

Obviously, Stalin's project was not accepted. The points proposed by Stalin have, however, become part of the fifth chapter of the Constitution (General Provisions), entering into them as individual points (9–12).

In the constitution, from the very beginning, great importance was attached to issues of civil rights, but understood mainly as an active and passive right to vote. This was understandable due to limitations imposed in earlier electoral regulations for the State Duma. In the case of the Bolsheviks, the originality was to exclude the active and passive electoral rights of the category of people who, during the time of the monarchy, enjoyed the opportunity to participate in the election. Deprivation of similar elective rights (*lishenie prav* – hence the name of *lishentsy*) in the conditions of the civil war resulted in various ailments, ranging from food cards that the refugees were not entitled to, through the list of hostages to which they were the first candidates, to actual civilian death. The version of the article proposed at the beginning of the meeting (about 10 April) in this case included groups with much wider rights, doing so on the principle of a negative definition. The population groups enjoying civil rights as well as the persons deprived of such rights have been defined comprehensively. Due to the uniqueness of the material presented, the original version of the article is probably for the first time provided in its entirety. The constitution article entitled "On the Electoral Law" constituted the following (the original style was retained in the translation):

> 1. The following citizens of both sexes of the Russian Soviet Federative Socialist Republic, who are at the age of 18 on the day of the election, have the right to elect and be elected to the councils of delegates [*sovdepy*]:
>
> 1) All those who take their means to live productively or socially useful work, taking place after [confirmation] trade unions, namely:
>
> a) Of the workers.
>
> b) Peasants, landowners,

c) Officials – representatives of manual labor,

d) Craftsmen,

e) Officials – representatives of intellectual work,

f) Practicing profession, science, art, literature and technology without distinction of branches and specialties;

2) Members of the a-b-c group families in the case of: 1) continuous work at home, such as running a household, bringing up children and caring for ill and infirm persons, even if these members did not belong to a trade union ...

2. They do not choose and cannot be elected:

1) Everyone, in general, people resorting to [employment] hired force to make a profit,

2) All those living on non-work-related income, such as: capital interest, property benefits, etc.,

3) All merchants, merchants and traders,

4) Religious worshipers [*sluzhiteli religioznykh kul'tov*] as such,

5) Employees and agents of former protected units, as well as members of the house in Russia,

6) Persons recognized in a defined procedure incapacitated or in part, as well as deaf people in custody.[47]

As you can see, the design of the Bolshevik Constitution formed the very beginning assumed formal limitation of civil rights. The regulation also did not raise any objections from committee members. The postulates of depriving citizens of political rights because of the activities they performed were also known to the public. In the introductory article, published in the Bolshevik daily *Pravda* in mid-May, the described principle is presented as distinguishing the new constitution from the basic laws of other (bourgeois) states. The tone of the article testified that a similar recipe was already widely criticized in the Bolshevik circles. In the article, under the mocking title Constitution does not like, *Pravda* warned groups of people who were to be excluded from participation in elections before breaking the constitutional ban: "get out from electoral lists" (*Von iz izbiratel'nykh spiskov*), and also to you do not have access to the election. According to the newspaper, the exclusion of groups of people from participation in political life was exceptional. "Capitalists and the bourgeois" could – as the *Pravda* reported – get electoral rights if they took to work. It depends – the newspaper stated – only from themselves (*eto v ikh vlasti*).[48]

Other proposals for restricting civil rights were also made during the deliberations of the committee. The most bizarre proposal was put forward by the Social Revolutionaries, who presented their own draft constitution. The name of the state

[47] ГА РФ. Ф. 6980. Оп. 1. Д. 1. Л. 8–9 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 1, P. 8–9].

[48] *Id.*

was different in the draft Social Revolutionaries, which was defined only as the Republic of Labor (*Konstitutsiya Trudovoy Respubliki*). The basic law was further divided into paragraphs, not articles. Besides, the presented text did not differ much from that of Bolshevik. It even contained a provision permitting the choice of a place of work (which the Bolsheviks did not envisage in the *Kodeks zakonov o trude*). The Socialists-Revolutionaries Maximalists proposed very strict adherence to the obligation to work (*trudovaya povinnost'*), they also insisted on the complete abolition of private property. Most probably, the radical provision of the Socialists-Revolutionaries Maximalists project provided for exceptions to the basic entitlement of citizens – the right to life.

In § 7 it was written that

> … the right to life is not entitled to:
> a) The ones who shall not work,
> b) Enemies of the working people [to the wrath of a troubled nation] or [persons] violating the legal order of the Republic,
> c) Persons performing forced labor or deprived of their liberty.[49]

In comparison to similar projects, the Bolshevik concepts were considered quite moderate. This also concerned left-wing Social Revolutionaries showing greater radicalism, for example in the matter of abolishing the right to land ownership, which the Bolsheviks approved without exception, first in decrees on land and on the socialization of the land, and then in the constitution. Discrepancies between the left-wing Social Revolutionaries, Socialists-Revolutionaries Maximalists and the Bolsheviks in the drafting the constitution also concerned many other issues. For example, the left SRs advocated for a decentralized state, although not according to nationality criteria[50]. They also postulated the inclusion of councils in the system of municipal institutions, depriving them of political functions. Similarly, the project of the People's Commissariat of Justice, which recognized the so-called *communes*, associating in federated unions (*federativnye ob'edineniya*), then – in provinces (*provintsii*), and finally – in federal republics, on the principles of full voluntariness joining an independent state (RSFSR). The essence of the project developed by M.A. Reisner and the NKJ Collegium, under which the work was headed by A.G. Goikhbarg (1883–1962), was to create a system of maximum decentralization of

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[49] Материалы III Всероссийской конференции Союза эсеров-максималистов. Москва, 10–15 мая 1918 г. Проект основ Конституции Трудовой Республики, принятый на конференции // Союз эсеров-максималистов. 1906–1924 гг. Документы, публицистика [*Proceedings of the III All-Russian Conference of the Union of Socialists-Revolutionaries Maximalists. Moscow, 10–15 May 1918. Draft of the Constitution of the Labor Republic, Adopted at the Conference* in *Union of Socialists-Revolutionaries Maximalists. 1906–1924. The Documents, Journalism*] 128 (Moscow: ROSSPEN, 2002).

[50] Further discrepancies are described based on cited work: Isaev 1995, at 292.

the state administration. Municipal, provincial and peripheral management bodies (*oblastnye*) imposed economic tasks, but not political ones. Nevertheless, the project of Reisner and Goikhbarg was more restrictive than the adopted draft constitution. For example, the authors of the NKJ project proposed to include the following article in the constitution:

> ... in the event of violation by individual Councils and their congresses of this Constitution and the socialist system they establish, the All-Russian Central Executive Committee has the right to: 1) revoke the relevant provisions with new elections; and 2) adopt all necessary measures, including mobilization of the Soviet Army and military interference [*voennoe vmeshatel'stvo*].

All groups, besides Bolshevik, also insisted on a closer dependence of the Council of People's Commissars from VTsIK and the Congress of Soviets. This was motivated by the need for a more complete connection of the authorities. Most of the proposed regulations were absolutely irreconcilable with the Lenin concept, which by July 1918 had never participated in the development of the draft. Nonetheless, before directing the final version to VTsIK, the Bolshevik leader took the decision to take action into his hands. At the beginning of July, the VTsIK appointed a special commission for the final elaboration of the project, headed by the chairman of the Council of People's Commissars in person.[51] Lenin personally made only one amendment, adding to the basic act an article on the right to grant in the RSFSR full political rights to foreigners staying on the territory of the country, if they deal with production work.[52]

However, all the postulates of the decentralization of the state disappeared from the final version of the project. The leader of the Bolsheviks also rejected the NKJ project, which foresaw – according to Goikhbarg – "a combination of state and social system."[53] A similar concept was unacceptable to Lenin due to the strong executive power in the center and in the field. Speaking at the next (Sixth) Congress of Soviets in November 1918, the Bolshevik leader, as he often did – in the margins – assessed the whole situation, stating:

> ... we know that this Soviet constitution, which we approved in July, is not a figment of a commission, it is not a creation of lawyers, it is not copied from other constitutions. There was no such constitution in the world as ours.[54]

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[51] Isaev 1995, at 292–293.

[52] Włodzimierz Lenin, *Dzieła wszystkie. T. 37* [Vladimir Lenin, *The Complete Works. Vol. 37*] 492 (Warsaw: Książka i Wiedza, 1988).

[53] Goikhbarg 1918; Goikhbarg 1919, at 22–23.

[54] Włodzimierz Lenin, *Wystąpienie w rocznicę rewolucji 6 listopada* [*Speech on the Anniversary of the Revolution of 6 November*] in Lenin, *The Complete Works. Vol. 37*, *supra* note 52, at 138.

3. Important Principles and Provisions of the RSFSR Constitution of 1918

The Constitution of the Russian Soviet Federative Socialist Republic was finally accepted at the Fifth All-Russian Congress of Soviets on 10 July 1918. However, the extraordinary resolution was dictated by the adoption of the Constitution only *de jure*. According to the published on 5 July 1918 in the newspaper *Pravda* of the agenda, the adoption of the Basic Law is provided only in the fourth, penultimate point of the agenda. However, previous cases concerned such issues as the report of the Council of People's Commissars (the first item of the meeting), *the problem of food supply* and *the organization of the Socialist Red Army*.[55] Establishing a similar procedure was probably supposed to prevent discussion of particular provisions of the Constitution. In view of the earlier development of the project, the Congress of Soviets passed the Constitution without special discussion at the final stage of the debate. The Basic Law came into force immediately after its adoption. During the congress, neither Lenin, who was apparently involved in suppressing the so-called rebellion of left-wing Socialist Revolutionaries, which took place on 6–7 July, did not sacrifice the new Constitution.

The adopted Constitution of the Bolshevik state constituted, to some extent, a compromise between the previously described postulates of political groups and people's commissariats preparing it. It consisted of six parts, seventeen chapters and ninety articles. As in other particularly solemn regulations, the Constitution was given the name "law" to which – as in European systems – the adjective "basic" was attached. The document was published in a separate official journal, issued on 20 July 1918.[56]

The Basic Law – the Constitution of the Russian Soviet Federative Socialist Republic – was opened by a short preamble. Unlike other preambles in Bolshevik

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[55] Пятый Всероссийский съезд Советов рабочих, солдатских, крестьянских и казачьих депутатов: стенографический отчет. Москва, 4–10 июля 1918 г. [*Fifth All-Russian Congress of Soviets of Workers', Peasants', Cossacks' and Red Army Deputies: Shorthand Report. Moscow, 4–10 July 1918*] (Moscow: Publishing House of the All-Russian Central Executive Committee, 1918).

[56] Собрание узаконений и распоряжений Рабочего и Крестьянского правительства. 1918. № 51. Ст. 582 [Collection of Laws and Orders of the Workers' and Peasants' Government, 1918, No. 51, Art. 582]. During the war communist period, the Constitution was repeatedly reprinted in the form of a separate brochure. Bolshevik lawyers also attached it to their work on this subject. This was done, for example, by M.A. Reisner (*Рейснер М.* Что такое Советская власть? [Mikhail Reisner, *What Is Soviet Power?*] 32–46 (Moscow: People's Commissariat of Agriculture, 1918) and P.I. Stuchka (*Стучка П.И.* Конституция РСФСР в вопросах и ответах [Peter I. Stuchka, *Constitution of the RSFSR in Questions and Answers*] 66 (Moscow; St. Petersburg: Communist, 1919)). The reprint of the Constitution of 1918 was also published in the sixties (*see, e.g.*, Декреты Советской власти. Т. 2 [*Decrees of the Soviet Authorities. Vol. 2*] 550–564 (Moscow: State Publishing House of Political Literature, 1959) and Советские Конституции. Справочник [*Soviet Constitutions. Encyclopedia*] 128–153 (P.S. Romashkin (ed.), Moscow: State Publishing House of Political Literature, 1963)).

legislation, it contained no ideological content, only formal information. In addition to the statement of the publication of the Constitution by the congress of councils, information about the adoption of the Basic Law by the congress of the councils and the inclusion in the Constitution of the Declaration of Rights of Working and Exploited People. The People's Commissariat of Education was also recommended in the preamble:

> to introduce in all schools and educational units, without exception, the teaching of the basic principles of this Constitution as well as their explanation and interpretation.

The ideological goals of the Constitution are explained in the second chapter. It confirmed the abolition of private land ownership in the Land Decree, which is to constitute "nationwide property" and the nationalization of forests, minerals and model land estates, constituting "national property." The nationalization of basic industries was also confirmed, recalling the Decree on Workers' Control. The principles adopted in the Decree on Peace were also repeated, complementing them with the Declaration on the proclamation of Finnish independence, the commencement of withdrawal of troops from Persia and recognition of Armenia's sovereignty.

One of the initial articles also stated:

> In order to eliminate parasitic layers of society and organize the economy, a general obligation of work is introduced [*vseobshchaya trudovaya povinnost'*].

A similar rule was repeated once again in famous Article 18 of the Constitution, stating that

> ... the Russian Soviet Federative Socialist Republic recognizes work as an obligation for all citizens of the Republic and proclaims the slogan "He who does not work shall not eat" ["*Kto ne rabotaet, tot ne dolzhen est'*"].

The Basic Law also managed the general "arming of working people." Several chapters of the Constitution mainly contained propaganda regulations. Therefore, the following was condemned:

> bourgeois civilization, building the prosperity of the exploiters of the few selected nations on oppression of hundreds of millions of people working in Asia, in general in colonies and small countries.

The main political goals of the RSFSR were:

> ... the liquidation of human exploitation by man, the complete removal of division into classes, the ruthless [*besposhchadnyy*] suppression of exploiters, the assurance of a socialist organization of society and the victory of socialism in all countries.

As in all the previously adopted normative acts, the Constitution does not formulate the definition of repeatedly repeated concepts (for example, "exploiters" or "socialist organization of society").

In the fifth chapter, devoted to the general principles of the Constitution, literally the rules of territorial organization, proposed in the Stalin project described earlier, were repeated. The only change introduced was the replacement of the name "union" (*soyuz*) proposed by the People's Commissar for Nationality, the name "district council." As in the project, all federation entities were to belong to it on an autonomous basis. However, these concepts are not specified in the text of the Constitution.

Many articles of the Constitution were devoted to social rights and, to a much lesser extent, to political ones. According to the latter, the freedom of the press was recognized and citizens were granted the right to freedom of religion, free organization of meetings, rallies, parades, etc. and the right to a comprehensive and free education. The laws in question were largely due only to "working people" or "the poorest." Only in the case of freedom of assembly, the Act did not use similar terms, as we shall see, however, it could only be a mistake of the legislator, which was corrected by another general clause.

Similarly to the discussion on the draft constitution, the Constitution of the RSFSR introduced inequality of citizens, depriving some of them of political and social rights. At first glance, it seemed that the restrictions apply only to active and passive electoral law. However, this principle was extended by the provision of the Constitution, constituting in this case a specific provision of the *legi generali*. It stated:

> Guided by the interests of the entire working class, the Russian Soviet Federative Socialist Republic deprives individuals and groups of rights used by them to the detriment of the interests of socialist revolution.

Similar rules were repeated twice in the Constitution. Earlier, in the next general norm it was stated that *for exploiters cannot be a place in any of the authorities*. Clarification of the above principles was made in Article 65, concerning electoral rights. It was a repetition of the provision cited when discussing the draft constitution.

The analysis of the provisions of the Bolshevik Basic Law penalizes that the circle of persons having electoral rights was significantly narrower than the circle of persons excluded from the right to use them. The right to choose and eligibility was vested only in persons *gaining resources for a socially useful production and social work*, that is, workers, peasants, Cossacks and soldiers of the Red Army.

It was only in the second part of the Constitution that the structure of the Soviet power was used to use the terminology taken from the Act. At the central level, it was the All-Russian Congress of Soviets of Workers', Soldiers', Peasants' and Cossack' Deputies. This body was elected proportionately at two levels – city councils (one delegate for 25,000 voters) and county councils (one delegate for 125,000). A similar procedure had to break the delegates from voters, despite the Constitution being able to appeal to delegates at any time.

What seems strange, the Constitution of the RSFSR did not mention almost any competences of the congress, which were included in a rather scattered form. It was limited to the statement that it is the supreme power in the republic. It has also been added that the congress should be convened at least twice a year by the All-Russian Central Executive Committee (VTsIK) elected from among its members. At the request of the councils representing the town counting at least one third of the country's population, VTsIK may have convened an extraordinary meeting. It could do it on its own initiative.

The All-Russian Central Executive Committee, just as before the Constitution was adopted, constituted the parliament *sensu stricto*. The number of this body was fixed by the Basic Law for not less than two hundred people. The VTsIK received the competences of the highest legislative, management and control body of the state. Its tasks also included "determining the general direction of the government's activities" and harmonizing legislation. The VTsIK also had the right to issue its own decrees and orders (*rasporyazheniya*). Theoretically, the All-Russian Central Executive Committee created the Council of People's Commissars, approving the draft decrees and other normative acts submitted by it and by other central offices.[57]

One of the next articles of the Constitution, however, limited the principle of subordinating the Council of People's Commissars to parliament in the event of issuing a decree to *resolutions and decisions having important political significance*. As the modern Russian theoretician of the law writes, in fact in the Bolshevik state of that period there were as many as three legislative institutions: the Council of Ministers, the VTsIK and the Council of People's Commissars.[58] By virtue of the Constitution, however, the exclusivity of the Council of People's Commissars in law making was nominally limited, which was *de facto* assumed shortly after the Bolshevik takeover of power *Dekret o poryadke utverzhdeniya i opublikovaniya zakonov*.

The Council of People's Commissars was from the beginning of the Bolshevik state the proper center of exercising power. The Constitution of 1918 confirmed this state of affairs. The Council, consisting of eighteen members acting under the direction

[57] Article 33 of the Constitution. However, the dependence of RKL on VTsIK was incomplete (*see* below), although some authors simply refrained from citing only the article described. *See, e.g.*, Stanisław Ehrlich, *Ustrój Związku Radzieckiego. T. 1* [*System of the Soviet Union. Vol. 1*] 30 (Warsaw: Panstwowe Wydawnictwo Naukowe, 1954).

[58] Isaev 1995, at 293.

of its chairman, was given the competence of the general management of state affairs. Therefore, it was not a purely administrative body, in line with the Leninist and cruise-oriented concept discussed earlier, rejecting the division of powers. The Basic Law gave the Council of People's Commissars the right *to issue decrees, orders, instructions and to take all steps necessary for the proper and rapid course of state life*.

Therefore, it was not a purely administrative body, in line with the Lenin's and Reisner's concepts discussed earlier, rejecting the division of powers. The Basic Law gave the government (*Sovet narodnykh komissarov*) the right *to issue decrees, orders, instructions and the adoption in general of all the steps necessary for the correct and rapid running of the life of the state*.

In law, the VTsIK received the right to repeal or suspend all resolutions or decisions of the Council of People's Commissars, however, as far as it was possible to determine – it never used this option. The limitation of the VTsIK's competences was also a provision granting Council of People's Commissars the right to implement projects directly (*meropriyatiya*) requiring immediate implementation.[59]

Pursuant to the provisions of the Constitution, the scope of competences of individual People's Commissars was broad. Their competence included *sole decision-making in all matters falling within the scope of activities of the relevant people's commissariat*. The decision of the People's Commissar could be repealed only by the decision of the head of the Council of People's Commissars or the All-Russian Central Executive Committee. The decision to these bodies could also be appealed against by a member of the auxiliary body of the People's Commissar (*Collegium of the Commissariat*).

A similar system was used in local organs, which were the provincial and municipal, district (*uezd*), and commune councils. Such bodies were appointed by the appropriate level of congresses, and individual, usually five-member executive committees exercised power over the conferences. The latter constituted the most important authority in the field, and the organs of the executive power could also establish their own resolution. However, contrary to the name describing the state as a republic of councils, all local institutions had little power. Article 61 of the Constitution stipulated that the scope of activity of local councils at all levels was primarily *the implementation of all resolutions* [*postanovleniya*] *of the respective superior organs of the Soviet power*. Other permissions boiled down to tasks of much smaller importance. Local councils could only take steps "in order to raise a given area in terms of culture" and settle all matters of purely local significance (*imeyushchiye chisto mestnoe znachenie*). Local councils were also obliged to unite "all Soviet activities" within a given area.

