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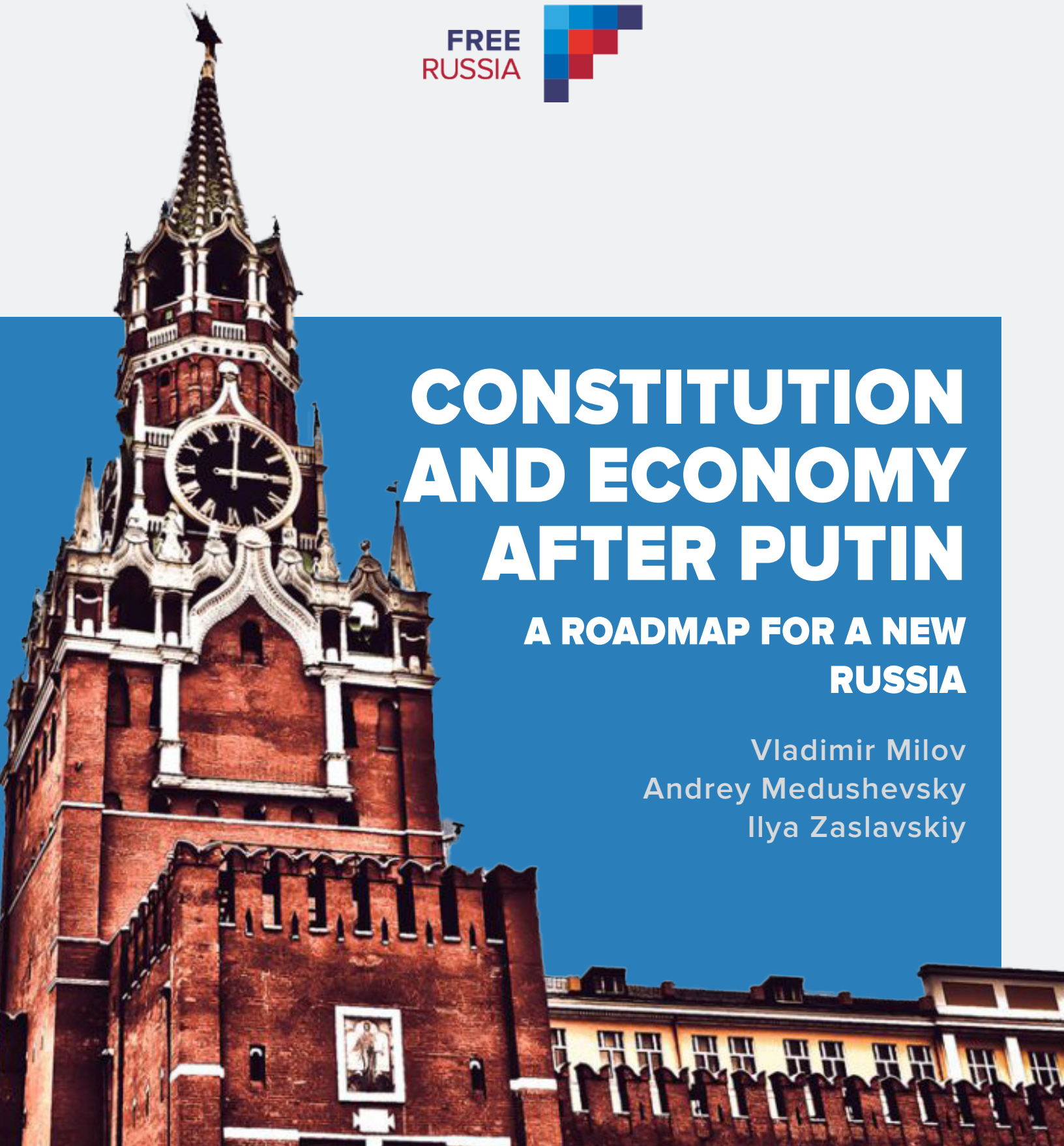

# CONSTITUTION AND ECONOMY AFTER PUTIN

## A ROADMAP FOR A NEW RUSSIA

Vladimir Milov
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# CONSTITUTION AND ECONOMY AFTER PUTIN: a roadmap for a New Russia

**Ilya Zaslavskiy**

Source: diariopopular.com

## Preface

Vladimir Putin's regime has arguably surpassed the Soviet Union in its artful employment of propaganda. One of the most widespread myths that the regime energetically pedals is that there is "no life" – or any viable political options – after Putin. This line is fed both to domestic and foreign audiences in different but overlapping forms.