The system created in this way was characterized by full hierarchy, not allowing any self-government of local authorities. With the appearances of decentralization, the pyramid of power organs was created, at the top of which the omnipotent VTsIK stood, and in fact – making decisions on its behalf, a few-man presidium. Even the

[59] Notice to Article 41 of the Constitution.

competences of the latter body were however limited in relation to the Council of People's Commissars. Only his organ had real and the greatest power.

The competences of many important ruling institutions have not been included in the Constitution at all. This concerned the Bolshevik party,[60] the system of extraordinary commissions, as well as the supreme governing body for the transformation of industry – the Supreme Council of National Economy. The Bolshevik Constitution mentioned very few institutions at all.

The extensive influence of the Bolshevik party resulted primarily from the fact that the party of Lenin was from the middle of 1918 the only party forming part of the Council of People's Commissars. It had an absolute majority in central institutions (VTsIK) and local councils. This state was perfectly in line with Lenin's position, which he believed that RCP(b) *should gain for himself an indivisible political rule in councils and real control over their activities*.[61]

However, the Bolshevik party maintained its position in the organs of government, administration and the judiciary on the basis of a factual majority, not normative, which apparently resembled a model of European parliamentarism with a winning grouping. However, this system was not applied in Russia to the consistent taking over of power by the Bolsheviks – as the only political group.

The adoption of the Constitution was given a broad propaganda frame. A similar function seemed the most important thing for the Bolshevik leader himself. In his works, however, Lenin did not devote much attention to the Basic Law, limiting himself to recalling some of its principles on the margins of the fundamental subject matter of his political journalism. Only in the work "The Proletarian Revolution and the Renegade Kautsky," written in October 1918, the Bolshevik leader devoted a separate chapter of the chapter to the Basic Law.[62]

He stated in it that the Constitution was born as a result of the revolutionary struggle, and the councils themselves "were formed without any constitution and for over a year ... they lived without any constitution."[63] The Bolshevik leader also pointed out to the adversary that he saw the "arbitrariness" of the new Constitution, and "... from us requires a constitution drawn up to the last letter within a few months."[64] Lenin quoted Lenin in his characteristic, polemical style:

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[60] Wictor Sukiennicki, *Ewolucja ustroju Związku Socjalistycznych Republik Radzieckich w świetle oficjalnych publikacji władzy radzieckiej* [*Evolution of the Constitution of the Union of Soviet Socialist Republics in the Light of Official Publications of Soviet Power*] 31 (Vilno: Research Institute of Eastern Europe, 1938); Wacław Komarnicki, *Nowy ustrój państwowy Związku Sowietów* [*New State System of the Soviet Union*] (Wilno, 1938) (Aug. 1, 2019), available at http://www.polskietradycje.pl/artykuly/widok/301.

[61] Sukiennicki 1938, at 86; Isaev 1995, at 319.

[62] Włodzimierz Lenin, *Rewolucja proletariacka a renegat Kautsky* [*The Proletarian Revolution and the Renegade Kautsky*] in Lenin, *The Complete Works. Vol. 37*, *supra* note 52, at 267–275.

[63] *Id*. at 267 (underlining Lenin).

[64] *Id*. at 269.

> ... "The willfulness"! Just think how much bottomless, most filthy servility towards the bourgeoisie, how much the most dull pedantry reveals such a charge – he wrote. – When the bourgeois and mostly reactionary lawyers of the capitalist countries worked out the most detailed regulations over the centuries or decades, they wrote dozens and hundreds of laws and commentaries on laws opposing the worker, embarrassing the poor hands and legs, making every ordinary man work and people thousands of obstacles and harassment – oh, then the bourgeois liberals and Mr. Kautsky do not see in this "arbitrariness"! There is "order" and "rule of law"![65]

The quoted passage was at the same time the only theoretical reference to the Bolshevik Basic Law. Looking at the text, it can be said that Kautsky considered one of the tasks of the Basic Law to be the ultimate liquidation of the exploiters and the creation of a state in which they do not exist. Lenin also accused the adversary that he was "interested only in the formal and legal aspects of the case" in the matter of the constitution, from which it can be inferred that the Bolshevik Constitution was not rigid in sticking to the letter of the law. The next part of the text was insulted by Kautsky himself, like: "Judas Kautsky," "despicable renegade," "snoophant of the bourgeoisie" and similar.

In his other works, the leader of the revolution did not add anything original about the Constitution of 1918, once again reminding only of its role of suppressing exploiters.[66]

In addition to Lenin's work, a few more thorough studies were devoted to the Constitution. Shortly after the adoption of the Basic Law, a special issue of the bi-weekly of the People's Commissariat of Justice appeared on this subject, which was given the subtitle as the Book of the Constitution.[67] As in previous issues, the editor of the edition was A.G. Goikhbarg. The journal also included an article by Goikhbarg, reprinted a year later in a collection of articles by him. However, the author's work on the subject of the 1918 Constitution ended, although it seems that he had greater ambitions in this case.[68] Nevertheless, the main exegete of the new Constitution was P.I. Stuchka.

In the considerations of Bolshevik lawyers regarding the Constitution of 1918, contrary to the concept of other regulations or institutions, the fundamental

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65 Lenin, *The Complete Works. Vol. 37, supra* note 52, at 269–270 (underlining Lenin).

66 *Cf., e.g.*, Włodzimierz Lenin, *Sprawozdanie Komitetu Centralnego na IX Zjeździe RKP*(*b*) [*Report of the Central Committee at the Nineth Congress of the RCP(b)*] in Włodzimierz Lenin, *Dzieła wszystkie. T. 40* [Vladimir Lenin, *The Complete Works. Vol. 40*] 239–242, 258 (Warsaw: Książka i Wiedza, 1988); *Przemówienie na III Zjeździe związków zawodowych* [*Speech at the Third Congress of Trade Unions*] in *Id.* at 258; Włodzimierz Lenin, *O państwie* [*On the State*] in Włodzimierz Lenin, *Dzieła wszystkie. T. 39* [Vladimir Lenin, *The Complete Works. Vol. 39*] 79–80 (Warsaw: Książka i Wiedza, 1988).

67 Пролетарская революция и право. 1918. № 3/4 [3/4 Proletarian Revolution and Law (1918)].

68 Goikhbarg 1918; Goikhbarg 1919, at 21–32.

convergence of the views expressed prevailed. The main feature of all the works was mainly popularization, consisting in quoting entire articles of the basic act and explaining some phrases. In this case, only strictly commenting activities were carried out, and if theoretical considerations were made, they always came down to the statement that the purpose of the basic act was to "suppress exploiters" or the possessing classes. Goikhbarg's article, though in many places containing similar content, is an exception in this respect. The author included a remark that the Constitution, despite the need to create a strong organization of state and power, is based on the ideas of freedom, equality and brotherhood.[69] Goikhbarg also repeated the concept approved by Lenin and included in the text of the Basic Law, concerning the transition of the Bolshevik Constitution, the death of state power and law. He also included in the article the thesis that the only formal guarantee of real equality of all people is economic equality. It can only arise through the complete abolition of private property, to which, according to Goikhbarg, the Constitution also sought. The article, however, contains ideas that are absent in any instance of Lenin or Stuchka. Goikhbarg tried to prove that *the proletariat never desired and never wants to rule over other classes, putting it under the rule of its social system*.[70] He also stated that the proletariat also *liquidates the conditions for the existence of antagonisms between classes, eliminates the classes themselves, and thus their existing class rule. In place of the old bourgeois society, with classes and their antagonism, there is an association in which the free development of each is a condition for the free development of all.*[71]

The proletarian state was to evolve towards complete harmony in the absence of pressure measures and the disappearance of political power for social sake.[72] The author warned that the described order could only prevail after "choking the enemies of the proletariat," but similar, solidarist ideas were unacceptable for political reasons, especially that according to Goikhbarg's idea, "proletariat rule" was to be of short duration only.[73]

Peter Ivanovich Stuchka understood the Bolshevik Basic Law in a completely different way, calling it the "constitution of the civil war." The most orthodox of the Bolshevik lawyers drew attention to the necessity of liquidation – also by means of a constitution – of class enemies and "... establishing the urban and rural dictatorship of the proletariat and poor peasantry" (Art. 9 of the Constitution). In Stuchka's article, expressing the principles discussed, there were absolutely no solidaristic elements. The author, partly against his own views, also advocated the possibility of various

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69 Goikhbarg 1918; Goikhbarg 1919, at 23.

70 Goikhbarg 1919, at 23.

71 *Id.* at 24.

72 *Id.*

73 *Id.*

interpretations of the constitution in a way that would allow the fight against "hostile classes." In the article described by P.I. Stuchka, he strongly opted for the advantage of unwritten or vague provisions, which was all the more surprising as he was the least die-hard nihilist among the Bolshevik lawyers.

> At the most acute moment of the civil war – he began his argument – we had to put on the written form of the constitution we have in force. And the question clearly arose whether a transitional time constitution was possible at all. For this reason, for example, that the transitional era in which "only movement is a permanent thing" does not form a hard framework for the written constitution. For this reason, that in this transitional era "the state cannot be anything other than the revolutionary dictatorship of the proletariat," and the dictatorship somehow wrongly connects with the words "written act."[74]

Although Stuchka's concept presented a greater than official nihilistic radicalism, it was much closer to the official ideology and the objectives of the Constitution. Probably for this reason P.I. Stuchka, who did not take part in the work on the Constitution, was given the task of making it officially exegesis. A semi-official commentary on the basic act of Stuchka's pen was published in 1919 by a Bolshevik party publishing house (and not – as the vast majority of publications of those years – by the *Narodnyy komissariat yustitsii*). The author gave it a form of short questions and answers already tested in his former work on the people's court. The work developed the thoughts contained in the article published earlier. In his work P.I. Stuchka explained the articles of the Constitution step by point. The deliberations included the thought of oppression by the proletariat of classes possessing on an analogous basis to the principle of oppression in a bourgeois state, where, according to the author, the proletariat was always oppressed by the bourgeoisie. The difference, however, was that in the bourgeois state the majority was oppressed, while in the Soviet Republic – the minority of society.[75] In both cases, the organization described was permanently antagonistic, not allowing any agreement between the different groups. In Stuchka's work for the first time, the concepts used repeatedly in normative acts were defined. And so the term "bourgeoisie" meant for the author

> a social class, a category of population, using not its own, and from someone else's work, living from income received from industrial, commercial and credit operations, including all elements, either living as such or serving as income supporting the bourgeoisie.[76]

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[74] Goikhbarg 1919, at 15.

[75] *Id.* at 11–12.

[76] *Id.* at 9–10.

On the other hand, the dictatorship of the proletariat meant

> taking over [*zakhvat*] of all state power and the full realization of this power ... The working class, by its dictatorship, understands the "powerful All-Russian Soviet power," which appoints its brave fighters for responsible positions before the councils. The outcome of the civil war depends on the victory of this or other dictatorship.[77]

The definitions, however, very broad in meaning, were only the terms proposed by the author. Their essence was confrontationality and the far-reaching degree of ideologization. With this understanding of the new Basic Law, it could be a good explanation of the fight to the death with the enemies of the Bolshevik system.

Conclusion

The adoption of the Constitution did not end, of course, the creation of the Bolshevik legal system, which in the case of even the revolutionary tribunals lasted until 1920. However, it was the closure of one of the stages of creating a similar system. The main task of the Constitution was to systematize the hierarchy of normative acts and dependencies between individual organs of authority and administration in the Bolshevik state. This means that as early as in mid-1918, it began to realize the organizational and competence chaos that the nihilist legal system had, showing, on the other hand, many strictly political advantages.

We can look for some features of the common basic laws 1905–1906 and the Bolshevik Constitution. Both constitutions aimed to give the state some kind of cohesion, which manifested itself, *inter alia*, in the adoption of laws jointly by both chambers of parliament and executive authority. In the first Constitution, such power was the monarch, while in the second the government, endowed with broad prerogatives, also in the field of legislating. Starting from other premises, the Bolshevik doctrine adopted the concept of a unified state, with no opposing and inhibiting authorities.

Of course, the analogy with the earlier tradition would not be much. Also, formally, the Bolshevik state in the first period programmatically rejected all earlier Russian political traditions, and in a broader sense, the constitutional theory and practice of other states. Antennas were only sought in the utopias existing in the history, above all in the experiences of the French Revolution in its egalitarian dimension and in the achievements of the so-called Paris Commune of 1871. In the latter, the Bolshevik leader saw a direct pattern of defining the Constitution of the state he was forming.[78]

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[77] Goikhbarg 1919, at 16.

[78] *Cf.* Jerzy Stembrowicz, *Rządy Komuny Paryskiej z 1871 r. a państwo socjalistyczne* [*The Rule of the Paris Commune of 1871 and the Socialist State*], 31 Studia Prawnicze [Studia Prawnicze] 33, 43 (1971).

In the Constitution, Lenin therefore saw the document primarily of political and not legal significance. The legal aspect was also irrelevant in the way that from the beginning, the revolutionary practice did not coincide with reality, of which Lenin, even as a lawyer, had to be aware as well. However, the Constitution was designed to legitimize the principles of the new system, and, as it was always stressed, as a form of propaganda in Bolshevik Russia and beyond. In a broader sense, the Constitution of 1918 expressed Lenin's fascination with the idea of direct democracy, of which it was already mentioned, including the experience of anarchizing the so-called Paris Commune and the idea of the French Revolution after 1789. In the last case, the idea of unlimited supreme power, undivided and combined, and at the same time federated in the form of loose communes, whose idea in Bolshevik Russia took over, obviously only nominally, revolutionary councils, was adopted. Nominally, they were meant to express the conception of the rule of the congregation, the direct rule of the people, and the transmission of divided power to the sovereignty of the people. This simple projection of the Rousseau concept, however, resulted in the creation of a totalitarian system, which the People's Commissar of Justice, Isaac Nachman Steinberg, though unable to name yet, described it as state despotism, which was far more powerful than the tsarist despotism.

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REISNER VS. STALIN: THE RSFSR CONSTITUTION OF 1918

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https://doi.org/10.21684/2412-2343-2019-6-3-78-99

In 2018, the centenary of the Constitution of the Russian Socialist Federative Soviet Republic (RSFSR) was celebrated. Scholarly debate over this legal and political document – Russia's first constitution – has continued across time up to the present day. The process of drafting the Constitution of 1918 has received very contradictory coverage in the historical and legal literature. Writers' assessments of the works on this topic have often been influenced by political circumstances. In particular, for a long time the role of the famous Soviet legal scholar and lawyer Mikhail Reisner in the preparation of the draft of the first Soviet Constitution was hushed up. This article examines Reisner's contribution to the creation of the draft of the first Soviet Constitution and his confrontation with Joseph Stalin over the issue of federation in the Constitutional Commission. These two men proposed diametrically opposed approaches to the principles and foundation of the Soviet Federation. If Stalin believed that the Soviet Federation should be built on the national-state principle, Reisner considered this principle bourgeois and offered to abandon the national principle and build a Federation of Russia as a multi-stage Federation of Soviets. The article then analyzes the content of the draft of the Constitution prepared by Professors Reisner and Goikhbarg (the "professorial project") and identifies its provisions, borrowed by the authors of the final text of the Constitution of the RSFSR of 1918. Additionally, the article describes a number of the provisions of the draft prepared by Reisner and Goikhbarg and distinguishes it from the final text of the Constitution of the RSFSR of 1918.

Keywords: legal history; Soviet constitutions; constitutionalism; Russia; federation; Reisner; Stalin.

Recommended citation: Sergey Shakhray & Konstantin Krakovskiy, *Reisner vs. Stalin: The RSFSR Constitution of 1918*, 6(3) BRICS Law Journal 78–99 (2019).

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Introduction

After the October Revolution, well-known constitutional legal scholar and, at the same time, member of the Bolshevik Party Mikhail Reisner, at the suggestion of Vladimir Lenin, became the head of the department of legislative projects, a department which he himself created under his own initiative at the People's Commissariat of Justice. In 1918, it was precisely in this post that Reisner participated in the *drafting of the first Soviet Constitution*.

Questions about the preparation of the first Soviet Constitution have been analyzed in the literature quite widely, and not without criticism. Various aspects of the Constitution of 1918 were discussed shortly after its adoption[1] and debate over the document still continues to the present day.[2] Taking into consideration the fact that the historiography of the issues relating to the first Soviet Constitution is quite extensive,[3] and the key subject of this article, we will appeal only to the history of the drafting of the first Soviet Constitution, Reisner's participation in this process and his

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[1] *Крупская Н.К.* Конституция Российской Социалистической Федеративной Советской Республики [Nadezhda K. Krupskaya, *The Constitution of the Russian Socialist Federative Soviet Republic*) (Moscow: Publishing House of the All-Russian Central Executive Committee of the Councils of Workers, Soldiers, Peasants and Cossack Deputies, 1918); *Глебов Н.П.* Наш Основной Закон. Разъяснение Конституции Российской Социалистической Федеративной Советской Республики [Nikolay P. Glebov, *Our Basic Law. Explanation of the Constitution of the Russian Socialist Federative Soviet Republic*] (Moscow: Publishing House of the All-Russian Central Executive Committee of Soviets of Workers, Soldiers, Peasants and Cossack Deputies, 1918).

[2] *Плотников А.А.* Конституция РСФСР 1918 года (историко-правовое исследование): Дис. … канд. юрид. наук [Andrey A. Plotnikov, *The Constitution of the RSFSR of 1918 (Historical and Legal Research): Thesis for a Candidate Degree in Law Sciences*] (Moscow, 2003); *Земцов Б.Н.* Конституционные основы большевистской власти (первая советская Конституция 1918 г.) // Отечественная история. 2006. № 5. С. 65–74 [Boris N. Zemtsov, *The Constitutional Foundations of the Bolshevik Government (First Soviet Constitution of 1918)*, 5 The History of Russia 65 (2006)].

[3] Historiographical review is given in the work of O.I. Chistyakov (*Чистяков О.И.* Конституция РСФСР 1918 года [Oleg I. Chistyakov, *The Constitution of the RSFSR of 1918*] (Moscow: Moscow State University Publishing House, 1984)) and the dissertation of A.A. Plotnikov (Plotnikov 2003).

confrontation with Joseph Stalin over the fundamental issue of federation for the formation of the Soviet state. Up to now, this issue has remained in the background of the Russian literature.[4]

This article fills the existing historiographic vacuum.

1. Mikhail Reisner's Project on the Federal Form of Government in Russia

By one of the ironies of history, or maybe by just a historical accident, the real work on the draft of Russia's first constitution began on *1 April* 1918. On that day, the chairman of the All-Russian Central Executive Committee Yakov Sverdlov, as tasked by the Central Committee of the Communist Party, presented to the Central Executive Committee (surprisingly, the meeting began at 10.50 p.m.) a report on the creation of a commission to draft a constitution.[5]

Let us direct our attention to the very mixed backgrounds of the sixteen members of the Constitutional Commission in view of their education. No more than nine members of the Commission had university degrees, and just five of those had degrees in law. Only Mikhail Reisner and Gregory Gurvich were experts in the field of *state law*. The Bolsheviks constituted a large majority (twelve out of sixteen) of the members of the Commission and they, of course, could not allow an uncontrolled discussion. This, in the end, predetermined whose projects and proposals were supported although it should be noted that the Commission held heated debates on many issues and above all about the dictatorship of the proletariat, the nature and functions of the Soviets, the principles of the Soviet Federation, etc. In the declassified memoirs of the members of the Constitutional Commission and the

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[4] In the scholarly works of the Soviet period, Reisner was presented in a negative light, almost as an enemy of the Soviet state. *Гурвич Г.С.* История Советской Конституции [Gregory S. Gurvich, *History of the Soviet Constitution*] 200–216 (Moscow: Socialist Academy Edition, 1923); Первая Советская Конституция (Конституция РСФСР 1918 года): Сборник документов [*First Soviet Constitution. The Constitution of the RSFSR of 1918: Collection of Documents*] XV–XVI (I.Ya. Vyshinsky (comp.), Moscow: Legal Publishing House of the People's Commissariat of Justice of the USSR, 1938); *Ронин С.Л.* Первая Советская Конституция (к истории разработки Конституции РСФСР 1918 г.) [Samuel L. Ronin, *The First Soviet Constitution (to the History of Drafting of the RSFSR Constitution of 1918)*] (Moscow: State Publishing House of Legal Literature, 1948); *Филимонов В.Г.* Первая Советская Конституция [V.G. Filimonov, *The First Soviet Constitution*] 27–28 (Moscow: State Publishing House of Legal Literature, 1960); Советские Конституции. Справочник [*Soviet Constitutions. Encyclopedia*] 114 (P.S. Romashkin (ed.), Moscow: State Publishing House of Political Literature, 1963). In modern works, this topic was touched upon by A.N. Medushevsky: *Медушевский А.Н.* Демократия и авторитаризм: российский конституционализм в сравнительной перспективе [Andrey N. Medushevsky, *Democracy and Authoritarianism: Russian Constitutionalism in a Comparative Perspective*] (Moscow: Russian Political Encyclopedia, 1997); *Медушевский А.Н.* Политическая история русской революции [Andrey N. Medushevsky, *Political History of the Russian Revolution*] (Moscow; St. Petersburg: Center for Humanitarian Initiatives, 2017).

[5] Протоколы заседаний Всероссийского центрального исполнительного комитета 4-го созыва: Стенографический отчет [*Minutes of Meetings of the Central Executive Committee of the Fourth Session: Verbatim Report*] 66 (St. Petersburg: State Publishing House, 1919).

editor of the newspaper *Izvestia* (*Известия*) Yury Steklov, we can read that the work of the Commission nevertheless took place in a friendly atmosphere. Despite the heated debates, the conversations between the members of the Commission remained companionable – everyone was eager to find the most correct solutions to the numerous issues to be dealt with by the Commission.[6]

Later, when recalling the work of the Constitutional Commission on the development of the draft of the Constitution, Reisner noted that the material accumulated by the Commission "was embarrassingly diverse." He wrote about this, without mentioning names:

> Some brought to the Commission's meeting the sacred books of bourgeois science – thick volumes of such state scholars as Jellinek. Others thought of creating a federation of labor syndicates in the form of Soviets, a kind of an anarchist union of professional associations. Still others took the extreme point of national liberation and were ready to turn the Federation of Soviets into an alliance of countless Russian nations from the first days. Some others sought to step over the era and to get closer immediately to the threshold of a communist society. Some others slavishly kept the already emerging division of the former empire into a mass of small, almost independent republics. Some others ...[7]

As we can see, the time of consensus had not yet come. However, the Central Executive Committee kept the Commission under constant control: the Commission had to report on its work on a weekly basis.[8]

We can see from the first protocol of the meeting of the Constitutional Commission of the All-Russian Central Executive Committee (5 April 1918) that some members of the Commission had only a remote idea of how to approach their work on the draft of the Constitution. The members of the Commission (Berdnikov, Pokrovsky, Avanesov, Bogolepov, Smirnov, Schreider, Steklov, etc.) who spoke during the general discussion on the work on the project proposed different approaches. In particular, the discussion revolved around the issue of the structure and basis of power: to construct first the local authorities (the bottom) and then to determine the structure of supreme power, or vice versa "starting from the top."[9]

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[6] *Данилевская И.Л.* М.А. Рейснер о правовом государстве // Труды Института государства и права Российской академии наук. 2013. № 6. С. 160 [Inna L. Danilevskaya, *M.A. Reisner on the Rule of Law*, 6 Texts of the Institute of State and Law of the Russian Academy of Sciences 152, 160 (2013)].

[7] *Рейснер М.А.* Я.М. Свердлов и Первая Советская Конституция. (Из личных воспоминаний.) Рукопись // НИОР РГБ. Ф. 369 (В.Д. Бонч-Бруевич). Картон 402. Д. 12. Л. 3 [Mikhail A. Reisner, *Ya.M. Sverdlov and the First Soviet Constitution. (From Personal Memories.) Manuscript*, Manuscript Research Department of the Russian State Library, F. 369 (V.D. Bonch-Bruevich), Card 402, D. 12, P. 3].

[8] ГА РФ. Ф. Р-1235. Оп. 19. Д. 3. Л. 50 [State Archive of the Russian Federation, F. R-1235, Op. 19, D. 3, P. 50].

[9] ГА РФ. Ф. 6980. Оп. 1. Д. 3. Л. 2–7 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 3, P. 2–7].

The meaningful and distinctive contributions of Mikhail Reisner and Joseph Stalin provide some clarity to the issue.

Reisner suggested that the drafting should begin with the definition of the supreme power, and only afterwards develop the regulation of its lower echelons (local councils).[10] Stalin, referring to the decisions of the Third Congress, which adopted a number of documents on the federation, suggested first to define the key question as to how to understand the federal republic ("which is defined differently") and afterwards to determine the relationship between the central and local authorities.[11]

After an exchange of views, it was proposed (by Sverdlov) to the members of the Commission that Reisner and Stalin present a report on the main issue of the Russian Constitution – the federation of the Russian Republic. It was assumed that each would write a report laying out his own vision of the issue.[12]

On 10 April 1918, Reisner presented his report on the main principles of the Constitution of the Russian Socialist Federative Soviet Republic (RSFSR) at the meeting of the Central Executive Committee. Stalin did not come to the meeting because he was otherwise busy, as it was said. Let us express the historical hypothesis that this absence of Stalin at the meeting on 10 April *was not accidental*. Stalin could not present a detailed report to the Commission by virtue of his knowledge and educational background. He understood that his three short theses would look inadequate compared to the professorial report by Reisner. Due to the fact that Reisner had kindly presented a hard copy of his report to the members of the Commission, one of the copies reached Stalin. At the meeting of the Central Executive Committee held two days later on 12 April, Stalin built his oral presentation on criticism of Reisner's report and presented his three short theses on the federation. In this form, Stalin's intellectual work had already acquired a certain conceptual image.

It is necessary to make two preliminary remarks before we set forth the essence of Reisner's project, unusual and even, at first glance, extravagant.

First, let us appeal to one important statement from an article by Steklov in which he wrote in particular:

> The Soviet system as the first state-wide experience of socialist government features such *an original phenomenon in world history, that the approach to it with certain standards, borrowed from the theory and practice of traditional state law, is absolutely not necessary*.[13] (emphasis added)

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[10] ГА РФ. Ф. 6980. Оп. 1. Д. 3. Л. 7–8, 9–10 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 3, P. 7–8, 9–10].

[11] *Id.* at 12.

[12] On 8 April 1918, Sverdlov reported to the Central Executive Committee at its regular meeting on the beginning of the work of the Commission and subsequently reported every week. ГА РФ. Ф. Р-1235. Оп. 19. Д. 4. Л. 1–2 [State Archive of the Russian Federation, F. R-1235, Op. 19, D. 4, P. 1–2].

[13] *Стеклов Ю.М.* Конституция Советской России // Известия ВЦИК Советов рабочих, солдатских, крестьянских и казачьих депутатов. 1918. 4 апреля. № 72(336) [Yury M. Steklov, *The Constitution*

Indeed, why was it necessary then to focus on the concept of a federation, formed in the "bourgeois" state law?[14] Did the "Soviet Federation" also represent a different order? In our opinion, Reisner proceeded precisely from such an assumption, which is why his project, in our view, should not be regarded as initially erroneous and simply extravagant or even avant-garde. It was a search by a *scientist for a form of the government adequate to socialism*, based precisely on Marxist theory. We believe that in his thoughts about the construction of a fundamentally new, and the first in world history, "socialist federation" he showed himself to be a more consistent Marxist than his opponents. As for the evaluation of his project, we will return to it after presenting Reisner's project itself.

Our second remark is that the project, presented by Reisner before the Constitutional Commission of the All-Russian Central Executive Committee on 10 April 1918 was not spontaneous or made hastily in five days. It represented the core ideas of his long reflections. In the period between the two revolutions of 1917, Reisner published a number of works devoted to various aspects of the state structure of the new Russia, including the new principles of federation-building. Let us consider some of his ideas on the issue of federation.

In a small work titled "Revolution and Federation," published shortly after the February Revolution,[15] Reisner proceeded from the assumption that national feelings were fading, the proletariat was internationalizing. He wrote,

> Nationality and territory are the words, which combination should truly be permanently erased from the life of people.[16]

He believed that in the new Russia there must be a different and more important basis for the structure of the state than nationality.

In line with the Marxist approach, he assumed that,

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of Soviet Russia, News of the All-Russian Central Executive Committee of Soviets of Workers, Soldiers, Peasants and Cossack Deputies, 4 April 1918, No. 72(336)].

[14] *Ященко А.С.* Международный федерализм: Идея юридической организации человечества в политических учениях до конца XVIII века [Alexander S. Yashchenko, *International Federalism: The Idea of the Legal Organization of Mankind in the Political Teachings Until the End of the 18th Century*] (Moscow: Printing House of Imperial Moscow University, 1908)]; *Ященко А.С.* Теория федерализма: Опыт синтетической теории права и государства [Alexander S. Yashchenko, *The Theory of Federalism: The Experience of the Synthetic Theory of Law and the State*] (Yuryev: Printing House of K. Mattisen, 1912); *Ященко А.С.* Что такое федеративная республика и желательна ли она для России [Alexander S. Yashchenko, *What Is a Federal Republic and Is It Preferable for Russia?*] (Moscow: Printing House of the Partnership of Ryabushinsky, 1917); *Кокошкин Ф.Ф.* Автономия и федерация [Fedor F. Kokoshkin, *Autonomy and Federation*] (St. Petersburg: Leshtukovskaya Steam Early Printing Press "Svoboda," 1917).

[15] *Рейснер М.* Революция и федерация [Mikhail A. Reisner, *Revolution and Federation*] 32 (St. Petersburg: I.R. Belopolsky, 1917).

[16] *Id.* at 21–22.

> The material culture precedes spiritual culture,

and he put the economic organization of the country at the forefront and proposed that,

> For the division of Russia into regions, for the organization of self-government, the economic interests should be taken into account before everything else.[17]

Only after the decision on questions about economic self-determination is made can questions about national self-determination be raised. It does not matter if the boundaries of a region due to economic necessity will not coincide with the boundaries of national settlement. National rights should not be tied to a piece of land. Reisner believed,

> If you create a national formation in the framework of resettlement, it would lead to a monstrous result – an agricultural Russia would be cut off from the seas – by Kyrgyzstan, the Cossack republic, Ukraine, Latvian and Estonian regions.

So, on the basis of an economic union, and where necessary the national principle, local political autonomy should be created, and in such a way the region, province, county creates for itself, within the framework of a general law, its own legislative, governmental and judicial institutions; with their help it issues the laws and its own special constitution, and it manages finances, public health, education, the police and all that is of local interest.[18]

We can find similar thoughts in his pamphlet "Revolution, Nationality, and Union System (Federation)" published in the same period.[19] He emphasized that it must not be nationality that should come first, but freedom. The national question is resolved only by freedom. And freedom is impossible without a union structure, autonomy, self-government. "The Federal Republic sets free from nationality."[20]

Let us note that Reisner was one of the few legal scholars at the beginning of the 20th century who interpreted the principle of federation as limiting public authority in order to protect civil liberty.[21] According to Reisner, under the federal structure "the

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17 Reisner 1917, at 28.

18 *Id.* at 30–31.

19 *Рейснер М.А.* Революция, национальность и союзный строй (федерация) [Mikhail A. Reisner, *Revolution, Nationality, and Union System (Federation)*] [s.l.; s.n.].

20 *Id.* at 31.

21 *Лебедев А.* Образы федеративной России в отечественной науке конституционного права досоветского периода // Сравнительное конституционное обозрение. 2011. № 6. С. 125–141

autocrat nation divides itself into a number of increasingly wider territorial unions," which means limiting the people's sovereignty and the "transforming of an absolute, unlimited sovereign into a moderate and limited governor."[22]

The report by Reisner to the Constitutional Commission of the All-Russian Central Executive Committee became the apotheosis of *his theory of socialist federalism*.[23] Reisner, while developing his previously expressed ideas, stated that this "federation in the spirit of socialism" could not be based on the national principle, which, in his opinion, was already losing its value under capitalism, and even more so under the conditions of socialism. He said that

> one can only speak about the cultural self-determination on the basis of the national principle, but not about the political one.[24]

He also rejected the purely territorial principle, stating that,

> Territorial organization and territorial federalism absolutely cannot serve as a basis for solving state issues in the Socialist Republic. For our federalism is not a union of territorial governments or states, but a federation of social and economic organizations.[25]

He also named "the three main forces" that should be taken into account in the organizing of the Russian Federation:

1) *Social-economic unions* (professional, production associations, cooperatives, etc.) that acquire public-legal nature and state importance;

2) *Unions of a communal type* (such as the Kronshtadt and Petrograd communes), other "local territorial unions" that appeared in place of old country councils and local governments, some "small Soviet organizations";

3) *Pure political organizations* of a "revolutionary and class nature," leading the struggle for the dictatorship of the proletariat with the help of the court, army

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[Anton Lebedev, *Images of Federal Russia in the Domestic Science of Constitutional Law of the pre-Soviet Period*, 6 Comparative Constitutional Review 125 (2011)].

22 *Рейснер М.А.* Государство. Ч. 3: Государственные формы [Mikhail A. Reisner, *State. Part 3: State Forms*] 259 (Moscow: Printing House of the Partnership of I.D. Sytin, 1912).

23 Reisner's report was published in the newspaper *News of the All-Russian Central Executive Committee* on 12 April 1918 (No. 72). Five days later, in the same newspaper, Reisner published the article "Soviet Power and the Federation (on the Issue of the Constitution)," which opened discussions in the press about the Constitution. In the article, he outlined his views on the socialist federation as a federation of Soviets, previously published in a number of publications and a report to the Central Executive Committee Commission on the drafting of the Constitution.

24 Report of a Member of the Commission M.A. Reisner on the Basic Principles of the Constitution of the RSFSR (ГА РФ. Ф. 6980. Оп. 1. Д. 4. Л. 37 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 4, P. 37]).

25 *Id.* at 48.

headquarters and the Red Army. In addition to this there are also "legislative, governmental, judicial bodies" since they are in charge of national tasks.[26]

Reisner finalized his plan of the Russian Socialist Federation organization in the following provisions:

> The RSFSR is a free socialist community of all working people united in *class, labor, professional, economic and political unions*. These unions should form local federative communes for social economy, the organization of public life and cultural activities. Such local community is called a *commune*.

According to Reisner, the commune should become the *basic unit of the federation*, which did not contradict the ideas of Marx, formed under the influence of the practice of the Paris Commune. At the head of each commune there is the Council of Labor Deputies (according to the figurative expression of Reisner "a living crystal of the proletarian dictatorship") formed from the elected representatives, who are members of the communes of economic and social unions and formations.

Communities form a federal union – *a province* – which is headed by a congress of communal Soviets or a provincial Council of Deputies, consisting of representatives of communal Soviets, as well as representatives of major unions.

Several provincial federations form a *regional union* under the name of a *regional republic* (at the head of it there is a regional congress of Soviets, formed from the representatives of provincial federations and the most important economic and social unions of the region).

Finally, the regional republics form a *union* under the name of the Russian Socialist Federative Soviet Republic, headed by the council of workers, farmers, laborers and labor Deputies of the Russian Federation.[27]

Reisner saw the future in the formation of the RSFSR with other socialist countries for the "universal triumph of socialism, prosperity, peace and brotherhood of nations" in the Union of the United Socialist Federative Republics.[28]

At the meeting on 10 April, Reisner's ideas were supported by Mikhail Pokrovsky, who recognized as "valuable" the rejection of the "national moment" by Reisner

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[26] ГА РФ. Ф. 6980. Оп. 1. Д. 4. Л. 41–42 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 4, P. 41–42].

[27] *Id.* at 49–50. The criticism of this anarcho-syndicalist idea of the federation, by the definition of Reisner's opponents, was given in the literature of the "Stalin period" by G.S. Gurvich and others. Gurvich 1923, at 25–29. S.L. Ronin criticized the project by Reisner in a rather rough manner, using words in the spirit of the epoch, such as "with great swagger he spoke ... ," "ugly and dangerous anarcho-syndicalist tendencies," "direct undermining and collapse of political power ... ," etc. Ronin 1948, at 76. It is interesting that some modern Russian researchers recognize the form of the territorial-state structure of Russia, proposed by Reisner, as quite acceptable. *Скибина О.А.* Государственно-правовые взгляды М.А. Рейснера: Дис. … канд. юрид. наук [Olga A. Skibina, *State Legal Views of M.A. Reisner: Thesis for a Candidate Degree in Law Sciences*] 198 (Belgorod, 2015).

[28] ГА РФ. Ф. 6980. Оп. 1. Д. 4. Л. 50–51 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 4, P. 50–51]. In fact, Reisner predicted the coming of a world socialist system, the CMEA, the Warsaw Pact.

as the basis for building a federation and the elimination of the nation's right to self-determination.[29] On the contrary, the Bolsheviks Smirnov, Steklov and Sverdlov criticized the ideas in Reisner's report and reminded him that the "transitional period" to socialism, which the country was undergoing, dictated the preservation of the national-territorial principle,[30] as well as the right of the nation to self-determination. Yet, the opponents of Reisner accepted that "under socialism," when it is built, the national principle will fade into the background, and the economic principle will rise to its full height. In other words, Reisner's opponents, in fact, accepted that his project was simply *ahead of its time*.

In the article "The Draft of the Constitution of the Russian Socialist Federative Soviet Republic," published in the *News of the All-Russian Central Executive Committee* (*Известия ВЦИК*) on 12 April, devoted to the review of the draft prepared by Reisner, it was predicted that, in connection with the objections of some members of the Constitutional Commission, the project, for certain, would undergo significant changes.[31] And so it turned out.

The report by Stalin on the same issue was considered at a meeting of the Constitutional Commission of the All-Russian Central Executive Committee on 12 April. Stalin began his rather tongue-tied report, as it can be described from the transcript, with criticism of Reisner's position, and the main criticism of this position he saw in ignoring the transition period (in Stalin's words, "This Constitution is temporary, a thing, designed for a certain period").[32] Stalin referred to the decisions of the Third Congress of Soviets, emphasizing their directive nature for the Constitutional Commission, which stated that the Russian Republic was the Federation of Soviet Republics of the *peoples of Russia*, and the regions that make it up are distinguished by a special spirit and *national composition of the population*.[33] He insisted on the idea that the adoption of Reisner's constitutional plan could create even more confusion in the state economy.

The principal provisions of Stalin's report were formulated in the document "On the Type of Federation of the Russian Soviet Republic":

1. The Constitution's plan, currently being drafted by the Commission, should be temporary, designed for a period of transition from the bourgeois system to the socialist system. Hence, questions about the dictatorship of the proletariat and the rural poor, about the organization of power as an expression of such a dictatorship, and so on, are questions that do not attach to the established socialist system, where there will be neither classes nor an apparatus of power.

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[29] ГА РФ. Ф. 6980. Оп. 1. Д. 4. Л. 5–7 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 4, P. 5–7].

[30] *Id.* at 8–22.

[31] Известия ВЦИК. 1918. 12 апреля. № 72 [News of the All-Russian Central Executive Committee, 12 April 1918, No. 72].

[32] ГА РФ. Ф. 6980. Оп. 1. Д. 5. Л. 1–6 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 5, P. 1–6].

[33] *Id.* at 3.

2. The starting points of the Constitution should be: on the one hand, the decision of the Third Congress of Soviets on the Russian Soviet Republic as the "Federation of Soviet Republics,""the peoples of Russia" and, on the other hand, the existence of areas, differing in their particular way of life and ethnic composition, in other words, the areas inhabited by different nations requiring broad autonomy on a federation basis.

3. In view of this, the subjects of the federation in Russia should not be the separate cities, resolving their affairs autonomously, and not all areas in general, the economic characteristics of which (if any) should be represented by the relevant autonomous bodies of the Supreme Council of the National Economy, but completely certain areas, characterized by life and national composition.[34]

In a sufficiently substantive and emotional response to Stalin's criticism (at that time it was still allowed and safe to do so), Reisner[35] first noted that he had always held the views of the Bolsheviks, even more, that in the spring of 1917 he had been against the Constituent Assembly, while the Bolsheviks supported it and only later changed to his viewpoint, and, additionally, that he realized the Constitution was designed for a transitional period. Reisner explained that he, like other members of the Constitutional Commission, stood for a strong central authority, but that he was concerned about the origin and the legitimacy of this authority. He insisted that the Bolsheviks had taken

> power not on the basis of a fist… In order for this power to be strong, it must not only have a bullet, it must have sound principles and a historical, indisputable rationale. Essentially, these points, that I offered you, are nothing else, but an introduction to the reality of the constitution.[36]

Reisner again rejected the "bourgeois principle of the national federation" proposed by Stalin and insisted on the *federation of the Soviets* as truly socialist, and he defined the representation in the Soviets as economic and professional.