Inside Russia, Putin publicly denigrates non-systemic opposition as lacking vision and constructive ideas. This was one of the public narratives advanced by Putin Administration to justify barring Alexey Navalny from participation as presidential candidate in Russia's March 2018 elections (in addition to the "technical legal" pretext which is the sham criminal case against Navalny). Russian officials and the Kremlin-controlled media portray all systemic (i.e. coopted by the government) opposition as power-hungry, rapacious and incompetent; a threat to the fragile stability and out of touch with the common people.

Outside Russia, the regime's emissaries often concede that the current state of affairs is far from perfect, and there are even occasional admissions of corruption, inefficiency, and lack of democratic process. Such admissions are invariably followed up with qualification that the West features similar vices on comparable scale. However, the underlying message is always that Putin's departure from power will trigger one of various horror scenarios where the power falls into the hands of even more corrupt and unpredictable leaders and Russia disintegrates.

Without question, any transition, when it takes place (the question is indeed not if but when), will feature objective difficulties. However, Russian pro-democracy leaders have been engaged in robust considerations of transition issues for years, including multiple academic theses and research initiatives in 2000s[1] and within the framework of a short-lived Coordination Council of Opposition[2] circa 2012-2013. These debates intensified after Putin's invasion of Ukraine which demonstrated that his regime is unable to transform itself peacefully.

This preface highlights the core tenets that have emerged from previous debates. By doing so, it provides the context for the report itself, which is written by two remarkable Russian political visionaries, both very well-informed, pragmatic and actively engaged with a wide spectrum of Russian voters. Vladimir Milov is a key member of the team of Navalny (currently the most popular and powerful opposition figure in Russia) and former Deputy Minister of Energy. Andrey Medushevsky is a distinguished scholar whose life work has been dedicated to the Constitution of the Russian Federation.

Today, the need for a roadmap for the transformation of Russia post-Putin is a critical one. To be truly comprehensive, it must address a range of monumental issues within the Russian state and society, from reforming healthcare to establishing procedures for dealing with the most corrupt and abusive representatives of the Putin's regime. However, for practical purposes, the scope of this report has been limited to two key issues that would define the nature of the future Russian State and are of the highest concern to the Russian people and their neighbors, — constitutional change and economic reforms.

This paper does not attempt to determine how to set Russia on a path to becoming a liberal state and away from Putin's authoritarian political and economic model. This is a separate and truly a monumental question of its own. However, when Russia is ready for a transition toward liberalism, it is precisely the economic and constitutional reforms that will serve as its vectors and incubators.

Andrey Piontkovsky, Senior Adviser at Free Russia Foundation, has made a prominent contribution to this roadmap.[3] In his article on the subject of fundamental reforms, Piontkovsky highlights the major consensus on the character of changes needed in the Constitution, namely removal of "monarchical presidential powers" introduced in the 1993 Constitution as a compromise between elites in the aftermath of a violent standoff with a dissenting Parliament.

Andrey Medushevsky agrees with Piontkovsky on the need to rebalance the Constitution where President dominates all other organs of power toward a more "authentic model of mixed presidential-parliamentarian system." Medushevsky offers an array of recommendations for legal reforms, new court interpretations of the existing Constitutional text, and for institutional reforms. In Medushevsky's view, the 1993 Constitution should neither be abolished outright nor preserved. Arguing for the middle ground, he aspires to "return constitutional principles to their original democratic meaning" proactively while steering clear of "constitutional populism," i.e. radical reform that, in his view, would likely pose a serious risk of political destabilization.

In a thorough, academic manner Medushevsky reviews the current state of affairs in Russia's political and legal system, identifies sources of constitutional dysfunction, articulates amendments and larger reform initiatives that can be carried out without changing the text of the Constitution, and discusses instruments and subjects of change of the Constitution.

Vladimir Milov also believes that presidential power should be reduced from the position of supreme dominance over all other branches and made rather just one of the three; while the approval of the structure of government, as well as appointment of ministers and judges should become a prerogative of the Parliament; and the Judicial Branch should be given much more autonomy and independence. Milov argues for clearer and unequivocal provisions guaranteeing direct elections of all senators, governors, mayors and municipal heads without "filters" introduced by Putin, or other forms of administrative interference. He advocates measures

1 Aleksandr Vorzhetsov, "Konstitutsionnaya Reforma ili Novaya Konstitutsiya Rossii?" [Constitutional Reform or the New Russian Constitution ?] Politobrazovanie, October 29, 2016, accessed August 19, 2018, http://lawinrussia.ru/content/konstitucionnaya-reforma-ili-novaya-konstituciya-rossii.