For those who denied his construction of the Federation of Soviets, he threw the following words in a heated verbal attack:

> You have no right to call yourself the Congress of workers and peasants, for where is it [i.e. the power] concentrated? – at the Congress of Soviets, and

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[34] ГА РФ. Ф. 6980. Оп. 1. Д. 5. Л. 37 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 5, P. 37]. Published in the book, Gurvich 1923, Appendix X, at 146–147. It is interesting that, for unknown reasons, this document was not included in the collected works of J.V. Stalin.

[35] ГА РФ. Ф. 6980. Оп. 1. Д. 5. Л. 7–19 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 5, P. 7–19]. Not a single legal scholar of the history of the first Soviet Constitution has given attention to this vivid statement made before the Constitutional Commission of the All-Russian Central Executive Committee on the preparation of the draft Constitution. The authors of this article are the first to analyze these texts from the State Archive of the Russian Federation.

[36] *Id.* at 9 and the following.

from where are the Soviets? – they come from these organizations [*economic, professional*].[37]

And further he threw in temper seditious words:

> We have to state that the power, *that exists now, is a terrible power, despotic and this power, excuse me, is not the peasant's power*. Why? Because it is the power, that now, by way of the Federation, has accumulated from the places, came here, condensed at the top and performs common tasks.[38] (emphasis added)

In other words, in his angry polemic Reisner named one of the most important features of the new government – its ultracentralization, separation from the people. By analogy with the well-known thesis of the preamble to the U.S. Constitution of 1787, "We, the people of the United States ... ," Reisner insisted on the following construction:

> We, the peasant and workers, labor people ... united in a socialist-economic organization, through our Soviets we execute this power in this way.[39]

Further, he defended quite in the spirit of the theoretical statements of Marx the idea of a commune as a "living unit," the most important basic unit of the Soviet state, "the atom of a socialist federation." Reisner specified that as a lawyer he should tend to strive for a uniform form, but being a Marxist, he put real life and real interests in the first place. He saw the interests of the representatives of various Soviet organizations, professional associations, socialist farms, etc., in the representation at Congresses of Councils, and he saw the socialist essence of a new type of federation, *the Federation of Soviets*, in this union of different units (Stalin called this "chaos"). We admit that it was not at all a dogmatic approach.

Inspired by the speech given by Sverdlov on the freedom from party affiliation of views, the members of the Commission differed in their proposals for the structure of the Soviet Constitution. They criticized both reports. Schrader proposed his own report as opposing both points of view, and he called Stalin's construction "typically imperialistic, typical fist"[40] (Samuel Ronin will later write about this episode of the discussions:

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[37] ГА РФ. Ф. 6980. Оп. 1. Д. 5. Л. 12 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 5, P. 12].

[38] *Id.*

[39] *Id.*

[40] *Id.* at 22.

> In his immodest argument against the principle of the dictatorship of the proletariat Schrader stopped at nothing to call the provisions, put forward by comrade Stalin, neither more nor less than "imperialist constructions."[41]

Ronin proposed basing the federation on an exclusively *territorial principle*: to preserve the former division into governorates, counties and townships (almost a century later this plan, touted as "original," was put forward by the Liberal Democratic Party of Russia (LDPR) (*ЛДПР*) party leader Vladimir Zhirinovsky).

Bogolepov supported the principle of centralization and clear borders of competence between the center and the local areas.[42] Berdnikov declared himself a supporter of a unitary republic.[43] Latsis definitely supported Stalin.[44] Only the intellectual Mikhail Pokrovsky, in general, supported Reisner's proposal.[45]

At this meeting of the Constitutional Commission, Reisner put forward a new "draft resolution on the general debate."

He sought recognition of the following key points:

1. The full authority of the supreme power in the Russian Socialist Federative Soviet Republic belongs to the union of all workers, peasants, laborers, labor Cossacks, etc.

2. In order to exercise this power, the workers create Soviets and Congresses of Soviets of workers, peasants and other labor deputies.

3. Soviets and Congresses are divided into rural, parish, county, city, provincial, regional and central or common for the entire Russian Socialist Federative Soviet Republic.

4. Each Soviet or Congress of Soviets exercises its power within the boundaries of a particular locality and within the limits established by this Constitution.

5. Soviets and Congresses of the Soviets form within the borders of the Russian territory a single and indivisible federation, which is called the Russian Socialist Federative Soviet Republic.

6. The central power of the federation is exercised by the All-Russian Congress of Soviets of Workers, Soldiers and Peasants Deputies, by the Central Executive Committee and by the Council of the People's Commissars of the Russian Socialist Federal Soviet Republic.

7. If in other countries the Socialist Federative Soviet Republics would form, the Russian Socialist Federative Soviet Republic, for the purpose of the universal triumph

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41 Ronin 1948, at 81.

42 ГА РФ. Ф. 6980. Оп. 1. Д. 5. Л. 25–28 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 5, P. 25–28].

43 *Id.* at 28–31.

44 *Id.* at 35.

45 *Id.* at 32–34.

of socialism, the prosperity of the world and the brotherhood of nations, is included in their highest federal union of the United Socialist Federative Soviet Republics as a full member, on the basis of equality and freedom.[46]

At the next meeting of the Constitutional Commission on 19 April the debate on the projects of Reisner (seven points) and Stalin (three points) continued. Reisner's project was again supported by Pokrovsky and Berdnikov; Steklov favored the adoption of Reisner's project with several addendums from Stalin's project.[47] The same amicable position was demonstrated by Reisner himself, who said that it was possible to combine his project and some of the provisions of Stalin's project. But most importantly, Reisner referred to the authoritative work of Lenin – "State and Revolution" – wherein, as it turned out, the form of federation that he proposed is mentioned.[48]

Stalin still desperately and adamantly defended his project through criticism of Reisner's project, calling its design a "bacchanalia of the federation."[49] V.A. Avanesov supported Stalin's project. Of Stalin's project he said that it "gives a completely definite answer, the answer to the question, what should the federation be that we are going to build, while the project of comrade Mikhail Reisner does not give such an answer," for it suggests the federation which essentially cannot include any national units.[50] Sverdlov supported Stalin's project in his speech. He stated that the draft prepared by Reisner was not acceptable as a basis for the general provisions of the Constitution, but some of its articles could be used in the relevant sections of the Constitution.[51]

Thus, following the discussion at the Constitutional Commission meeting of the All-Russian Central Executive Committee on 19 April 1918, a vote was taken on three projects: Stalin's, Reisner's and the project of the maximalist Socialist Revolutionaries.

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[46] ГА РФ. Ф. 6980. Оп. 1. Д. 6. Л. 42 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 6, P. 42]. It is interesting that maximalist Socialist Revolutionary Berdnikov supported Reisner's project, explaining that he had already freed himself from the "boundless federation." Berdnikov proposed including in Reisner's draft the first section of the draft Constitution developed by the maximalist Socialist Revolutionaries.

[47] *Id.* at 2–4.

[48] ГА РФ. Ф. 6980. Оп. 1. Д. 6. Л. 6–7 [State Archive of the Russian Federation, F. 6980, Op. 1, D. 6, P. 6–7]. Later (in 1948) S.L. Ronin will write that, "Comrade Stalin has most energetically exposed the arrogant attempt of Reisner to refer in support of his project of the 'communal federation' to the work of V.I. Lenin's *State and Revolution*." Stalin indicated a negative assessment given to the project by Reisner by Lenin as worthless and harmful. Ronin 1948, at 83. In fact, Stalin said the following: "Here [Reisner] refers to Comrade Lenin. I allowed myself to note that, as far as I know, and I know it well, Lenin said that this project [Reisner's] is useless." ГА РФ. Ф. 6980. Оп. 1. Д. 6. Л. 10 (стенограмма заседания) [State Archive of the Russian Federation, F. 6980, Op. 1, D. 6, P. 10 (Transcript of the Meeting)].

[49] *Id.* at 3.

[50] *Id.* at 4.

[51] *Id.* at 8–9.

Reisner's project received three votes; Stalin's project received five votes.[52] *Mikhail Reisner lacked two votes to turn the history of Soviet Russia in a completely different direction.*

During the article-by-article discussion of the draft prepared by Stalin, structural and editorial amendments and clarifications were made, including the principal one: it was suggested not to use the word "federal" in the text at all (the vote was four in favor and four against, thus the suggested amendment did not pass).[53]

Reisner saw the direction in which the discussion was going and made a desperate attempt to return to the normal order of work. He gave an impassioned speech, which we consider necessary to present virtually in full:

> I have to say that I am immensely embarrassed personally by this order of discussion, which is currently going on, because the concepts that have now been voted for and were included in the draft that comrade Stalin presented, for the most part are not found there ... Now I must say that it is not completely clear to me, for example, I follow with the greatest tension and cannot understand the thoughts of the author who introduced these clauses. [It was Stalin.] Now I listen to his motivation and I clearly see a whole series of uncoordinated thoughts, where I don't find the slightest point of logic, which contradict from the beginning to the end, which all the time go back to the fundamental question, which I don't know, whether they decided or not. I must say that I cannot blame individual comrades, because now we are confronted with an issue of immense importance, I am afraid to say that we are not aware of the responsibility that we bear now, we don't cook this or that machine for practical purposes in a light kitchen. We faced an extremely important, serious task, the creation of the first socialist Constitution, the question of socialism and state power and the proletariat. In these articles we must establish the basic principle of the state, thereby establishing the workers' councils of deputies and congresses, and what happens? Now we confuse everything, being like the blind in a few ... [Here, there is an omission in the text.][54]

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[52] Not identified in the transcript of the meeting.

[53] At the same time, Stalin proposed to exclude Cossacks from the description of the social composition of society (workers and poor peasants), since they form a social category, not a class ("What are Cossacks – a special kind of social category; … not necessary ..." *Id.* at 15). Reisner objected, pointing out that they do not form just a social category, that among the Cossacks there are many descendants of the ancient clans, and that this is an agricultural population. They were excluded. First, on paper, and in the 1920s the Soviet government carried out "work" to exclude them materially (mass repressions against the Cossacks in the mid-1920s). The ancestors of both of the authors of this article – Terek and Don Cossacks – suffered.

[54] *Id.* at 23–24.

The authors of this article believe that this was one of the best speeches made during the preparation of the draft of the first Soviet Constitution.

The text of the general provisions of the Constitution of the RSFSR, approved by the Constitutional Commission of the All-Russian Central Executive Committee, in particular, stated the following:

> 2. The Russian Republic is a free socialist society of all the working people of Russia, united in urban and rural Deputy Soviets.
>
> 3. Deputy Councils of the regions, differing in special way of life and national composition, are united in autonomous regional unions, headed by regional congresses of the Soviets and their executive bodies.
>
> 4. Regional Soviet unions unite on the basis of a federation into the Russian Socialist Republic, which is headed by the All-Russian Congress of Soviets, and in the period between congresses – the All-Russian Central Executive Committee.

This document, published on 25 April in the newspaper *News of the All-Russian Central Executive Committee*, was included in the final text of the RSFSR Constitution of 1918 (Arts. 9–12).

When evaluating the draft fundamentals of the Russian Socialist Federation proposed by Reisner, we consider it our duty, first of all, to put aside the unfounded accusations against Reisner which asserted that his project would mean the destruction of the Soviet power and was in practice an "anti-Leninist" project.[55]

Fortunately, in recent years researchers have sought to understand calmly and objectively the essence of the project on the federation authored by Reisner. And there we see the range of opinions. So, according to S.F. Udartsev, the structure of Reisner's project on the federation was reminiscent in some features of the projects on the federation of M.A. Bakunin and P.A. Kropotkin (i.e. anarchist, in essence). With all the differences in the views of Kropotkin and Reisner, they nevertheless in common believed *to organize a federation on the most decentralized basis and "bottom-up."*[56] P.A. Ol and R.A. Romashov stated that Reisner spoke from the standpoint of the ethnocultural concept of the nation and pursued the idea of implementing national legal personality in an extraterritorial form.[57] To the contrary,

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[55] For example, S.L. Ronin wrote: "In contrast to the Reisner project, the implementation of which would have meant *a direct undermining and collapse of the political power of the working class*, Comrade Stalin especially stressed the conclusion about the vital need for a strong and powerful dictatorship of the proletariat ..." (emphasis added). Ronin 1948, at 80.

[56] *Ударцев С.Ф.* Политическая и правовая теория анархизма в России: история и современность [Sergey F. Udartsev, *The Political and Legal Theory of Anarchism in Russia: History and Modernity*] 202 (Moscow: Graduate School of Law; Forum, 1994).

[57] *Оль П.А., Ромашов Р.А.* Нация (генезис понятия и вопросы правосубъектности) [Pavel A. Ol & Roman A. Romashov, *Nation (the Genesis of the Concept and Questions of Legal Personality)*] 80–81 (St. Petersburg: Law Institute Publishing House, 2002).

A.N. Lebedev[58] believed that, generally, Reisner fully shared the point of view of the outstanding pre-revolutionary Russian federal scientist A.S. Yashchenko, who stated that

> any national, fragmenting federalism is only the extreme expression of provincialism, a relic of the stage of the political life of humanity ... to implement such a national program would turn back the entire historical course of humanity. Therefore, in every provincial-tribal federalism there is a certain share of anarchism, the denial of existing states.[59]

First of all, in our opinion, it should be noted that Reisner's project fits into the principles of *Marxism*, as the author himself understood and interpreted it, and did not contradict the statements of Lenin, in particular, set out in his work "State and Revolution."[60] And although at the present time precisely these characteristics have turned into their opposite and are called accusations now, we try to evaluate objectively the doctrine and projects of Reisner. As the sad fate of the federations created on the basis of the national principle defended by Stalin (the USSR, Czechoslovakia, Yugoslavia) shows, the latter became a kind of "time bomb." It finally exploded, burying the named federations (they all fell apart).

2. The "Professorial Project" (Reisner-Goikhbarg)

In June 1918, the People's Commissariat of Justice began to work in parallel with the Constitutional Commission of the All-Russian Central Executive Committee on the draft of the Constitution. On 11 June, at the meeting of the People's Commissariat of Justice, under the report presented by the People's Commissar for Justice P.I. Stuchka, it was decided to entrust the collection of all the material on the Constitution to Reisner.[61] Somewhat later, Stuchka pointed out that this work had begun under the instructions of Lenin. O.I. Chistyakov supposed that this decision was motivated by the desire to speed up the work on the project.[62]

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[58] *Лебедев А.Н.* Советские государствоведы о проблемах и перспективах развития советской федерации (1918–1985 гг.) // Труды Института государства и права Российской академии наук. 2013. № 6. С. 25 [Alexander N. Lebedev, *Soviet State Scholars on the Problems and Prospects of Development of the Soviet Federation (1918–1985)*, 6 Texts of the Institute of State and Law of the Russian Academy of Sciences 24, 25 (2013)].

[59] Yashchenko 1912, at 767.

[60] *Ленин В.И.* Государство и революция. Гл. III.4 «Организация единства нации» / *Ленин В.И.* Полное собрание сочинений. Т. 33 [Vladimir I. Lenin, *State and Revolution, ch. III.4. Organization of the Unity of the Nation* in Vladimir I. Lenin, *Complete Set of Works. Vol. 33*] 51–54 (5th ed., Moscow: State Publishing House of Political Literature, 1969).

[61] Gurvich 1923, at 82.

[62] Chistyakov 1984, at 24–25.

On 4 July 1918,[63] the draft developed by the board of the People's Commissariat of Justice – specifically by the professors-editors Reisner and Goikhbarg – was published in *Izvestia*. Subsequently, Stuchka clarified that, in fact, these two professors were the *authors* of the project and the project was only discussed at the board of the People's Commissariat of Justice.[64]

Gregory Gurvich was the first writer to criticize the "professorial project." However, he allowed himself to moderate his criticism and noted graciously that everything good in the "professorial project" was connected with the influence of the project of the Constitutional Commission of the All-Russian Central Executive Committee.[65] This statement raises doubts in the minds of the authors of this article on the following grounds.

A particularly stinging objection of this critic was connected to the fact that there was no such term as "dictatorship of the proletariat" in the "professorial project." Gurvich was not satisfied with the fact that already Article 1 of the Reisner-Goikhbarg project stated quite definitely that,

> All power within the RSFSR belongs to the entire working population of the country united in the Councils of Deputies.

Let us suppose that Reisner and Goikhbarg, even if they were Marxists by their beliefs and romantic supporters of the socialist revolution, did not use the term, which was followed by "iron power, won by violence and supported by violence."[66] Time and history have shown how right these two legal scientists were in their fears.

Sixty years will pass before A.I. Lukyanov will write that Reisner argued against the wording of Article 10 of the Constitution, reading that the power "belongs to the entire working population of the country, united in urban and rural Soviets," stating that it can be interpreted as the transfer of state power only to those elected to the Soviets. *The failure of this position*, as Lukyanov noted, was convincingly proved by the Bolsheviks.[67] As we see, on the contrary, this criticism is *ungrounded*. The wording

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[63] G.S. Gurvich was mistaken in pointing out that this project was published on 1 July (on that day, Monday, *Izvestia* did not come out at all). Later, this mistake was repeated in other publications on this topic.

[64] *Стучка П.И.* Учение о государстве и Конституции Р.С.Ф.С.Р. [Peter I. Stuchka, *The Doctrine of the State and the Constitution of the RSFSR*] 102 (Kursk: Agitation Department of the Provincial Committee, 1922).

[65] Gurvich 1923, at 78 and following.

[66] *Id.* at 84.

[67] *Лукьянов А.И.* Развитие законодательства о советских представительных органах власти. Некоторые вопросы истории, теории и практики [Anatoly I. Lukyanov, *The Development of Legislation on the Soviet Representative Bodies. Some Questions of History, Theory and Practice*] 58 (Moscow: Yuridicheskaya literatura, 1978).

of Article 10 of the Constitution of the RSFSR is "*fully adopted*" from the Reisner-Goikhbarg project (Art. 1).

Gurvich criticized the Reisner-Goikhbarg project in terms of the status of the Councils of Deputies because it contained the words, "…not so much, what the Congress can and should do, but what it has no right to do."[68]

However, it is necessary here to defend the legal construction proposed by Reisner and Goikhbarg. First, an entire chapter (3) of the "professorial project" was devoted to the rights of the central government, and the defining of rights was carried out in a "*positive form*." All these questions could be solved both by the Congress of Soviets and by the All-Russian Central Executive Committee and the Council of the People's Commissars. Secondly, in chapter 4 of the project, "in order to prevent potential restoration of the capitalist order and bourgeois property," there were fixed "restrictions" that even the Congress of Soviets could not overcome[69] (twelve clauses concerning the prohibition of the annulment of the nationalization of land, industry, etc., the abolition of workers' weapons, separation of church and state, etc.).

Later, referring to the issue of "restrictions" of the legislature of the highest authority, Reisner explained that his project with Goikhbarg proposed these restrictions in order to ensure the basic and sole right of the working people, namely the right for a social revolution and the establishment [as stated in the text] of the socialist order.[70] It is unlikely that, analyzing the content of these "restrictions," the authors of the project can be suspected of "undermining Soviet power" and threatening the revolution, as Gurvich and other ruthless critics of the "professorial project" asserted. Moreover, we note that the consolidation of "restrictions on changes to the Constitution" is fairly common in constitutional law practice.[71]

The status of the All-Russian Central Executive Committee (fifteen clauses vs. six) and the status of the Council of the People's Commissars (fourteen clauses vs. eleven) were more developed in the "professorial project" than in the Constitution of the RSFSR. There were separate chapters in the "professorial project" "On the People's Commissariats" (ch. 7) and "On Revising and Changing the Constitution" (ch. 8) that were absent in the text of the Constitution of the RSFSR, and this sets the "professorial project" apart.

Let us note one more remarkable and undoubtedly positive feature of the "professorial project" which favorably distinguished it from all other projects:

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68 Gurvich 1923, at 85.

69 According to a caustic remark made by G.S. Gurvich, these items "were put in the wrong place, in a completely inappropriate form, they lost all their impressiveness and aroused only sad thoughts." *Id*. at 86. This criticism seems to us to be completely unfounded and simply spiteful.

70 *Рейснер М.А.* Государство буржуазии и РСФСР [Mikhail A. Reisner, *State of the Bourgeoisie and the RSFSR*] 334 (Moscow: State Trust "Petropechat," 1923).