2 Vladimir Dergachev and Yelizaveta Maetnaya, "Khodorkovskiy zakazal Konstitutsiyu," [Khodorkovskiy Ordered Constituion], Gazeta.ru, April 28, 2016, accessed August 19, 2018, https://www.gazeta.ru/politics/2016/04/27_a_8200625.shtml?updated.

3 Andrey Piontkovskiy, "Dorozhnaya karta perekhodnogo perioda," [Roadmap of the Transitional Period], Dom Svobodnoy Rossii, accessed August 19, 2018, https://freerussiahouse.org/2018/07/25/dorozhnaja-karta-perehodnogo-perioda.

to prevent monopoly over media and outstanding guarantees to opposition political forces. Notably, Milov, unlike many other experts, does not hesitate over the question whether it should be a referendum or a uniquely gathered one-time Constituent Assembly to adopt these changes. Although he believes the ultimate decision is to be made by a post-Putin government, he advocates for the most practical path in terms of speed and scale of mobilization of the three branches. Milov points out that Chapters 3-8 of the current Constitution regulating balance of powers can be changed with a Parliamentary supermajority if there is a will from a newly-elected President (for example, Navalny) and a broad agreement within the new Parliament.

Despite agreeing on basic tenets, the two authors have their own distinct views and even contradictions on certain aspects of possible Constitutional reforms. Milov and Medushevsky discuss these contradictions in critical reviews of each other's proposals. These critiques are included in the annex of the paper and will hopefully encourage further discussions in the policy-making community, media and think tanks.

As mentioned earlier, this is by no means the first serious consideration of constitutional reforms. Earlier works by Russia's leading academic constitutionalists include the 2015 paper ***Constitutional Crisis in Russia And How to Resolve It***[4] co-published by the Institute of Modern Russia together with Open Russia. The paper diverges from our Roadmap in its assessment of the historical factors that brought about current erosion of constitutional norms and their implementation. The publication of this paper triggered a lengthy and intense debate[5] between its three authors[6] and prominent external commentators.[7]

These debates focused heavily on historical aspects surrounding the constitutional process in 1990's and their lessons, as well as a consideration of whether the 1993 Constitution should be amended or replaced altogether.

In her recent book,[8] Elena Lukyanova, one of the participants of that debate, compares quasi-democratic institutions of post-Soviet and other authoritarian states and concludes that Russia merely pays lip service to its 1993 Constitution. The degree to which the Russian regime imitates democracy is proportional to its levels of aggression, corruption and poverty. In other words, constitutional matters are linked to economic and social.

The second portion of this Roadmap is dedicated to economic reforms. In his article, Piontkovsky argues passionately and persuasively that the question of ways to deal with the legacy of the unfair privatization and the absence of a functioning concept of private property must be the starting point for any meaningful economic transformation that the Russian society would accept after Putin.[9] Piontkovsky urges the opposition to set forth a vision that would resonate with millions of disillusioned citizens who lost faith in political institutions and legal processes in order to facilitate Russia's "peaceful anticriminal revolution." Piontkovsky acknowledges that the question of what to do with the assets of Russian oligarchs, who grew their wealth through unfair privatization before and under Putin, is key. After all, this issue is of great concern to most Russians. However, in his mind, it is even more critical to reset all economic mechanisms to clear the way for truly free market sustained by the rule of law. It may be possible for oligarchs to keep the main bulk of their assets if truly competitive market-based system is established and accepted by the entire Russian society, including by Putin era businessmen.

In his contribution to the Roadman, Milov also recognizes the contentiousness of the post-Soviet privatization and seems to agree with Piontkovsky's view that transformation from de-monopolization to rule-based competition would contribute to higher levels of productivity as well as encourage domestic and global investments.

4 Elena Lukyanova, Ilya Shablinsky, Vladimir Pastukhov, "Constitutional Crisis in Russia And How to Resolve It." Institute of Modern Russia, accessed August 19, 2018, https://imrussia.org/images/stories/Reports/Constitutional_Crisis/IMR_Constitutional_Crisis_in_Russia_And_How_to_Resolve_It.pdf.