71 "The provisions of chapters 1, 2, 9 of the Constitution of the Russian Federation cannot be revised by the Federal Assembly" (part 1 of Art. 135 of the Constitution of the Russian Federation).

it contained an entire chapter on legislation (ch. 9, "On Legislative and Governmental Acts," Arts. 72–79). Here, it stated the supremacy of the Constitution in relation to current legislation, the prohibition of "retroactive law" (except in cases specified by law), the hierarchy of laws, the procedure for resolving conflicts of acts of Soviets, etc. Today, there is *still* no special "law" in Russia about the laws.

Moreover, a little later, comparing his and Goikhbarg's project with the text of the adopted Constitution, Reisner marked the advantage of the first over the second from a formal legal point of view. He wrote that the adopted Constitution completely

> *does not know the particular concept of constitutional law*. Or, rather, it recognized only the moral value of it, that may be characteristic for the highest of socialist reorganization of society. Perhaps out of fear of return to the path of bourgeois constitutionality, the basic law of the Soviets deliberately denies special forms for its publication or revision: it is established in the same order in which other laws of the republic are passed through the supreme body – the Russian Congress of Soviets.[72]

To the contrary, the "professorial project" emphasized the constitutional act from the formal point of view and made it difficult to abolish it and change it by establishing special conditions and methods of revision, that should distinguish it from the ordinary legislation (Arts. 63–70 of the Reisner-Goikhbarg project).[73]

Considering the text of the RSFSR Constitution of 1918 in connection with the drafting of the Constitution of the USSR (1936), Stalin wrote after the text of the last section (VI): "VII. On Amending the Constitution."[74] The need for this section was defined in 1918 by Reisner and Goikhbarg, but their idea was not accepted then.

Moreover, Reisner recognized this particular procedure for revising the Constitution not as a mere formality, but as a "*special guarantee of the rights for the entire working class as a whole*." Reisner wrote that:

> The current constitution takes the standpoint of recognizing and guaranteeing the rights of public groups and associations in only one respect, this is in the matter of proclaiming national self-determination to individual nations or nations (Article 8 of the Constitution of the RSFSR). The project of the People's Commissariat of Justice went much further in this respect. It was decided to give a formal expression to the guarantees of the rights of the working and exploited people and, moreover, in the most basic content of these rights – *the right for socialism*. Both the restrictions, written down in the draft, and the

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72 Reisner 1923, at 335.

73 Gurvich 1923, Appendix XVII, at 212–213.

74 РГАНИ. Ф. 3. Оп. 51. Д. 34. Л. 10–17 [Russian State Archive of Recent History, F. 3, Op. 51, D. 34, P. 10–17].

> special requirement, that their cancellation could be made only by a special constitutional act, have precisely this meaning.[75] (emphasis added)

In other words, the authors of the "professorial project" proposed a system of defensive institutions of socialism, a number of formal and material guarantees against the restoration of the "old order." But their proposals were not heard. Only in the subsequent constitutions of the country were these ideas, in fact, embodied.

The Constitution project developed by Reisner and Goikhbarg was reviewed on 3 July 1918 by a commission of the Central Committee of the Russian Communist Party of the Bolshevik, headed by Lenin. We could not establish the course of the discussion and its results, but it is obvious that a number of provisions of the "professorial project" were taken into account and "migrated" to the final text of the draft Constitution of the RSFSR, which was presented to the Fifth Congress of Soviets.

Despite his fierce criticism, Gurvich, nevertheless, had to admit that from this "professorial project" the final text of the Constitution borrowed the idea of paragraphs X and XII of Article 27 (Arts. 21 and 22 of the Constitution), Article 1 of the project is attached to Article 2 of the "General Provisions" and together they constituted Article 10 of the Constitution. We consider it important to note that a *description of the emblem and the flag of Soviet Russia* was borrowed from the "professorial project" for the text of the Constitution.[76] Our comparative analysis of the "professorial project" and the text of the Constitution shows that the developers of the Constitution used the text of the draft somewhat more widely although without the literal reproduction of certain provisions.

Conclusion

In concluding the story of the Reisner-Goikhbarg project, especially in light of the sometimes fierce criticism, which has been heard for decades and has not decreased in the modern literature, let us present the assessment of the project given by Ya.M. Sverdlov. After the completion of the procedure for adopting the first Constitution of the RSFSR, he, according to the memoirs of Mikhail Reisner, repeatedly told Reisner that,

> The only mistake of the draft of the People's Commissariat and his [Reisner's] proposals was that the authors did not take into account the times and were too eager to come forward ...[77]

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[75] Reisner 1923, at 335.

[76] Gurvich 1923, at 91.

[77] НИОР РГБ. Ф. 369 (Бонч-Бруевич). Картон 402. Д. 12. Л. 5 [Manuscript Research Department of the Russian State Library, F. 369 (Bonch-Bruevich), Card 402, D. 12, P. 5].

In other words, as acknowledged by Sverdlov, the "professorial project" was not "a means for destruction of the Soviet power," but was simply ahead of its time.

In 1993, Mikhail Reisner's idea of abandoning the national principle of building a federation was used in the drafting of the current Russian Constitution. Its authors S.S. Alekseev and S.M. Shakhray rejected the selfsame national principle.

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RUSSIAN CONSTITUTIONAL DEVELOPMENT: FORMAL AND INFORMAL PRACTICES*

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https://doi.org/10.21684/2412-2343-2019-6-3-100-127

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.

Recommended citation: Andrey Medushevskiy, *Russian Constitutional Development: Formal and Informal Practices*, 6(3) BRICS Law Journal 100–127 (2019).

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* This study (research grant No. 15-01-0014) was supported by the National Research University Higher School of Economics Academic Fund Program in 2015–2016.

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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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THE RUSSIAN CONSTITUTION OF 1993 AND THE CONSTITUTIONALIZATION OF FEDERAL LEGISLATION: DATA ANALYSIS

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https://doi.org/10.21684/2412-2343-2019-6-3-128-161

The Constitution of the Russian Federation of 1993 provided the basis and tools for large-scale societal transformations in Russia. Still, the question of whether the results of political and socio-economic reforms are irreversible and in line with constitutional ideas and norms is open to discussion. This study investigates the temporality of the process of the "constitutionalization" of Russian law using the statistics of Federal laws and Federal constitutional laws for the period 1994–2018. The article presents the outcome of the quantitative analysis as well as a discussion of the findings involving the approaches of the legal and political sciences. The research leaves open the question of the relationship between the durability of the democratic constitution and the quality and irreversibility of democratic transformations of the social system. Monitoring the dynamics of the adoption of primary laws and laws on amendments gives evidence that even a "rigid" democratic constitution can become "elastic" with age since its ideas and meanings can often be "stretched" to apply to current cases without the need to make any changes to existing constitutional norms. The authors propose considering the conceptual possibilities of adaptive governance theory to explain the features of modern Russian lawmaking ("adaptive lawmaking," "agile lawmaking").

Keywords: constitution; Russia; legal statistics; legal policy; legal stability; adaptive governance.

Recommended citation: Svetlana Popova & Andrey Yanik, *The Russian Constitution of 1993 and the Constitutionalization of Federal Legislation: Data Analysis*, 6(3) BRICS Law Journal 128–161 (2019).

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Introduction

This work is part of a study on the role of the constitution in large-scale transformations of society. We understand the constitution both as a basis for the transformation of political and economic regimes and as a tool for the management of societal changes.

It is evident that a new constitution cannot change, in an instant, the whole existing legal framework, which was at the same time a reflection, a "creator" and a guarantor of a previous social order. The "old law" keeps functioning and directly affects social relations. Some of the old laws may be neutral for democratic change, but for the most part they are unable either to regulate new institutions and social relations or to contradict the new model of society.

So, for social systems under transformation the *time factor* plays a crucial role. This factor affects the nature and range of possible political and legal events,[1] limits the spectrum of political and legal opportunities as well as determines the choice of options for action. Also, the time factor acts on the possibility of reaching the "point of no return," the transition through which ensures the irreversibility of democratic change. For these reasons, the analysis of the dynamics of the adoption of new (primary) laws directly prescribed by the constitution, as well as the analysis of the timeliness of the abolition of the "old legislation," contrary to new principles and ideas, is of interest. This kind of research could provide evidence-based data with which to assess the quality of social, political and economic changes boosted by the adoption of the new democratic constitution and ensure that new legislation renders the democracy irreversible.

Russian researchers in constitutional law do not see any particular difficulties in determining the content and periodization of the processes that took place in the system of Russian law after the adoption of the democratic Constitution of 1993 and relate to the implementation of constitutional principles and models. For instance, academician Taliya Khabriyeva calls the ongoing transformations "the constitutionalization of modern Russian legislation" and identifies three main stages in this process:

> During the "formation" stage, in the first seven years of the Constitution ['s operation] … the foundations of legislative regulation of the new socio-economic formation were created. Codes and other legal acts were developed that revealed the content and ensured the operation of constitutional values and norms …

At the second – "adaptation" – stage, which covered the first decade of the new [i.e. twenty-first] century, lawmaking was aimed at solving urgent problems of political and socio-economic development and adjustment of legal regulators.

> In recent years, the third – "modernization" – stage of development of constitutional values and norms has come. At this stage, the task of the radical transformation of the legislation has not been set longer. However, this process is not limited to the current improvement of legislation. Modernization is distinguished by the scale and method of solving problems, which requires

[1] Ruth B. Collier & David Collier, *Critical Junctures and Historical Legacies* (Princeton: Princeton University Press, 1991); Antoni Z. Kamiński, *Stracony moment konstytucyjny w pokomunistycznej Polsce: skutki dla jakości rządzenia dwadzieścia lat później* in *Modernizacja Polski. Struktury, agencje, instytucje* [*A Lost Constitutional Moment in post-Communist Poland: Implications for Quality Management, Twenty Years Later* in *Poland's Modernization. Structures, Institutions, Organizations*] (Warsaw: Scientific and Professional Publishing House, 2010).

the adoption of not only new laws but also the improvement of methods and means of legal influence.[2]

We decided to investigate in more detail the conclusion that after the entry into force of the new Constitution of 1993 there is a period during which the adoption of new laws (basic, primary laws) dominates, after which legislators pay more attention to the clarification and improvement of already adopted legal acts. In this paper, we will call these laws the "new laws" or "primary laws" (the individual units related to the primary regulation). As for the laws used as a tool for modification of existing legislation, we will call them "laws on amendments," although, of course, both types of the mentioned legal acts are the newly adopted laws. At the same time, our aim was to analyze the dynamics of the adoption of new laws in comparison with the dynamics of the adoption of laws on amendments. The question that we hoped to clarify through this analysis centered on the relationship between the durability and stability of the democratic Constitution and the quality and irreversibility of democratic transformations of the social system.

Why are we interested in issues related to statistical studies of different types of Federal laws? Many observations and expert judgments on the development of Russian legal policy motivated us to direct our attention to this subject, but two stimuli are perhaps the most potent.

The first stimulus was the many academic papers and media reports that noted the rapid and uncontrolled growth of the laws on amendments in Russia. Their authors argue that this practice makes law enforcement and an understanding of legislation quite tricky.

The second stimulus was the papers and the expert positions accusing the current Constitution of the Russian Federation of vagueness in respect of norms. Some experts go further and claim the Constitution of 1993 has a sham nature. The critics base their reasoning on the observation that the constitutional views on the state order and economic system, as well as the political model, are still not implemented one hundred percent.[3]

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[2] *Хабриева Т.Я.* Конституционные основы, тенденции и проблемы развития российского законодательства: 20-летний опыт и современное состояние // Журнал зарубежного законодательства и сравнительного правоведения. 2013. № 4. С. 556–558 [Taliya Ya. Khabriyeva, *Constitutional Foundations, Trends and Problems of Russian Legislation Development: 20 Years of Experience and Current State*, 4 Journal of Foreign Legislation and Comparative Law 556 (2013)].

[3] *Аничкин Е.С.* Фикции в конституционном праве Российской Федерации: особенности, виды, действие // Научный ежегодник Института философии и права УрО РАН. 2018. Т. 18. № 2. С. 87–105 [Eugene S. Anichkin, *Fictions in the Constitutional Law of the Russian Federation: Features, Types, Action*, 18(2) Scientific Yearbook of the Institute of Philosophy and Law of the Ural Branch of the Russian Academy of Sciences 87 (2018)]; *Умнова-Конюхова И.А.* Конституция Российской Федерации 1993 года: оценка конституционного идеала и его реализации сквозь призму мирового опыта // Lex Russica. 2018. № 11. С. 23–40 [Irina A. Umnova-Konyukhova, *The Constitution of the Russian Federation of 1993: Evaluation of the Constitutional Ideal and Its Implementation Through the Prism of World Experience*, 11 Lex Russica 23 (2018)]; *Хабриева Т.Я.* Конституционная реформа в современном мире [Taliya Ya. Khabriyeva, *Constitutional Reform in the Modern World*] (Moscow: Nauka, 2016); *Авакьян С.А.* Конституционно-правовые реформы:

Many authors note that a quarter of a century after the adoption of the democratic Constitution Russia still retains the "antinomic symbiosis of democracy and authoritarianism,"[4] since power is exercised both by democratic and formally undemocratic methods. Such judgments apply equally to the current period and the time of the "democratic years of the 1990s." It is well known that the first President of Russia Boris Yeltsin was repeatedly accused both by politicians and by experts of authoritarian methods of governance.[5] In particular, one of the reasons was that Yeltsin initiated and performed many reforms by decree, without waiting for the consent of the legislators or openly against their will.[6]

From 1990 to the present day, a large number of enthralling discussions covering the legal and political assessment of the style of government of Russian leaders have taken place, as well as on the most accurate scientific definition of the essence of the current Russian political regime.[7] Neil Robinson, for example, argues that accurate evaluations are not yet possible, because Russia has "far from finished either state or regime building."[8]

Some researchers believe that the basic cause of the "incompleteness" and inconsistency of Russian democracy is the Constitution of 1993 itself. For example, political scientist Andrey Medushevskiy argues that the new Russian Constitution

объективные и субъективные факторы // Журнал зарубежного законодательства и сравнительного правоведения. 2016. № 1. С. 142–148 [Suren A. Avakian, *Constitutional and Legal Reforms: Objective and Subjective Factors*, 1 Journal of Foreign Legislation and Comparative Law 142 (2016)]; *Нефедов Д.В.* Экономическая теория как основание конституционного толкования // Известия вузов. Правоведение. 2013. № 5. С. 215–223 [Dmitry V. Nefedov, *Economic Theory as the Basis of Constitutional Interpretation*, 5 Izvestiya vuzov. Pravovedenie 215 (2013)].

4 *Красин Ю.А.* Российская демократия: коридор возможностей // Полис. 2004. № 6. С. 125–135 [Yuri A. Krasin, *Russian Democracy: Corridor of Opportunities*, 6 Polis 125 (2004)].

5 *Гельман В.Я.* «Transition» по-русски: концепции переходного периода и политическая трансформация в России (1989–1996) // Общественные науки и современность. 1997. № 7. С. 64–81 [Vladimir Y. Gelman, *"Transition" in Russian: Concepts of Transition and Political Transformation in Russia (1989–1996)*, 7 Social Sciences and Modernity 64 (1997)]; *Умланд А.* Постсоветская Россия между демократией и авторитаризмом: Критика сравнения ельцинского и путинского периодов из исторической перспективы // Научный общественно-политический журнал <БЕЗ ТЕМЫ>. 2009. № 1(11). С. 5–11 [Andreas Umland, *Post-Soviet Russia Between Democracy and Authoritarianism: Criticism of the Comparison of the Yeltsin and Putin Periods from a Historical Perspective*, 1 Scientific Socio-Political Journal <NO TOPIC> 5 (2009)].

6 *Лучин В.О.* «Указное право» в России [Victor O. Luchin, *"Decree-Law" in Russia*] (Moscow: Veles, 1996); *Лукьянова Е.А.* Указное право как российский политический феномен // Журнал российского права. 2001. № 10. С. 55–67 [Elena A. Lukyanova, *Decree-Law as a Russian Political Phenomenon*, 10 Journal of Russian Law 55 (2001)].

7 Mikael Wigell, *Mapping "Hybrid Regimes": Regime Types and Concepts in Comparative Politics*, 15(2) Democratization 230 (2008); *Моммзен М.* Российский политический режим: неосоветский авторитаризм и патронажное президентство // Неприкосновенный запас. 2010. № 6(74) [Margaret Mommsen, *Russian Political Regime: Neo-Soviet Authoritarianism and Patronage Presidency*, 6 Emergency Ration (2010)] (Aug. 10, 2019), available at http://magazines.russ.ru/nz/2010/6/mm10.html.

8 Neil Robinson, *State, Regime, and Russian Political Development*, Limerick Papers in Politics and Public Administration, No. 3 (2008) (Aug. 10, 2019), available at https://www.ul.ie/ppa/content/files/Robinson_state.pdf.

is initially not able to determine the political regime rigidly since its provisions are "unclear, misleading," "deliberately vague" and "can be interpreted in different ways."[9] One of the co-authors of the Constitution of 1993 Professor Sergey Shakhray does not share this point of view. He believes that attempts to "blame" the constitutional act for the observed failures of democracy

> are the result of naïve faith in the magic power of the written word that is capable, only by its existence, automatically to change the mentality of the elites and the prevailing political practices.[10]

Therefore, our present interest is related to consideration of the dynamics of the adoption and clarification of Federal constitutional laws and Federal laws for the period 1994–2018 as a first step to investigation of how the temporality and other characteristics of Russian lawmaking influence the irreversibility of key social transformations, prescribed by the models contained in the provisions of the Russian Constitution of 1993.

1. Materials and Methods

We conducted the quantitative analysis of various information on Federal constitutional laws and Federal laws adopted after the entry into force of the Constitution of the Russian Federation of 1993 using the official Database "Federal Legislation." This online database is part of the State System of Russian Legal Information "Official Internet Portal of Legal Information" that can be found at http://pravo.gov.ru (in Russian).

As of 1 January 2019, the Database "Federal Legislation" contained 195,025 Federal acts adopted since 1 January 1994.

We carried out a general search in the Database "Federal Legislation" using the tag of "Federal law OR Federal constitutional law," with the interval of dates from 1 January of each selected year to 1 January of the following year. In each annual array of laws (legislative acts adopted by the Federal Assembly of the Russian Federation and signed by the President of the Russian Federation during the analyzed year), we did a new sampling search using the additional search criteria (in Russian) for the field of "Act Name" such as "amendments," "changes," "additions," "addenda" and so on.

To find the rate of change in the number of laws in percentages, we used the compound annual growth rate. Compound annual growth rate (CAGR) is a specific

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[9] *Медушевский А.Н.* Российская конституция в мировом политическом процессе: к десятилетию Конституции Российской Федерации 1993 г. // Мир России. 2003. № 3. С. 81 [Andrey N. Medushevskiy, *Russian Constitution in the World Political Process: To the Decade of the Constitution of the Russian Federation of 1993*, 3 World of Russia 62, 81 (2003)].

[10] *Шахрай С.М.* О Конституции: Основной закон как инструмент правовых и социально-политических преобразований [Sergey M. Shakhray, *Towards the Constitution: Basic Law as an Instrument for Legal and Socio-Political Change*] 241 (Moscow: Nauka, 2013).

term widely applied for describing the geometric progression ratio that provides a constant rate of return over the period. Also, this term is often used to describe a number of the elements of the process (in our case, the legislative process), for example, laws adopted.

$$\mathrm{CAGR}(t_0, t_n) = \left(\frac{V(t_n)}{V(t_0)}\right)^{\frac{1}{t_n - t_0}} - 1$$

Where $V(t_0)$ is the initial value, $V(t_n)$ is the end value and $t_n - t_0$ is the number of years.

For our calculations, we chose to take the data from 1 January of each selected year to 1 January of the following year for two reasons. First, the Constitution of the Russian Federation entered into force at the end of 1993 (25 December 1993) and, therefore, logically, the laws were adopted after that date. Second, our choice aimed at ensuring that the average annual rate of change in the number of laws was correctly calculated, so this required data for the full calendar year.

2. Results

2.1. General Statistics

The results of the search conducted in the Database "Federal Legislation" showed that the total number of Federal constitutional laws and Federal laws adopted in the period from 1 January 1994 to 1 January 2019 amounted to 7,912. More than 5,000 of them (5,451) are the laws on amendments and additions to previously adopted legislation. Thus, the number of laws aimed at amending or clarifying existing legislation accounts for almost 69% of the total number of Federal constitutional laws and Federal laws enacted during the study period.

2.2. Dynamics of Adoption of Laws

According to the results of the analysis, about 47% of the total number of laws available in the Database "Federal Legislation" were adopted in the period from 1 January 1994 to 1 January 2010, that is, during the first sixteen years following the entry into force of the new Constitution of the Russian Federation.