5 Viktor Sheynis, "Konstitutsiya-93 v Rossiyskikh Politicheskikh i Kul'turnykh Realiyakh," [Constituion 93' in the Russian Political and Cultural Reality], Otkrytaya Rossiya. accessed August 19, 2018, https://openrussia.org/post/view/9489/.

6 Elena Lukyanova, "Nam Ne Nuzhen Novyy Tekst, Poka My Do Kontsa Ne Poznali Staryy," [We Do Not Need New Text Until We Fully Understand the Old One], Otkrytaya Rossiya, accessed August 19, 2018, https://openrussia.org/post/view/3983/.

7 Andrey Medushevskiy, "Svoboda Kak Poznannaya Neobkhodimost'," [Freedom as Cognized Necessity], Otkrytaya Rossiya, accessed August 19, 2018, https://openrussia.org/post/view/7364/.

8 Elena Lukyanova, Konstitutsionnye transformatsii i politicheskie imitatsiii [Constitutional Transformations and Political Imitations] (Raleigh: Open Science Publishing, 2018).

9 Andrey Piontkovskiy, "Dorozhnaya karta perekhodnogo perioda," [Roadmap of the Transitional Period], Dom Svobodnoy Rossii, accessed August 19, 2018, https://freerussiahouse.org/2018/07/25/dorozhnaja-karta-perehodnogo-perioda.

Milov belongs to the Navalny camp that advocates what it considers a relatively modest retroactive privatization tax for the most egregious deals that took place under Yeltsin and Putin (i.e. loans-for-shares, as well as monopolistic and corrupt corporate takeovers). As Milov puts it, "we're talking about 15-20 large highly public cases maximum, no big lists of companies to pay the windfall tax." However, even this arguably moderate approach is a highly controversial matter dividing the Russian opposition. An exiled Russian businessman Yevgeniy Chichvarkin,[10] for instance, believes that such move would be detrimental to the sanctity of private property and lead to administrative abuses against members of the wider business community. Milov, however, emphasizes that such revision of privatization may simply not be optional, as a much wider opposition exists on the other side demanding much deeper investigations and steeper taxes on past corrupt "privatization."

Admitting that his own approach to constitutional reforms is "a narrow consensus", Milov lists an impressive array of programmatic proposals advanced by Navalny's party, Yabloko, Parnas, supporters of Mikhail Khodorkovsky and even by the reform-leaning "non-opposition" (known as systemic opposition) – the teams of Kseniya Sobchak and Aleksei Kudrin. Broader consensus does exist, according to Milov, on the need to shift from massive state spending on non-human capital projects and toward sectors such as healthcare and education, protection and support of small and medium businesses, reducing state interference and de-monopolizing the economy, relegating regulatory and taxation powers away from Moscow to the regions, normalizing Russia's political and economic relations with the West.

In his chapter, Milov provides helpful charts comparing basic economic elements of leading liberal opposition forces, highlighting big differences and smaller nuances.

In his writings, Milov channels Navalny's emphasis on the "humanization" of the Russian Criminal Code and his call for amnesty for Russian businessmen

Source: http://podrobnosti.ua

imprisoned through fabricated or distorted "economic" cases. While the undue harshness of the outdated Criminal Code is hardly disputed by anyone, there are divergent views on the need for amnesty and the ability of the transitional government to distinguish between framed persons and actual criminal elements.

Other prominent and intensely-debated issues raised by Milov are those of immigration and Russia's relations with its neighbors. While Alexey Navalny supports introduction of visa regimes with Russia's neighbors to the South, the Yabloko and Parnas parties oppose that proposal. Yabloko contends that the available domestic workforce in Russia is insufficient due to aging population and due to the forecasted stagnation of productivity rate growth. Milov rejects this assumption and counters with a peculiar and even radical suggestion to abandon the Eurasian Economic Union, "as it only generates economic losses for Russia" and instead focus on improving economic ties with China. •

10 Mikhail Fishman, "Debaty Chichvarkina i Milova Po Programme Naval'nogo: Kakie v Ney Protivorechiya, Budet li u Migrantov Zarplata v 25 Tysyach i Zhdet li Putina Arest?" [Debates Between Chichvarkin and Milov Regarding Navalny's Program: What Contradictions it Has, Would Migrants Have a 25-Thousand Salary, and Whether Putin Will be Arrested], Dozhd', December 26, 2017, accessed August 19, 2018, https://tvrain.ru/teleshow/debaty/debaty_chichvarkina_i_milova-453905/.