More than 53% of the total number of laws available in the Database "Federal Legislation" were adopted in the period from 1 January 2010 to 1 January 2019, that is, during eight years. At the same time, a quarter of the laws available in this database were adopted over the past four years – from 1 January 2015 to 1 January 2019.

These results show that the total number of laws increased with acceleration, and the rate of change in this indicator continually increased, especially in the last few years.

A comparison of the dynamics of the adoption of primary laws and the dynamics of the appearance of laws on amendments shows the following results: during 2010–2018, compared with the period 1994–2009, the average annual rate of the adoption

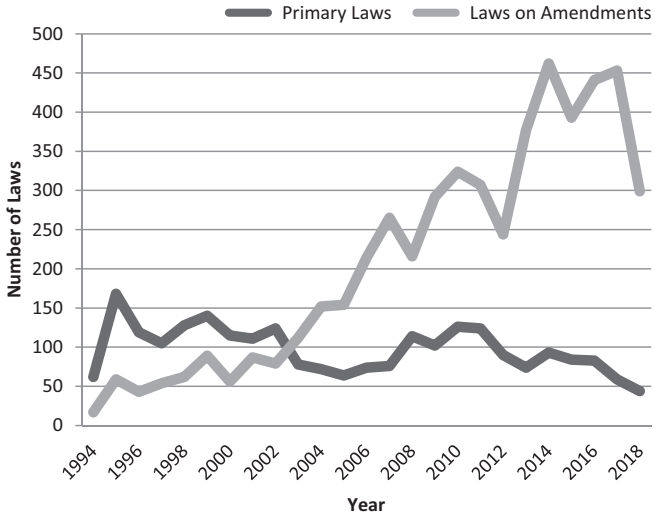
of primary laws decreased by about a third, and the annual average rate of the adoption of laws clarifying the then current legislation increased by 2.75 times (*see* Table 1 below for more details).

Table 1: The Average Annual Rate of Increase in the Number of New Laws and Laws on Amendments

Average annual rate of increase in the number of Federal constitutional laws and Federal laws	01.01.1994–01.01.2010	01.01.2010–01.01.2019
New laws	11%	4%
Laws on amendments	8%	11%

We made a comparison of the number of primary laws and the laws on amendments over the years. The graphical representation of the results obtained (*see* Figure 1 below) shows that since 2003 the number of laws on amendments adopted annually far exceeds the number of primary laws.

Figure 1: Dynamics of Adoption of Primary Laws and Laws on Amendments (Units per Year)



2.3. Dynamics of Adoption and Modification of Laws That Are Directly Provided by Articles of the Constitution of the Russian Federation

Table 2 below provides information on the temporal characteristics of the processes related to the adoption of Federal constitutional laws and Federal laws that

are directly provided by the provisions of the Russian Constitution of 1993. The presented data show that the laws, which are very important for new state-building and democracy-establishment, were adopted with a noticeable delay.

For example, the Federal Constitutional Law "On the Government of the Russian Federation" was adopted only in December 1997, that is, four years after the nationwide vote for passing the Constitution of 1993.[11]

Federal constitutional laws on the symbols of the new Russian state (laws on the state coat of arms, flag and anthem) passed at the end of December 2000, that is, seven years after the adoption of the democratic Constitution.[12]

The Federal Constitutional Laws "On the State of Emergency" and "On Martial Law," which were urgently needed in the context of the escalation of regional conflicts, were passed only in May 2001[13] and January 2002,[14] respectively. Until their passage, the law of the Russian Soviet Federative Socialist Republic (RSFSR), adopted in 1991, was in force.

The Federal Law "On the Citizenship of the Russian Federation" was adopted by the Parliament only in May 2002.[15]

Some of the acts provided for in the Constitution of the Russian Federation of 1993 are still pending. These are Federal constitutional laws on changing the status of a constituent entity of the Russian Federation (part 5 of Art. 66 of the Constitution of the Russian Federation) and on convening a Constitutional Assembly (Art. 135(2) of the Constitution of the Russian Federation).[16]

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[11] Федеральный конституционный закон от 17 декабря 1997 г. № 2-ФКЗ «О Правительстве Российской Федерации» // Собрание законодательства РФ. 1997. № 51. Ст. 5712 [Federal Constitutional Law No. 2-FKZ of 17 December 1997. On the Government of the Russian Federation, Legislation Bulletin of the Russian Federation, 1997, No. 51, Art. 5712].

[12] Федеральный конституционный закон от 25 декабря 2000 г. № 1-ФКЗ «О Государственном флаге Российской Федерации» // Собрание законодательства РФ. 2000. № 52 (ч. 1). Ст. 5020 [Federal Constitutional Law No. 1-FKZ of 25 December 2000. On the State Flag of the Russian Federation, Legislation Bulletin of the Russian Federation, 2000, No. 51 (part 1), Art. 5020]; Федеральный конституционный закон от 25 декабря 2000 г. № 2-ФКЗ «О Государственном гербе Российской Федерации» // Собрание законодательства РФ. 2000. № 52 (ч. 1). Ст. 5021 [Federal Constitutional Law No. 2-FKZ of 25 December 2000. On the State Coat of Arms of the Russian Federation, Legislation Bulletin of the Russian Federation, 2000, No. 51 (part 1), Art. 5021]; Федеральный конституционный закон от 25 декабря 2000 г. № 3-ФКЗ «О Государственном гимне Российской Федерации» // Собрание законодательства РФ. 2000. № 52 (ч. 1). Ст. 5022 [Federal Constitutional Law No. 3-FKZ of 25 December 2000. On the National Anthem of the Russian Federation, Legislation Bulletin of the Russian Federation, 2000, No. 51 (part 1), Art. 5022].

[13] Федеральный конституционный закон от 30 мая 2001 г. № 3-ФКЗ «О чрезвычайном положении» // Собрание законодательства РФ. 2001. № 23. Ст. 2277 [Federal Constitutional Law No. 3-FKZ of 30 May 2001. On the State of Emergency, Legislation Bulletin of the Russian Federation, 2001, No. 23, Art. 2277].

[14] Федеральный конституционный закон от 30 января 2002 г. № 1-ФКЗ «О военном положении» // Собрание законодательства РФ. 2002. № 5. Ст. 375 [Federal Constitutional Law of the Russian Federation No. 1-FKZ of 30 January 2002. On Martial Law, Legislation Bulletin of the Russian Federation, 2002, No. 5, Art. 375].

[15] Федеральный закон от 31 мая 2002 г. № 62-ФЗ «О гражданстве Российской Федерации» // Собрание законодательства РФ. 2002. № 22. Ст. 2013 [Federal Law No. 62-FZ of 31 May 2002. On the Citizenship of the Russian Federation, Legislation Bulletin of the Russian Federation, 2002, No. 22, Art. 2013].

[16] The draft Federal Constitutional Law "On the Constitutional Assembly" was submitted to the State Duma of the Federal Assembly of the Russian Federation in September 2000.

Table 2: Chronology of the Adoption of Federal Constitutional Laws Directly Mentioned by the Constitution of the Russian Federation (1993)

The Substance of the Act and Reference to the Constitution of the Russian Federation	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
State of emergency (Art. 56(2), Art. 88)	Act of the RSFSR 1991[1]							PL[2]															A		
Creation of a new subject of the Russian Federation (Art. 65(2))								PL[3]				A													
Change the status of the subject of the Russian Federation (Art. 66(5))																									
Symbols of the state (National symbols) of the Russian Federation (Art. 70(1))																									
– The state flag							PL[4]		A	A		A			A		2A				A				
– The state coat of arms							PL[5]		A	A						A	A			A	A			A	
– The state anthem							PL[6]	A												A					

[1] Закон РСФСР от 17 мая 1991 г. 1253-I «О чрезвычайном положении» // Ведомости СНД и ВС РСФСР. 1991. № 22. Ст. 773 [Law of the RSFSR No. 1253-I of 17 May 1991. On the State of Emergency, Gazette of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR, 1991, No. 22, Art. 773] (no longer valid); Постановление Верховного Совета РСФСР от 17 мая 1991 г. № 1254-I «О порядке введения в действие Закона РСФСР «О чрезвычайном положении»» // Ведомости СНД и ВС РСФСР. 1991. № 22. Ст. 774 [Ruling of the Supreme Council of the RSFSR No. 1254-I of 17 May 1991. On the Procedure to Put the Law of the RSFSR "On the State of Emergency" in Force, Gazette of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR, 1991, No. 22, Art. 774] (no longer valid).

[2] Federal Constitutional Law of 30 May 2001 No. 3-FKZ "On the State of Emergency."

[3] Федеральный конституционный закон от 17 декабря 2001 г. № 6-ФКЗ «О порядке принятия в Российскую Федерацию и образования в ее составе нового субъекта Российской Федерации» // Собрание законодательства РФ. 2001. № 52 (ч. 1). Ст. 4916 [Federal Constitutional Law No. 6-FKZ of 17 December 2001. On the Procedure of the Admission to the Russian Federation and the Creation in It of a New Subject of the Russian Federation, Legislation Bulletin of the Russian Federation, 2001, No. 52 (part 1), Art. 4916].

[4] Federal Constitutional Law of 25 December 2000 No. 1-FKZ "On the State Flag of the Russian Federation."

[5] Federal Constitutional Law of 25 December 2000 No. 2-FKZ "On the State Coat of Arms of the Russian Federation."

[6] Federal Constitutional Law of 25 December 2000 No. 3-FKZ "On the National Anthem of the Russian Federation."

Continuation of **Table 2**

The Substance of the Act and Reference to the Constitution of the Russian Federation	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Referendum (Art. 84(c))		Federal Constitutional Law 1995[7]									PL[8]		A		A						A	A		A	
The regime of martial law (Art. 87(3))									PL[9]								2A				A			A	
Commissioner for human rights (Art. 103(f))				PL[10]									A		A		A				2A	A	A		
Government of the Russian Federation (Art. 114(2))				PL[11] A							2A	A			2A		3A		A	A	A	2A	2A		
The judicial system (Art. 118(3))			PL[12]					A		A		A				A		A	2A		A				A

[7] Федеральный конституционный закон от 10 октября 1995 г. № 2-ФКЗ «О референдуме Российской Федерации» // Собрание законодательства РФ. 1995. № 42. Ст. 3921 [Federal Constitutional Law No. 2-FKZ of 10 October 1995. On the Referendum of the Russian Federation, Legislation Bulletin of the Russian Federation, 1995, No. 42, Art. 3921] (no longer valid).

[8] Федеральный конституционный закон от 28 июня 2004 г. № 5-ФКЗ «О референдуме» // Собрание законодательства РФ. 2004. № 27. Ст. 2710 [Federal Constitutional Law No. 5-FKZ of 28 June 2004. On the Referendum, Legislation Bulletin of the Russian Federation, 2004, No. 27, Art. 2710].

[9] Federal Constitutional Law of 30 January 2002 No. 1-FKZ "On Martial Law."

[10] Федеральный конституционный закон от 26 февраля 1997 г. № 1-ФКЗ «Об Уполномоченном по правам человека в Российской Федерации» // Собрание законодательства РФ. 1997. № 9. Ст. 1011 [Federal Constitutional Law No. 1-FKZ of 26 February 1997. On the Commissioner for Human Rights in the Russian Federation, Legislation Bulletin of the Russian Federation, 1997, No. 9, Art. 1011].

[11] Federal Constitutional Law of 17 December 1997 No. 2-FKZ "On the Government of the Russian Federation."

[12] Федеральный конституционный закон от 31 декабря 1996 г. № 1-ФКЗ «О судебной системе Российской Федерации» // Собрание законодательства РФ. 1997. № 1. Ст. 1 [Federal Constitutional Law No. 1-FKZ of 31 December 1996. On the Judicial System of the Russian Federation, Legislation Bulletin of the Russian Federation, 1997, No. 1, Art. 1].

Continuation of **Table 2**

The Substance of the Act and Reference to the Constitution of the Russian Federation	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
The judicial power of the Russian Federation (part 3 of Art. 128)																									
– Constitutional Court	PL[13]							2A			A	A		2A		A	2A		A	A	2A	2A	A		A
– Supreme Court																					PL[14] 2A		A	A	A
– Higher Arbitration Court	Act 1991[15]	Federal Constitutional Law 1995[16]																							
RF Arbitration courts		PL[17]								A	A		A		2A	2A	2A	A			2A		A		A
Admission and the creation of new subjects of the Russian Federation (Art. 137 (1))								PL[18]				A													
Note: PL – Primary Law; nA – number of Amendments Colors: ☐ – Existing Law; ☐ – Law that has ceased to apply																									

[13] Федеральный конституционный закон от 21 июля 1994 г. № 1-ФКЗ «О Конституционном Суде Российской Федерации» // Собрание законодательства РФ. 1994. № 13. Ст. 1447 [Federal Constitutional Law No. 1-FKZ of 21 July 1994. On the Constitutional Court of the Russian Federation, Legislation Bulletin of the Russian Federation, 1994, No. 13, Art. 1447].

[14] Федеральный конституционный закон от 5 февраля 2014 г. № 3-ФКЗ «О Верховном Суде Российской Федерации» // Собрание законодательства РФ. 2014. № 6. Ст. 550 [Federal Constitutional Law No. 3-FKZ of 5 February 2014. On the Supreme Court of the Russian Federation, Legislation Bulletin of the Russian Federation, 2014, No. 6, Art. 550].

[15] Закон РСФСР от 4 июля 1991 г. «Об арбитражном суде» // Ведомости СНД и ВС РСФСР. 1991. № 30. Ст. 1013 [Law of the RSFSR of 4 July 1991. On the Arbitration Court, Gazette of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR, 1991, No. 30, Art. 1013] (no longer valid); Постановление Верховного Совета РСФСР от 4 июля 1991 г. № 1544-I «О введении в действие Закона РСФСР «Об арбитражном суде»» // Ведомости СНД и ВС РСФСР. 1991. № 30. Ст. 1014 [Ruling of the Supreme Council of the RSFSR No. 1544-I of 4 July 1991. On the Procedure to Put the Law of the RSFSR "On the Arbitration Court" in Force, Gazette of the Congress of People's Deputies of the RSFSR and the Supreme Soviet of the RSFSR, 1991, No. 30, Art. 1014] (no longer valid).

[16] Закон Российской Федерации о поправке к Конституции Российской Федерации от 5 февраля 2014 г. № 2-ФКЗ «О Верховном Суде Российской Федерации и прокуратуре Российской Федерации» // Собрание законодательства РФ. 2014. № 6. Ст. 548 [Law of the Russian Federation on Amendment to the Constitution of the Russian Federation No. 2-FKZ of 5 February 2014. On the Supreme Court of the Russian Federation and the Prosecutors Office of the Russian Federation, Legislation Bulletin of the Russian Federation, 2014, No. 6, Art. 548].

[17] Федеральный конституционный закон от 28 апреля 1995 г. № 1-ФКЗ «Об арбитражных судах в Российской Федерации» // Собрание законодательства РФ. 1995. № 18. Ст. 1589 [Federal Constitutional Law No. 1-FKZ of 28 April 1995. On Arbitration Courts in the Russian Federation, Legislation Bulletin of the Russian Federation, 1995, No. 18, Art. 1589].

[18] Federal Constitutional Law of 17 December 2001 No. 6-FKZ "On the Procedure of the Admission to the Russian Federation and the Creation in It of a New Subject of the Russian Federation."

2.4. Chronology of Modification of Several Laws Adopted in Pursuance of Constitutional Provisions / Data on the Increase in the Number of Laws

The analysis showed that many laws adopted in pursuance of the provisions of the Constitution of the Russian Federation in the field of new state-building and political development almost immediately became the object of the introduction of amendments. Also, the volume of their texts was permanently/consistently increasing.

For example, after the entry into force of the Constitution of 1993 and to date, three Federal Laws "On the Procedure for Forming the Federation Council of the Federal Assembly of the Russian Federation" were passed sequentially one after another.

The first version of this law, the law of 1995,[17] was in effect for five years with no changes or additions. The volume of its text was 943 characters.

In 2000, the second version of this Federal law was adopted. During its effective period until 2012, legislators amended and modified this law eleven times. Legislators modified this act six times by passing laws on amendments to this law directly. Five more times changes were made through the Federal Law of 14 February 2009 "On the Modification of Individual Legal Acts of the Russian Federation in Connection with the Change of the Order of Formation of the Federation Council of the Federal Assembly of the Russian Federation" (No. 21-FZ) and by the laws of amendments to the mentioned act. The initial version of the 2000 law contained a little more than 8,000 characters, but after all of the changes and additions, the length of the text increased to almost 16,000 characters.

The third Federal law regulating the formation of the Federation Council was adopted in December 2012 and is still in force.[18] During the six and a half years of the law's operation, legislators modified it nine times. The length of the original text was slightly more than 17,500 characters. To date, with all introduced amendments, it exceeds 30,000 characters.

Thus, for all of the years of the existence of the Federation Council in the contemporary history of Russia, the volume of the law regulating an order of formation of this state body has grown by a factor of about 32.5.

We noted similar trends (an increase in the number of amendments and the length of the text) concerning other acts significant for the new Russian state-building. Tables 3, 4 and 5 below provide the data on the year of the law's adoption, the number of modifications and the length of the text, respectively.

For example, the Federal Constitutional Law "On the Government of the Russian Federation," adopted in 1997, is still in force. Over the course of time, legislators passed twenty laws on amendments and additions to this legal act, with the result

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[17] Федеральный закон от 5 декабря 1995 г. № 192-ФЗ «О порядке формирования Совета Федерации Федерального Собрания Российской Федерации» // Собрание законодательства РФ. 1995. № 50. Ст. 4869 [Federal Law No. 192-FZ of 5 December 1995. On the Procedure for Forming the Federation Council of the Federal Assembly of the Russian Federation, Legislation Bulletin of the Russian Federation, 1995, No. 50, Art. 4869] (no longer valid).

[18] Федеральный закон от 5 августа 2000 г. № 113-ФЗ «О порядке формирования Совета Федерации Федерального Собрания Российской Федерации» // Собрание законодательства РФ. 2000. № 32. Ст. 3336 [Federal Law No. 113-FZ of 5 August 2000. On the Procedure for Forming the Federation Council of the Federal Assembly of the Russian Federation, Legislation Bulletin of the Russian Federation, 2000, No. 32, Art. 3336].

that the text of the law on the Russian Federation government today has increased by more than a quarter in comparison with its initial text.

After the adoption of the Constitution of 1993 and up to the present, three Federal Laws "On the Election of the President of the Russian Federation" have been adopted, successively replacing each other.

The first Federal law[19] was in force from 1995 to 1999 and had no changes.

The second Federal law[20] was in force from 2000–2002. Amendments and additions were made one time.

The third Federal law[21] came into force in January 2003. As of 1 January 2019 legislators have changed the law thirty-eight times. The length of the text has increased by about 14%.

Comparing the length of the first Federal Law and the latest version of the third Federal Law "On the Election of the President of the Russian Federation," we can see that the first Federal Law was more than four times more compact than the current legal act.

With regard to an act of the utmost importance for any democratic state so as to guarantee the right of citizens to express their will and participate freely in elections, we may refer to two Federal laws that were adopted in succession following the entry into force of the Constitution of the Russian Federation of 1993.

The first Federal Law "On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation"[22] was in effect from 1997 to 2002. Legislators amended this law two times.

The current (second) version of the Federal law was adopted on 12 June 2002.[23] From then to 1 January 2019, legislators modified this act 102 times. During the period 2002–2018 the length of the text of the law increased almost 1.6 times. If we compare the current version with the text of the first Federal Law of 1997, we can see that the number of characters of the current version is four times larger.

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19 Федеральный закон от 17 мая 1995 г. № 76-ФЗ «О выборах Президента Российской Федерации» // Собрание законодательства РФ. 1995. № 21. Ст. 1924 [Federal Law No. 76-FZ of 17 May 1995. On the Election of the President of the Russian Federation, Legislation Bulletin of the Russian Federation, 1995, No. 21, Art. 1924] (no longer valid).

20 Федеральный закон от 31 декабря 1999 г. № 228-ФЗ «О выборах Президента Российской Федерации» // Собрание законодательства РФ. 2000. № 1. Ст. 11 [Federal Law No. 228-FZ of 31 December 1999. On the Election of the President of the Russian Federation, Legislation Bulletin of the Russian Federation, 2000, No. 1, Art. 11] (no longer valid).