By Vladimir Milov


Source: washingtontimes.com

# Russian Opposition Reform Agenda

The 2018 Russian Presidential elections have once again raised the issue of viable alternatives to the current authoritarian system. Is Russian democratic opposition capable of generating relevant, attractive and viable ideas on how to transform Russia into a better place to live, a sustainable market economy, and a democracy at peace with its neighbors and the rest of the world? Criticisms of the Russian democratic opposition as "lacking constructive agenda" are without ground, and yet remain pervasive in the narratives advanced by state propaganda outlets. Vladimir Putin himself has reiterated this accusation during his annual press conference on December 14th, 2017, stressing that "opposition would need to first come up with positive program" to qualify for real competition for power, let alone power transfer. Since that conference, this claim has been repeated on numerous occasions by Putin and the officials of his government.

There's little doubt that Russian democratic opposition, given its intellectual and professional potential, has a coherent vision and program for transforming Russia from a dictatorial kleptocracy in international isolation to a prosperous developed democratic state. Although positions on specific policy areas may at times differ between various opposition groups, there is a clear common policy vector, both on constitutional and political changes, as well as on the economic policy agenda.

## CONSTITUTIONAL REFORMS

There is a broad consensus among Russian opposition forces that Russia's current Constitution is a major obstacle to building a normal functioning democracy. The key and widely cited problems with the Constitution are the following:

- The super-Presidential system of governance envisaged by the Constitution. In accordance with the current provisions, the President is an authority which stands above all three branches of power (executive, legislative, judicial), and his status is not clearly defined – beyond the formulation of being the "guarantor of Constitution" (which indeed puts the President above all other branches of power and contradicts the basic principle of equality of branches of power established in Article 10 of the Constitution) and wide powers set across all the branches of power.

- Lack of clarity on electability of key officials – members of the upper chamber of the Parliament (the Federation Council), governors of regions, mayors of cities, heads of municipal districts. The Constitution does not explicitly establish that all these officials shall be elected by direct popular vote. This omission has allowed Putin to effectively

abolish direct elections of these officials gradually since 2000, which has greatly contributed to the establishment of an authoritarian system of governance in Russia.

- Limited powers of Parliament. The super-Presidential system sidelines Parliament on many important issues. For instance, in the process of appointment of Government, the Parliament only has a say in the appointment of a Prime Minister. Moreover, in the event that Parliament rejects the President's candidate for the Prime Minister post three times in a row, it must be dissolved. The Parliament does not have a say in appointing the structure of Government, deputy Prime Ministers and Ministers, appointing federal judges, or many other important posts.

- Complete dependence of the judicial branch of power on the executive branch. Chapter 7 of the Constitution, which regulates the judiciary system, explicitly puts the judicial branch in the position of total dependence from the President, including providing the President with the prerogative to appoint almost all judges unilaterally without parliamentary approval (part 2 of Article 128 of the Constitution), lack of guarantees for the independent financing of the judicial system, etc.

- Absence of guarantees for independent local self-governance. The Constitution's Chapter 8 on local self-governance is a joke, consisting of just 4 rather hollow and declarative articles (22 much more detailed articles are dedicated to President and Government, 15 to Parliament, 11 to judicial branch). In a truly democratic Russia, much more Constitutional guarantees shall be given to local self-governance authorities.

- Given these circumstances, the broad consensus among the Russian opposition forces is that:

- The President's status must be reduced and clearly legally defined; the President shall not be a supreme body above all branches of Government, but rather an arbiter whose powers to interfere should be limited and strictly regulated (some opposition fractions even call for abolishing the Presidential post and transforming Russia into a Parliamentary republic, which is not a consensus but rather an idea, but a notable one);

- Significant Presidential powers should be transferred to the Parliament (approval of the structure of Government, Ministers, judges, etc.)— there's a broad consensus about that, the Presidential program of main opposition candidate Alexey Navalny definitely includes these provisions;

- Unequivocal provisions should be included into the Constitution to guarantee direct elections of members of the upper chamber of the Parliament (the Federation Council), governors of regions, mayors of cities, heads of municipal districts – with no room for alternative interpretation of that clause;

- Reaffirming the independence of the judicial branch (Article 7) and boosting the powers of local self-governance (Article 8). Strengthening the judiciary independence (Russia is currently ranked 90th in the world in its judicial independence by the World Economic Forum Global Competitiveness Index 2017-2018) is required to boost investors' confidence, protection of private property and encouraging economic growth.

These key changes will significantly reduce the ability of the President's office and the executive branch to centralize control over Russia's political system and ensure equal division of powers between various branches of government and facilitate a free and open debate on major issues of the society.

Other missing provisions are those limiting government control over the media and protecting opposition political forces (securing non-discriminatory access to the media, electoral procedures, freedom of assembly, etc.).

The Russian Constitution is articulated in such a way that only the first two Chapters, which describe basic human rights and freedoms (and to which there are no major objections among the opposition, as these basic provisions are solid yet violated by Putin's regime outright) require popular referendum to be approved. Chapters which regulate the system of power (Chapters 3-8) can be changed with a Parliamentary supermajority, which means relatively quickly, if a newly-elected President is willing to transfer major powers to the population directly, as well as to the parliamentary and judicial branches of the Government. So, in the event of a change of leadership in Russia, necessary adjustments of the Constitution establishing a far more democratic and pluralistic system can be made fairly quickly (which should not in any way preclude development and consideration of a new Constitution to be approved by a public referendum at some point in the future once democracy is restored).

## ECONOMIC REFORMS

Consensus on economic reforms is much narrower than that on constitutional reforms. However, there are several areas where various Russian democratic opposition forces (Alexey Navalny's Presidential Program, as well as platforms of the Yabloko and Parnas parties, Mikhail Khodorkovsky), and even the non-opposition reform-leaning groups like that of an ex-finance Minister Aleksei Kudrin are likely to find common ground:

1. The need for a dramatic shift in state policy priorities away from massive spending on bureaucracy, military and security forces, extravagant federal "investment projects" in favor of resourcing human capital programs such as health care and education;

2. The need to reduce regulatory burden on small and medium businesses, promote competition and reduce state interference in economic affairs;

3. Overt preference for more competitive decentralized markets over the current system dominated by a handful of burdensome and inefficient state-linked monopolies in key sectors of the economy;

4. Allowing a greater economic autonomy to regions and municipalities, in contrast to the current economic and fiscal over-centralization;

5. Normalizing economic relations with the West, lifting sanctions and improving commercial and investment climates.

Although details differ, it would be safe to say that various Russian opposition forces pursue similar goals through their economic proposals, as well as through their constitutional reform plans, —a shift away from Putin's overcentralized system toward a greater autonomy of regions, municipalities, economic agents, freer and decentralized markets. This shared policy vector can help overcome divisions over smaller issues. Extremely concentrated political power, wealth, economic influence, and budget revenues create a system in Russia where economic development is unsustainable. It discourages individual initiative, private investment and competition by increasing costs and inefficiencies. This system also spawns human rights abuses, corruption, aggressive foreign policy behavior, while neglecting the needs of the Russian people.

Economic agendas of various Russian opposition groups dedicate significant attention to the issue of income inequality in Putin's Russia. Since the time Putin came to power, Russia's income inequality has grown significantly. According to Rosstat, the income differentiation ratio (the difference between the incomes of 10% richest and those of 10% poorest Russians) has grown from 13 in 2000 to 16-17 in the recent years; and the Gini coefficient – from 0,39 to 0,4. In 2000, Russia had no billionaires on the Forbes' list of the world's richest people. Today, with ten Forbes entries, Russia is among the top five countries in the world by number of billionaires. This is unprecedented among countries with similar size of economies (nominal GDP of $1.2-1.5 billion) such as Australia, Canada, South Korea or Spain, each having only one or two citizens on the Forbes 100 Richest People in the World list. At the same time, as reported by Rosstat, about half of working Russians receive a salary below $430 a month, and over 80% below the $850 a month level.

Some argue that this situation is a natural result of excessive monopolization of strategic economic sectors by a handful of entities controlled by Putin's inner circle, and the accompanying corruption and embezzlement of public funds. A sizable number of the richest Russians have acquired their wealth by monopolizing the state procurement process. The annual Kings of State Procurement ranking put out by Forbes and listing individuals with largest state contract portfolios is traditionally dominated by Arkadiy Rotenberg and Gennadiy Timchenko. This issue has been investigated and publicized by Alexey Navalny for years. Navalny believes that transparency and demonopolization of state sectors of the economy and state procurement are key to decreasing inequality in Russia. Likewise, in 2016, Mikhail Khodorkovsky's Open Russia published a comprehensive report arguing that de-monopolization of strategic Russian industries is critical to alleviating the horrific concentration of wealth and power in Russia.