21 Федеральный закон от 10 января 2003 г. № 19-ФЗ «О выборах Президента Российской Федерации» // Собрание законодательства РФ, 2003. № 2. Ст. 171 [Federal Law No. 19-FZ of 10 January 2003. On the Election of the President of the Russian Federation, Legislation Bulletin of the Russian Federation, 2003, No. 2, Art. 171].

22 Федеральный закон от 19 сентября 1997 г. № 124-ФЗ «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации» // Собрание законодательства РФ. 1997. № 38. Ст. 4339 [Federal Law No. 124-FZ of 19 September 1997. On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation, Legislation Bulletin of the Russian Federation, 1997, No. 38, Art. 4339].

23 Федеральный закон от 12 июня 2002 г. № 67-ФЗ «Об основных гарантиях избирательных прав и права на участие в референдуме граждан Российской Федерации» // Собрание законодательства РФ. 2002. № 24. Ст. 2253 [Federal Law No. 67-FZ of 12 June 2002. On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation, Legislation Bulletin of the Russian Federation, 2002, No. 24, Art. 2253].

Table 3: Dynamics of Changes in the Federal Constitutional Law "On the Government of the Russian Federation"

	Number of acts that introduced amendments to the initial law, by year																				
	1997	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**
Law	PL A							2A	A		2A	2A		3A		A	2A	A	2A	3A		
Number of acts that introduced amendments to the initial law, total	20																					
Length of text	Initial version – 40,285 characters											Latest version – 50,954 characters										
Note: PL – Primary Law; nA – number of Acts on amendments Colors: ▢ – Existing Law																						

Law: Federal Constitutional Law of 17 December 1997 No. 2-FKZ "On the Government of the Russian Federation"

Table 4: Dynamics of Changes in the Federal Law "On the Election of the President of the Russian Federation"

	Number of acts that introduced amendments to the initial law, by year																							
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Law 1	PL																							
Number of acts that introduced amendments to the initial law, total	0																							
Length of text	Initial version – 106,762 characters												Latest version – 106,762 characters											
Law 2					PL			A																
Number of acts that introduced amendments to the initial law, total	1																							
Length of text	Initial version – 358,950 characters												Latest version – 358,872 characters											
Law 3										PL	A	4A	3A		5A	4A	5A	A	4A	5A	A	A	3A	A
Number of acts that introduced amendments to the initial law, total	38																							
Length of text	Initial version – 389,311 characters												Latest version – 444,008 characters											
Note: PL – Primary Law; nA – number of Acts on amendments Colors: ▢ – Existing Law; ▢ – Law that has ceased to apply																								

Law 1: Federal Law of 17 May 1995 No. 76-FZ "On the Election of the President of the Russian Federation" (no longer valid)
Law 2: Federal Law of 31 December 1999 No. 228-FZ "On the Election of the President of the Russian Federation" (no longer valid)
Law 3: Federal Law of 10 January 2003 No. 19-FZ "On Presidential Elections of the Russian Federation"

Table 5: Dynamics of Changes in the Federal Law "On Basic Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum"

	Number of acts that introduced amendments to the initial law, by year																					
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Law 1	PL		A		A																	
Number of acts that introduced amendments to the initial law, total	2																					
Length of text	Initial version – 225,701 characters											Latest version – 299,585 characters										
Law 2						PL 2A	5A	5A	3A	5A	6A	7A	8A	8A	8A	5A	10A	11A	6A	6A	2A	5A
Number of acts that introduced amendments to the initial law, total	102																					
Length of text	Initial version – 414,262 characters											Latest version – 656,328 characters										
Note: PL – Primary Law; nA – number of Acts on amendments Colors: ☐ – Acting Law; ☐ – Law that has ceased to apply																						

Law 1: Federal Law of 19 September 1997 No. 124-FZ "On Basic Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum" (no longer valid)

Law 2: Federal Law of 12 June 2002 No. 67-FZ "On Basic Guarantees of Electoral Rights and the Right of Citizens of the Russian Federation to Participate in a Referendum"

3. Discussion and Conclusions

3.1. Why Was the Pace of Adoption of the Laws Prescribed by the Constitution Slow in the 1990s and Accelerating After 2000?

It is evident that the pace and quality of implementation of the principles and models that the Russian Constitution of 1993 contains depended and continue to rely on the impact of a complex set of various factors. We believe the critical factor is the recognition and acceptance by political elites of the value of a democratic Constitution, as well as their determination and ability to enact the necessary laws based on constitutional ideas so that the new legislation will contribute to the transformation of social reality in strict accordance with the constitutional intent. However, it is clear that in practice a full consensus of elites is an unattainable state, especially for transforming societies.

The Russian constitutionalist Professor Marat Baglay has repeatedly pointed out that constitutional law is more closely related to politics than other branches of law, because it directly interacts with the principles of democracy and the issues of the political order. This cause

> gives rise to the struggle of various political actors around the Constitution, laws, judicial decisions, and other legal acts that constitute the sources of constitutional law.[24]

So, it is not surprising that the dynamics of the appearance of new laws that can create a new social order under the ideas of a democratic Constitution directly depend on the ability of political actors, opposed to each other, to impact the legislative process and its results.

The essential feature of the "era of change," which began in Russia at the end of the twentieth century, was that several large-scale transformation processes *simultaneously* took place in the country. They influenced each other in extremely complex and unpredictable ways. As Professor Sergey Shakhray notes:

> … along with the change in the economic and social system, along with a deep macroeconomic and financial crisis, in Russia in the late 1980s and early 1990s, a full-scale political revolution was undergoing. Moreover, all this systemic transformation took place under conditions of the collapse of the state and its institutions.[25]

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[24] *Баглай М.В.* Конституционное право Российской Федерации [Marat V. Baglay, *Constitutional Law of the Russian Federation*] (Moscow: NORMA, 2007).

[25] Shakhray 2013, at 241.

To bring the country out of the destructive socio-economic crisis in the shortest possible time, the new Russian government led by Boris Yeltsin began "shock reforms," the first step of which was the deep liberalization of both political and economic life. It was assumed that a free market would start the engine of sustainable economic development, and the maximum possible level of political freedom would ensure the transition to a sustainable "self-enforcing" democracy. However, as history shows, the absolutization of any solution is risky technology: the pendulum, swung too far in one direction, is sure to swing back in the opposite direction. Today, we see many cases where states face the need to correct both "market failures" and "failures of democracy."

The broadest possible implementation of the principles of political liberalism in Russia in the early 1990s led to ambiguous results: the parties and social movements, supporting the course of President Boris Yeltsin and his Government, failed to gain a significant majority in the Russian State Duma.

Table 6 below shows statistic data related to the elections to the State Duma on party lists in the first years after the adoption of the new Russian Constitution. The figures show how many parties and electoral blocs expressed and realized their intention to participate in the elections, and how badly the Deputy Corps of the State Duma was politically fragmented.

Table 6: Results of the First Three Elections to the State Duma of the Federal Assembly of the Russian Federation (1993–1999)

Indicator	The year of the election		
	1993	1995	1999
The number of electoral associations, blocs and political parties that … – planned to participate in the elections	35	69	93
– admitted to the elections	13	43	28
– elected (with more than 5% of votes)	8	4	6
Number of political party factions in the newly elected State Duma	8	4	6
Number of Deputy groups in the newly elected State Duma	2	3	3

As another illustration, the results of the elections to the State Duma on party lists of 1993 (party-list proportional representation principle), presented on the official website of the Central Election Commission of the Russian Federation, can be cited (Table 7 below).

Table 7: Results of Elections of Deputies of the State Duma on the Federal District (Party Lists) on 12 December 1993[26]

Names of electoral associations	Votes (%)	Number of Deputy mandates
Agrarian Party of Russia	7.99%	21
Bloc: Yavlinsky – Boldyrev – Lukin	7.86%	20
Future of Russia – New Names	1.25%	–
Russia's Choice	15.51%	40
Civil Union for Stability, Justice, and Progress	1.93%	–
Democratic Party of Russia	5.52%	14
Dignity and Charity	0.70%	–
Communist Party of the Russian Federation	12.40%	32
Constructive-ecological movement of Russia "Kedr"	0.76%	–
Liberal Democratic Party of Russia	22.92%	59
Party of Russian Unity and Accord	6.73%	18
Political Movement "Women of Russia"	8.13%	21
Russian Democratic Reform Movement	4.08%	–

The Parliament, elected on 12 December 1993, consisted of many political factions that opposed each other, as well as the President and the Government. So, this main legislative body of Russia was not too efficient for implementing the new constitutional ideas in legislation. It is not surprising that throughout the second half of the 1990s the adoption of new laws to ensure political, economic and social reform, as well as the implementation of the constitutional provisions, went forward with great difficulty and delay. This fact is noted in many papers.[27]

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[26] Source: Центральная избирательная комиссия Российской Федерации [The Central Election Commission of the Russian Federation] (Aug. 10, 2019), available at http://www.cikrf.ru/banners/vib_arhiv/gosduma/1993/1993_itogi_FS_obshefed_okrug.php.

[27] *Зорькин В.Д.* Цивилизация права и развитие России [Valery D. Zorkin, *The Civilianization of Law and Development of Russia*] (Moscow: NORMA; Infra-M, 2016); Peter B. Maggs et al., *Law and Legal System of the Russian Federation* (6th ed., Huntington, N.Y.: Juris Publishing, 2015); *Legal Systems in Transition: A Comparison of Seven Post-Soviet Countries* (H.-G. Heinrich & L. Lobova (eds.), Frankfurt am Mein: Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2012); *Хабриева Т.Я., Чиркин В.Е.* Теория современной конституции [Taliya Ya. Khabriyeva & Veniamin E. Chirkin, *The Theory of the Modern Constitution*] (Moscow: NORMA, 2007).

For example, one of the co-authors of the Russian Constitution of 1993, directly involved in governing the political and legal transformations of the 1990s, Sergey Shakhray emphasizes:

> … the lack of a mature political culture and the "revelry" of the multi-party system led to the de facto paralysis of Parliament and legislative work in the 1990s, as has been repeatedly noted.

As a result of this situation, the roles of the head of state and the Constitutional Court of the Russian Federation (which were, on objective grounds, forced to repair the "failures" in the activities of legislative bodies) have disproportionately increased and, as a consequence, the influence of Parliament has decreased.[28]

However, statistics show that beginning at the turn of the twentieth century, the pace of passing Federal laws and their overall number began to grow steadily. Many acts of recent years have been adopted with remarkable swiftness.

A number of facts illustrate this conclusion. For example, in the 1990s the process of consideration and adoption of the Land Code of the Russian Federation took seven years: the government of the Russian Federation submitted the first version before the State Duma in 1994; the legislators adopted the final release of the law, after lengthy discussions, in 2001.[29] In 2012, the Federal law establishing criminal liability for the dissemination of intentionally false information to harm someone's reputation (the "Law on Defamation"[30]) passed all the procedures (it was adopted in three readings by Deputies of the State Duma, approved by the Federation Council and signed by the President of the Russian Federation) in twenty-four days.

Many hypotheses exist to explain the fact of the increasing quickness of adoption of laws and the overall increase in the number of Russian regulations by different reasons, including legal, technological and political factors, the needs of economic regulation and risk management in a fast-changing world, and even psychological causes. However, evidence-based studies are required to verify and support these tentative conjectures. In the meantime, we can only rely on the qualified opinions of experts.

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[28] Shakhray 2013, at 199.

[29] Земельный кодекс Российской Федерации от 25 октября 2001 г. № 136-ФЗ // Собрание законодательства РФ. 2001. № 44. Ст. 4147 [Land Code of the Russian Federation No. 136-FZ of 25 October 2001, Legislation Bulletin of the Russian Federation, 2001, No. 44, Art. 4147].

[30] Федеральный закон от 28 июля 2012 г. № 141-ФЗ «О внесении изменений в Уголовный кодекс Российской Федерации и отдельные законодательные акты Российской Федерации» // Собрание законодательства РФ. 2012. № 31. Ст. 4330 [Federal Law No. 141-FZ of 28 July 2012. On Amendments to the Criminal Code of the Russian Federation and Separate Legal Acts of the Russian Federation, Legislation Bulletin of the Russian Federation, 2012, No. 31, Art. 4330].

For example, we can explain the increase in the quickness of passing laws by the fact that

> most of the legislative acts adopted today are the documents on amendments, addenda to the existing legislation, but not new independent units that belong to the primary regulation.[31]

As a result, legislators need less time to discuss conceptual and substantive issues when they are working with draft laws on amendments than in situations concerning the consideration of the large primary acts.

We can also agree with the opinion of political scientists that a significant factor affecting the quickness of adoption and increasing the number of laws is the features of the political profile of the State Duma of the last convocations (after 2000). As it is widely known, political forces belonging to the so-called "party in power" get a steady majority in the modern Russian Parliament.[32] Therefore, the situation, typical for the mid-1990s when the Deputies practiced delaying or blocking the adoption of legal acts submitted to the State Duma by the President of the Russian Federation or the Government, is unlikely to return.

Indirectly, the results of an express analysis of the Database of Federal Bills hosted on the official website of the State Duma of the Federal Assembly of the Russian Federation[33] confirm this conclusion. We conducted the search on an array of bills submitted to the State Duma by the President of the Russian Federation and compared the statistics of "presidential" bills rejected or withdrawn from consideration by the State Duma with the statistics of "presidential" laws passed (*see* Table 8 below for more details).

The results show that during 1993–1999, the Deputies rejected on average every seventh bill submitted to the State Duma by the President of Russia Boris Yeltsin. Since 2000, the Deputies have declined just over one percent of the bills initiated by Presidents Vladimir Putin (2000–2008, 2012 to present) and Dmitry Medvedev (2008–2012). The data also show that since April 2012 the State Duma has not rejected any "presidential" bills.

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[31] *Пронина М.П.* Юридическая техника внесения изменений в действующее уголовное законодательство // Адвокатская практика. 2016. № 1. С. 23–28 [Maria P. Pronina, *The Juridical Technique of Amendments to the Acting Criminal Legislation*, 1 Law Practice 23 (2016)].

[32] У «Единой России» в Госдуме конституционное большинство, новички не прошли // РИА Новости. 19 сентября 2016 г. [The "United Russia" Has a Constitutional Majority in the State Duma; Newcomers Have Not Passed, RIA Novosti, 19 September 2016] (Aug. 10, 2019), available at https://ria.ru/20160919/1477299900.html.

[33] The website of the State Duma of the Federal Assembly of the Russian Federation (Aug. 10, 2019), available at http://www.gosduma.net/systems/law/.

Table 8: Statistics of Bills Submitted to the State Duma by the President of the Russian Federation During 1993–1999 and 2000–2018

Parameters of searching the Database of Federal Bills	1993–1999	2000–2018
Bills rejected or withdrawn from consideration by the State Duma, where the initiator is the President of the Russian Federation (units)	20	9
Bills that were adopted by the Federal Assembly and signed by the President of the Russian Federation, where the initiator is the President of the Russian Federation (units)	128	729
The percentage of rejected and adopted bills, where the initiator is the President of the Russian Federation	15.6%	1.2%

Interesting observations can also be reported regarding the findings in the study of Federal laws statistics for the period from 1 January 1994 to 31 July 2016, realized by the Center for Strategic Research[34] and the Company GARANT. The study notes that along with the overall trend of increasing the number of Russian laws, there is a correlation between the highs and lows in the number of Federal laws adopted during the year with the dates of Federal elections (correlation coefficient – 0.41).

> … the elections of the State Duma of the Federal Assembly of the Russian Federation affect the growth of the number of Federal laws adopted by the State Duma of present convocation in the final year before new elections (correlation coefficient – 0.24).
>
> … the elections of the President of the Russian Federation affect the reduction in the number of Federal laws adopted in the presidential election year (correlation coefficient – 0.33).[35]

The same study indicates that when analyzing each of the various legal branches separately, the individual dynamics of the appearance of the new laws has its specifics and differs from the overall picture. However, there are branches of law whose rhythms coincide with the general dynamics. In particular, the study talks about such legal

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[34] The Center for Strategic Research (CSR) is a Moscow-based think tank with a focus on strategy and policy development and implementation.

[35] *Ткаченко Н.* Статистический анализ федерального законодательства [Natalya Tkachenko, *Statistical Analysis of Federal Legislation*] 6 (Moscow: Center for Strategic Research; GARANT, 2017).

sectors as "Grounds of the State-Legal System,""Legislation on Taxes and Fees,""Defense, Military Duty, and Military Service, Weapons,""Regulation of Certain Types of Economic Activity" and "Criminal Law, Criminal Procedure, Criminal-Executive Law."[36]

We can assume that the observed effect is associated with the implementation of constitutional ideas about the new principles of the state, law and economy design. The political needs for the early establishment of the foundations of a new social order, as well as its protections, stimulated the development of legal branches that are directly related to the performance of these tasks.

3.2. Why Was 2003 a Milestone After Which the Number of Annually Adopted Laws on Amendments Began to Steadily Exceed the Number of Annually Passed Primary Laws?

The fact that around 2003 the trend towards the predominance of the adoption of new acts gave way to the trend towards the prevalence of the legislative policy of amendments and additions to the existing legislation (*see* Figure 1 above) was recorded not only by us, but also by other authors who have studied legislative statistics.

At the same time, the statistics show that in each separate branch of law a turning point comes at its unique moment, which does not coincide with the average date found for the entire array of Federal legislation. Researcher in Federal laws statistics Natalia Tkachenko writes:

> Within each specific branch of legislation, the change of the predominating legislative policy [*i.e. the transition from the adoption of primary laws to the legal policy aimed at modifying existing legislation*] occurs, as a rule, after the passage of the Basic sectoral law (Code). However, the time interval between the adoption of the Basic sectoral law and the transition to the policy of amendments, as a dominating one, may vary significantly in different sectors.[37]

Tkachenko explains the phenomenon of the "turning point of 2003" with the suggestion that in that year a new stage of legal policy replaced the previous one:

> At the first stage … accumulation of legal norms with their simultaneous interconnection [happens]; at the second stage (conditionally, starting from 2002–2004) the development of the legislative system as a result of its interaction with the economic and social system and the system of society as a whole [happens], and this development is manifested in the form of changes in legislation.[38]

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[36] Tkachenko 2017, at 6.

[37] *Id.* at 7.

[38] *Id.* at 45.

It seems that the phenomenon of the crossover point of 2003 on our graph (Figure 1 above) illustrating the overall dynamics of the adoption of "new" laws and laws on amendments can also be explained by the fact that it was in 2003 that the Russian authority launched large-scale reforms in almost all spheres of society. In particular, Russia began administrative and Federation reforms, reform of the court system, local government system, the budget and tax system, the system of political parties, education and science, as well as the transformation of specific sectors of the economy. We can assume, since all these changes were evolutionary, that the legal support for the reforms did not require the abolition of previously existing laws, but their modification by the introduction of numerous amendments and addenda.

However, all these hypotheses require evidence-based verification using a detailed analysis of the content of the laws and the study of their temporal characteristics.

3.3. Why Is the Number of Laws on Amendments More Than Twice the Number of Primary Laws in Current Russian Legislation?

The predominance of the legal policy aimed at modifying existing legislation over the primary regulation of social relations has been called a core trend of modern Russian lawmaking by many researchers. As we noted earlier, acts on amendments make a significant contribution to the rapid growth of the total number of Russian regulations and constitute today more than two-thirds of the total number of Federal laws.

For example, according to Maria Pronina, a researcher in issues of legal technique in modern Russia, we can regard many laws on amendments as an auxiliary tool designed for a single application. After completing its mission to clarify the text of the primary legislation, the law on amendments turns into a so-called "empty shell":

> … the main task of the "law-shell" on amendments and additions is the inclusion of changes to the current law, and then it should self-destruct.[39]

Since in practice self-destruction does not occur, "empty shell" laws continue to exist (i.e. remain in effect) and affect the increase of the total amount of legislation. It follows then that the data showing a significant increase in the number of laws can be adjusted downwards if we exclude "empty shells" (laws on amendments that have fulfilled their purpose) from the array of existing laws. However, in the Russian Federation there is no official state practice now aimed at providing the legal acts in an up-to-date form. Only private legal information providers allow their users to see the digital copy of the law in the actual state with all amendments included in the text of the original act. Nevertheless, digital resources may contain errors and therefore are not entirely reliable. So, we have to continue taking into account the "empty shells" among the existing (in effect) laws.

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[39] Pronina 2016, at 24.