Opposition forces agree on the need for the government to reduce its excessive spending on bureaucracy, military and security forces, media propaganda, and massive and often ineffective state-financed investment projects, while at the same time significantly increasing spending on health care and education, which are severely underfinanced. In Russia, public healthcare expenditures account for less than 4% of GDP, whereas for most countries in Western Europe and North America they fall within the 7-10% range. Similar disparities exist in public

education expenditures. No wonder Russia has severe problems with the health of its population and deteriorating access to education, with notable reduction in the number of schools and medical centers, and plummeting doctors and teachers salaries even when compared to average income in the country. Clearly, human capital is not a priority of the heavily bureaucratized, corrupt Putin's regime. To address this failure, Alexey Navalny's economic program sets a goal of doubling the national spending on health care and education to match benchmarks of the developed world. Similar proposals have been put forward by Mikhail Khodorkovsky, Alexey Kudrin, as well as by the Yabloko and Parnas parties.

Another issue of broad consensus is the need to support small and medium businesses, as opposed to the current Russian state policy focused exclusively on large monopolies. According to the Russian statistics agency Rosstat, the share of SMEs in the country's GDP has rarely surpassed 20%, in stark contrast to the levels of 50% and higher for most OECD countries. Russia's small businesses are key to realizing economic growth, yet currently are suppressed by onerous regulations and steep market barriers erected by monopolies. Accordingly, opposition proposals focus on lifting small business taxes, removing regulatory barriers, simplifying accounting and oversight procedures; all of which have been promised by Putin's government since the early 2000s, yet the situation has been growing worse with each year.

It is important to emphasize that none of the opposition reform programs feature radical populist measures such as property nationalization, trade protectionism, introduction of market price regulation, raising taxes for small and medium business owners, increasing budget deficit, or financing real sector through irresponsible monetary emission. This stands in stark contrast to the proposals put forth by various incumbent populist and dirigiste forces on the left and on the right. It would be fair to say that democratic opposition economic programs promulgate responsible fiscal, monetary, and regulatory policies. While these agendas do contain many measures of social spending and responsible social policy that may look "populist" from a standpoint of ultra-ideological neoliberal economic policy script, they remain well within the mainstream economic policy norms of the developed Western countries. The opposition plans are quite remarkably responsible and carefully avoid truly radical populist measures. Alexey Navalny's proposals to drastically increase spending on healthcare and education, for instance, are carefully balanced with proposed spending cuts for bureaucracy, security services, wasteful and corrupt state-financed projects, and therefore do not increase the budget deficit.

Another economic policy matter requiring urgent attention is that of the Russian pension system. Spending on the state pension program reached 9% of GDP in 2016. At the same time, current levels of pensions are insufficient for sustaining a decent living standard for 40 million of Russian pensioners. Various pension reform proposals floated by the government in the past 20 years have failed. Moreover, financing of the pension system is a heavy burden on the Russian entrepreneurs. Pension fund's revenue comes from the payroll tax, which is one of the highest in the world. According to the PwC's Paying Taxes report, Russia is one of the top ten countries with the highest labor tax rates in the world. Excessive payroll tax precludes salaries from growing and is a major impediment for economic development.

This problem has been recognized by the Russian government, who has discussed lowering payroll tax rate from the current rate of 30% to 21-22%. However, the government intends to resource this cut with a VAT rate hike from the current rate of 18% to 22%, which will be detrimental to economic development. The burden on entrepreneurs to finance the pension system is only expected to grow due to the population that is aging. Government's attempts to introduce defined contribution plans during the past years have failed. To solve this imbalance, the government has proposed a significant increase of the retirement age. Publicized immediately following the 2018 Presidential election, this proposal has sparked mass protests and led to a notable plunge in Putin's approval ratings.