Based on the analysis of the literature and our observations, we can offer several hypotheses that explain why the laws on amendments are dominant in current Russian legislation.

The significant increase in the number of laws on amendments may be the result of pragmatic reasons and the routine needs of the legislative process. In case of detection of errors in the current law, or the new phenomena of social life demanding a legal regulation, the improvement of the law has to occur in short forms. Practice (including the experience of many other countries) shows that "short" laws that cover a narrow range of issues require less time and fewer resources to pass. For example, the UK House of Commons Political and Constitutional Reform Committee notes in its report "Ensuring Standards in the Quality of Legislation" that the Government

> … on the whole does not like big bills because the scope is broad, and amendments can come in on any subject … amendments can come in on new subjects late in a bill's passage, and that is quite often an area where mistakes creep in, so you might see more of that in a multi-purpose bill than in a small confined bill.[40]

Agreeing to the discussion of short, narrowly focused laws on amendments is an effective way to make their passage easier and faster, but in the end this practice leads to an increase in the total number of Federal acts of this type.

In a number of publications we also found a hypothesis that one might call a "conspiracy theory." This concept assumes that the endless introduction of changes to existing legislation (first of all, using the acts that amend several laws that differ in subject matter) allows for purposeful modification of the basic ideas underlying the primary laws, or even gives a new reading of the constitutional principles. These conclusions should not be discounted, as experts cite real cases of how amendments have led to a transformation in the meaning of the original concepts or legal provisions.

For instance, Svetlana Boshno and Galina Vasyuta, civil law researchers, describe in detail how the original meaning of the small- and medium-sized business concept was changed due to the amendments to the Federal law on the licensing of arms trafficking.[41] And the judge of the Constitutional Court of the Russian Federation Doctor of Law Gadis Gadzhiev gives an example of the change in understanding

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[40] Ensuring Standards in the Quality of Legislation: First Report of Session 2013–2014, House of Commons Political and Constitutional Reform Committee (2013), at 7–8 (Aug. 10, 2019), available at https://publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/85.pdf.

[41] *Бошно С.В., Васюта Г.Г.* Поправки к законопроекту и пределы трансформации концепции закона // Право и современные государства. 2017. № 3. С. 16 [Svetlana V. Boshno & Galina G. Vasyuta, *Amendments to the Bill and Limits of Transformation of the Concept of Law*, 3 Law and Modern States 9, 16 (2017)].

the constitutional principle which states the recognition and protection equally of private, state, municipal and other forms of property (Art. 8(2) of the Constitution of the Russian Federation):

> In several laws, the Federal legislator proposed a new interpretation of this principle, suggesting the emergence of a new unity due to the unification of Federal property and property of the subjects of the Russian Federation. State property was considered by the legislator as a single property complex of the Federal state as a whole, as the material basis of the Russian state, which, according to the authors of the new interpretation, should meet the state integrity of the Russian Federation and strengthen the unity of the system of state power. From our point of view, the authorship of this interpretation of the constitutional principle belongs to the developers of the Budget Code of the Russian Federation and the legislation on the delimitation of authority.[42]

> … The new interpretation of the above constitutional principle was accepted by the Federal legislator and led to a distortion in non-core laws of the basic legal principles underlying the legal regulation of property relations in the Civil Code of the Russian Federation.[43]

Also, one of the reasons for the predominance of laws on amendments in the Russian legal ecosystem may be the fact that legislators objectively cannot foresee all the new political, economic and social phenomena that continually arise due to the effects of the fast-changing world and which require proper regulations. Additionally, the entry into force of the new law changes social reality inevitably and causes various consequences, including unforeseen ones. So the legal framework needs to be refined and updated continually.

The research direction related to the subject under discussion is the assessment of the impact of the growth in the number of laws on amendments on the state of the Russian legal framework as a whole. Experts agree that the abundance of laws on amendments and addenda makes law enforcement difficult:

> First, the reader studying the law published in the official source, or a separate brochure, or in the collection, cannot be sure that this edition is relevant, and must verify this; secondly, the amendment has to publish in the official printed issue of the law collection of the Russian Federation. The pace

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[42] This refers to the delimitation of authority between the Federal and regional levels of government.

[43] *Гаджиев Г.А.* Экономическая Конституция. Конституционные гарантии свободы предпринимательской (экономической) деятельности // Конституционный вестник. 2008. № 1. С. 253–254 [Gadis A. Gadzhiev, *Economic Constitution. Constitutional Guarantees of Freedom of Entrepreneurial (Economic) Activity*, 1 Constitutional Bulletin 249, 253–254 (2008)].

between the official publication of the original law and publishing of changes to this law can range from several months to several decades.[44]

It is evident that the expansion of the practice of the adoption of laws on amendments negatively impacts on the stability of the Russian legal system as a whole, as well as on the integrity and efficiency of vital legislative acts:

> Thus, the stability of legislation in the field of tax law does not exceed two weeks. Forest Code changes every 22 days, Land Code and Criminal Procedure Code – once a month. The Code of Administrative Offenses "lives" without amendments on average no more than ten days a year.[45]

3.4. Why Does the Total Number of Laws Increase as Well as the Length of the Text of Primary Laws?

In modern legal literature, we can find various explanations about why the number of laws is growing and the text of primary laws is lengthening.

Academician Taliya Khabriyeva links the extensive growth of laws with objective processes of constitutionalization of legislation, the emergence of new legal branches and the complications of the structure of the traditional branches of Russian law, and the tasks of adaptation and modernization of the legal system to new political, economic and social realities. Khabriyeva points out that,

> With the increase in the number of laws, there is a problem of loosening the role of legislation as the most important regulator of public life.[46]

Legal researcher Elena Lukyanova sees the reason for the accelerated growth of the number of Federal laws in the strengthening of political centralization in Russia:

> Against the background of the ongoing political centralization, we can observe the processes of centralization of legal regulation, the curtailment of the regional and judicial lawmaking. One of the notable trends in the development of law, at the end of the twentieth century, was the change in the system of law sources (forms): the emergence and spread in the Russian legal system of legal precedent, in the role of which were, in particular, the

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44 Pronina 2016.

45 *Березина З.* «Изменения в законы об изменении законов»: как усмирить «бешеный принтер» // РИА Новый День. 13 февраля 2017 г. [Zoya Berezina, *"Amendments to the Laws on Amendment Laws": How to Subdue a "Mad Print Device,"* New Day, 13 February 2017] (Aug. 10, 2019), available at https://newdaynews.ru/policy/594155.html.

46 Khabriyeva 2013, at 556–559.

> decisions of the European Court of Human Rights as well as decisions and other acts of the Highest Courts of the Russian Federation.
>
> … Today, in the transformation of sources (forms) of law in the Russian Federation [we can observe] a reverse trend: the strengthening of the position of the normative legal act (law) in comparison to other sources (forms) of law, in particular, judicial precedent. The normative legal act is the most convenient form for the implementation of the centrist policy, thus in the development of the normative legal act (law) can be observed negative trends: its politicization and unreasonableness, forced adoption.[47]

Regarding the tendency to increase the number of laws, we can put forward several hypotheses that require further exploration and confirmation.

To begin with, the increase in the number of laws can be caused by the enlargement in the amount of the social life phenomena, which, according to legislators, are of direct concern to society (for instance, they can cause harm to society or a threat to the public security). Accordingly, the area covered by public law is continually enlarging. This trend is not typically Russian, but global.

As we know, in public law mandatory rules prevail. Also, state-made legislation, based on the concept of "everything which is not allowed is forbidden," is objectively more detailed and requires clarification and updating frequently. The need for dynamic updating comes from the fact that new phenomena of life occur more often than the legislator can foresee, and, more so, have time to impose a ban or give permission. Therefore, the total number of laws and the overall length of their texts are growing for reasons of *harmonizing* legislation with fast-changing life. We are talking about the so-called "Red Queen Effect":

> … we must run as fast as we can, just to stay in place. And if you wish to go anywhere, you must run twice as fast as that.[48]

Another reason may be a global commitment to risk management and control, which leads to increased over-regulation worldwide. As an illustration, the results of a study by the David Levi-Faur group, which analyzed data on the growth in the number of regulatory agencies in 48 countries (16 sectors) over 88 years (1920–2007), can be cited. If, before the end of the 1960s, rarely were more than 5 to 6 agencies created, since the beginning of the 1990s more than 25 agencies were being created

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[47] *Лукьянова Е.Г.* Правовая система России: современные тенденции развития // Труды Института государства и права РАН. 2016. № 6. С. 6–23 [Elena G. Lukyanova, *The Legal System of Russia: Modern Trends*, 6 Proceedings of the Institute of State and Law of the RAS 6 (2016)].

[48] The famous quote from the book "Alice's Adventures in Wonderland" by Lewis Carroll.

annually. By the end of 2007, there were more than 600 such institutional regulators in the 48 countries under study.[49]

Many commentators state that modern societies live in an era of "regulatory governance" or "regulatory capitalism."[50] As the American political scientist Steven Vogel noted in the mid-1990s, "The freer the markets, the more rules."[51]

The tendency to increase the length of the texts of laws is also widespread. For example, British experts are no less concerned than Russian experts about the increase in the volume of legislation:

> Whilst the number of Acts has decreased since the 1980s, the mean average number of pages per Act has increased significantly, from 37 and 47 pages during the 1980s and 1990s respectively, to 85 in the past decade. This continues a trend of an increasing number of pages decade on decade since the 1950s when the average was.[52]

Additionally, the poor quality of the bills, especially the laws on amendments, can be the reason for the increase in the number of regulations. This factor is often spoken of by Russian legislators when they openly recognize that they "hurried" the adoption of a law, and "as a result, since the adoption of the document, a single year has not passed, and there are already a lot of amendments to it."[53] They are echoed by those who must comply with the requirements of the law:

> The document is so raw that each company understands it in its way. Moreover, each new explanation gives rise to more questions than answers. And in the autumn, new amendments will be introduced in the law that is unlikely to simplify life.[54]

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49 Jacint Jordana et al., *The Global Diffusion of Regulatory Agencies: Institutional Emulation and the Restructuring of Modern Bureaucracy*, 44(10) Comparative Political Studies 1343 (2011).

50 John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Cheltenham: Edward Elgar Publishing, 2008); Martin Minogue & Ledivina Cariño, *Regulatory Governance in Developing Countries* (Cheltenham: Edward Elgar Publishing, 2008); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598(1) Annals of the American Academy of Political and Social Science 12 (2005); Martin Minogue, *Governance-Based Analysis of Regulation*, 73(4) Annals of Public and Cooperative Economics 649 (2002); *Голодникова А.Е., Ефремов А.А., Соболь Д.В., Цыганков Д.Б., Шклярук М.С.* Регуляторная политика в России: основные тенденции и архитектура будущего [Anna E. Golodnikova et al., *Regulatory Policy in Russia: Key Trends and Architecture of the Future*] (M.O. Komin (ed.), Moscow: Center for Strategic Research, 2018).

51 Steven K. Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries* (Ithaca, N.Y.: Cornell University Press, 1996).

52 Ensuring Standards, *supra* note 40, at 7.

53 Почему наши законы не работают? // Аргументы и факты. 16 февраля 2011 г. [Why Don't Our Laws Work?, Arguments and Facts, 16 February 2011] (Aug. 10, 2019), available at https://aif.ru/money/corruption/23462.

54 *Бурковская Н.* Закон каждый видит по-своему. Очередные правки в 214-ФЗ подпортили кровь застройщикам // Деловой Петербург. 22 августа 2018 г. [Natalia Burkovskaya, *Everyone Sees*

We should recognize that the adoption of poor-quality legislation, which in the Russian tradition is figuratively called "raw" (a closer in meaning term – "undercooked"), is observed everywhere.

As an example, Deputies of the Republic of Kazakhstan, criticizing the state of national legislation that was incessantly "swelling" because of the adjustments, have attested:

> More than once, the laws whose "ink has not yet dried" were massively amended. We have not yet got rid of this legislative disease. Alas, most of the amendments – because initially the law was adopted hastily, without proper study.[55]

Also, the earlier cited report of the UK House of Commons Political and Constitutional Reform Committee on the need to improve the quality of legislation notes that Parliament often has to adopt a large number of poorly prepared laws in a short time because of political pressure from the government and ministries:

> The Constitution Society[56] told us that the primary reason for poor-quality legislation was political: "There are very strong political pressures on governments, and individual ministers, to push through large quantities of new legislation on tight timetables and with insufficient preparation."[57]

However, it seems that the adoption of "undercooked" legislation, which entails a lot of amendments and, consequently, an increase in the total number of laws, cannot be adequately explained by the haste and lack of professionalism of Deputies, government pressure or other subjective factors.

We believe that this phenomenon occurs due to the increasing influence of the challenges of the *VUCA-world*, which is characterized by *volatility, uncertainty, complexity and ambiguity*. From the desire to put growing uncertainty under control, strategies based on the principle of so-called *adaptive governance* have emerged.

There is extensive and controversial literature relevant to the understanding and conceptualization of adaptive management. Without delving into this subject, which

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the Law in His Way. Regular Amendments to the 214-FZ Caused Much Worry to Developers, Business Petersburg, 22 August 2018] (Aug. 10, 2019), available at https://www.dp.ru/a/2018/08/21/Zakon_kazhdij_vidit_posvo.

55 Еще чернила не высохли: Депутаты критикуют качество законопроектов // Sputnik Казахстан. 8 февраля 2008 г. [The Ink Has Not Yet Dried: The Deputies Criticized the Quality of the Bills, Sputnik Kazakhstan, 8 February 2008] (Aug. 10, 2019), available at https://ru.sputniknews.kz/politics/20180208/4520079/eshche-chernila-ne-obsohli-deputaty-kritikuyut-kachestvo-zakonoproektov.html.

56 One of the witnesses who provided information for the Committee's report.

57 Ensuring Standards, *supra* note 40, at 9.

since the 1990s "continues to attract considerable interest in academic and policy circles,"[58] we prefer to talk about a structured, iterative decision-making process based on systematic, multilevel monitoring of changes.[59] In our opinion, this approach could help, simultaneously, *to research and to transform* the uncertain situation purposefully: the new information accumulated as a result of monitoring becomes the basis for the next step to improve governance and provide legal certainty.

From these ideas, we can assume that in Russia, as in other countries, the legislators consciously or unconsciously are increasingly beginning to use the strategy of adaptive governance. At the first stage, the problem "of keeping up with a fast-changing world" is solved by sacrificing the quality of the law that needs to pass. At the next stage, the legislators begin to finalize the law to return the proper level of quality, for which they use the iterative process based on the analysis of the negative consequences of the application of this law and consideration of the comments of the stakeholders.

This iterative strategy is close to the so-called agile practices that are used for creating software and other new products. This approach includes adaptive planning, evolutionary development, early product "delivery" and its continual improvement. Therefore, we could call this kind of legislative process "adaptive lawmaking" or "agile lawmaking."

As an example we can cite the previously mentioned Federal Law "On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation," which, during 2002–2018, was amended more than one hundred times to update and fine-tune this act in harmony with the changing political realities.

4. Final Remarks

These pages present the results of a quantitative analysis of the array of Federal Laws and Federal Constitutional Laws for the period of 1994–2018. It is clear that quantitative methods, allowing us to analyze the statistics and to fix the dynamics of the development of different types of laws, are not able to describe the observed

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[58] *See, e.g.*, Frances Cleaver & Luke Whaley, *Understanding Process, Power, and Meaning in Adaptive Governance: A Critical Institutional Reading*, 23(2) Ecology & Sociology 49 (2018).

[59] Gemma Carey et al., *Adaptive Policies for Reducing Inequalities in the Social Determinants of Health*, 4(11) International Journal of Health Policy & Management 763 (2015); Graham R. Marshall, *Polycentricity and Adaptive Governance*, paper prepared for the 15th Biennial Global Conference of the International Association for the Study of the Commons, Edmonton, Canada, 25–29 May 2015 (Aug. 10, 2019), available at https://www.researchgate.net/publication/277598119_Polycentricity_and_adaptive_governance; George H. Stankey et al., *Adaptive Management of Natural Resources: Theory, Concepts, and Management Institutions*, General Technical Report PNW-GTR-654, U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station (August 2005) (Aug. 10, 2019), available at https://www.fs.fed.us/pnw/pubs/pnw_gtr654.pdf.

effects and explain their underlying reasons. As we showed in the section "Discussion and Conclusions" above, the obtained quantitative results can be interpreted in various ways in the subject fields of law, political science, psychology and other sciences as well.

However, we can already draw several conclusions based on the evidence. In particular, our data show that the "formation" stage of the process of the constitutionalization of Russian law (in the terminology of academician Khabriyeva) can be extended to 2003 when the trend for the modification of then current legislation became steadily prevalent over the adoption of primary laws.

The average annual rate of change in the number of laws is constantly growing, with a particularly significant increase in the last few years. This acceleration needs explanation.

The phenomenon of the increasing total number of laws, more than two-thirds of which are laws on amendments, including "empty-shells," also requires conceptualization and in-depth study. The causes of this phenomenon, as well as the consequences for the stability and integrity of the legal system, the state and society, need to be analyzed in detail with the involvement of various sources of information and conceptual approaches of the social sciences. This subject is especially important because according to a number of experts, numerous amendments can uncontrollably modify the essential principles laid down in the original act and (what is more critical) in the Constitution also.[60]

The question of the relationship between the durability and stability of the democratic Constitution and the quality and irreversibility of democratic transformations of the social system remains open. Observations show that even a "rigid" democratic constitution can become more "flexible" with age due to legislators' opportunities to interpret the constitutional provisions in legislation and give them a sense different from the initial one. Although formally the Russian Constitution of 1993 is not flexible, but rigid, practice shows that we can call it, rather, an *elastic* Constitution, since its ideas and meanings can often be "stretched" to apply to current cases without the need to make any changes to existing constitutional norms.

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[60] *Авакьян С.А.* Надо ли принимать и применять положенные законы: конституционно-правовые подходы // Журнал конституционного правосудия. 2018. № 6. С. 28–45 [Suren A. Avakian, *Do We Need to Adopt and Apply the Prescribed Laws: Constitutional and Legal Approaches*, 6 Journal of Constitutional Justice 28 (2018)]; Boshno & Vasyuta 2017, at 9–20; *Батюшкина М.В.* К вопросу об определении субжанра текстов законов о внесении изменений // Вестник Брянского государственного университета. 2016. № 2. С. 118–124 [Marina V. Batushkina, *To the Question About the Definition of the Subgenre of Texts of Laws on Amendments*, 2 Bulletin of Bryansk State University 118 (2016)]; *Пайгина Д.Р., Стрельников П.А.* Поиск эффективных решений проблем правотворчества // Журнал российского права. 2014. № 6. С. 141–145 [Dina R. Paygina & Pavel A. Strelnikov, *Search for Effective Solutions to the Problems of Lawmaking*, 6 Journal of Russian Law 141 (2014)]; *Примаков Д.* Много законов – это правовой нигилизм и «минус» для экономики и судов // Право.ru. 5 июля 2010 г. [Denis Primakov, *Too Much of Laws, It Is a Legal Nihilism and a "Minus" for the Economy and Courts*, Pravo.ru, 5 July 2010] (Aug. 10, 2019), available at https://pravo.ru/review/view/33363/.

It seems to us that the concept of adaptive governance looks quite promising as a means to describe the features of the modern legislative process, which can be called *adaptive lawmaking*.

The obtained quantitative results and observations have allowed us to put forward some hypotheses that need to be verified during the next stages of the project. These stages involve the use of qualitative research methods such as, in particular, grounded theory, systematic content analysis of legal acts,[61] diachronic approaches to primary law analysis and comparative historical analysis of political and legal events.

Acknowledgements

The authors would like to express their sincere gratitude to Doctor of Law, Professor Sergey Shakhray for sharing his wisdom in constitutional law and statecraft. We also wish to thank David Goldsworthy, an expert in strategic programs evaluation, for his inspiring backing.

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[61] Maryam Salehijam, *The Value of Systematic Content Analysis in Legal Research*, 23(1) Tilburg Law Review 34 (2018).

BRICS Law Journal

Volume VI (2019) Issue 3

Оформление и компьютерная верстка:
ИП Резниченко А.С.

Подписано в печать 09.09.2019. Формат 70x100 $^{1}/_{16}$. Объем 10,125 п.л.
Цена свободная.
Заказ №

Наш адрес:
ООО «Издательство «Деловой стиль»
1119602, г. Москва,
ул. Тропарёвская, владение 4, этаж 2, комн. 802.
www.ds-publishing.ru