Russian opposition groups have identified another potential source for financing Russia's pension system that would provide a tax relief for entrepreneurs, while supporting a significant increase of pensions and keeping the current retirement age unchanged for at least a decade. This plan would create a rich, highly-capitalized pension fund similar to that of Norway by withholding income from oil and gas industries. Currently, Russian state-owned companies pay ludicrously low dividends to the state budget. Gazprom's gas export taxes, for example, are significantly lower than those of the private oil industry. Gazprom's tax to revenue ratio is at about 27-28% now, as opposed to the average of about 50% paid by oil companies. On the other hand, Gazprom spends excessive sums financing investment projects that enrich Putin's cronies such as Rotenberg and Timchenko. All of this takes place in the

environment of excessive upstream production capacity and excessive export pipeline capacity. Rescinding requirements for such unnecessary investments should enable Gazprom to pay more taxes to the state budget. Meanwhile, Gazprom's contribution to the state non-budgetary social funds (primarily the pension fund, but also the health insurance and social security funds, which are all financed through the payroll tax) is only 2% of the total income of these funds; and Rosneft's contribution is only 1%; whereas the remaining 97% is paid by the rest of the Russian entrepreneurs.

The opposition seeks to reverse this situation, while at the same time reforming the Pension Fund and ensuring that its capital becomes the property of Russia's pensioners (as opposed to the current revenue-redistribution mechanism disenfranchising pensioners), as well as significantly lowering the payroll tax burden on Russian entrepreneurs. These ideas have been circulating around for quite a while, starting with Boris Nemtsov's Solidarity movement in 2009. Today, they figure prominently in Alexey Navalny's Presidential program, as well as in the political program of the Parnas party. Putin's government, on the other hand, does not have a coherent long-term vision on what to do with the pension system.

An important component of democratic opposition's economic plan is its stance on the 1990s privatization. Although many assets have been re-nationalized by the Russian state since, the issue still stirs up bitter divisions within the Russian political and economic debate, as the lack of fairness with which the privatization was executed is arguably one of the main factors underpinning the deep income inequality in Russia. Naturally, most of the opposition plans include some sort of compensation tax levied on the owners of unfairly privatized assets. Most active in this regard is the Yabloko party, but similar compensation tax mechanism is also envisaged by Alexey Navalny's economic plan. Both fractions cite the British "windfall tax" of the 1990s levied on the beneficiaries of Margaret Thatcher's privatization as a reference. However, there is no strong consensus on the issue and some pro-democracy groups oppose all actions against owners of privatized assets and consider private property as untouchable regardless of the methods of privatization.

The details of the privatization windfall tax proposed by Navalny are not defined. Any such measure would have to be deliberated and passed by the Parliament. However, a working roster has emerged identifying the most problematic privatization transactions. On that short list of about 15-20 large cases are the infamous loans-for-shares auctions and other opaque transactions that took place without an open auction, such as Alisher Usmanov's acquisition of Gazprom's ferrous metals factories. Most of the assets on that list have not changed owners since the initial privatization, —Vladimir Potanin still owns Norilsk Nickel and Alisher Usmanov owns Lebedinsky GOK and Oskol Ferrous Metals Plant. Former owners of the assets that have since been re-nationalized would not be subject to the new taxes. The new tax provisions would include mechanisms for grievances to be adjudicated by courts.

The windfall privatization tax is not an idea exclusive to Alexey Navalny. Similar proposals in one form or another can be found within every opposition program, except for the ruling party. Yabloko's founder Grigory Yavlinsky has been advocating a similar idea for over a decade.[11] The sense that the post-Soviet privatization was gravely unfair is widely shared in Russia. It is the main reason behind the current monopolistic and oligarchic structure of the country's political and economic system. Without doubt, Russia will have to deal with this painful issue at some point in the future, and any final solution would inevitably result in certain individuals and groups incurring significant losses.

Critical to the future of the Russian economy are the issues of high-tech sector and the need to reverse the growing trend of massive brain drain from Russia. That is the focus of Alexey Navalny's economic policy agenda chapter ***Development of High Technology Economy***.[12]

The Russian opposition believes that, to encourage talented Russians to return home from abroad, the country's general political and economic climates should be radically improved. This can be achieved by strictly adhering to the rule of law, reducing corruption and undue influence, supporting judicial independence, guaranteeing personal security, increasing the quality of social services, creating and sustaining transportation and public utilities infrastructure. Other measures for developing a high technology economy may include a radical reduction of payroll taxes (to which high-tech industries who

11 Yabloko, "Kompensatsionnyy nalog na sverkhkrupnye dokhody" [Compensation Tax on Super High Income],] May 27, 2010, accessed August 19, 2018, https://www.yabloko.ru/faq/kompensatsionnyi_nalog_na_sverkhkrupnye_dokhody.

12 Naval'ny 2018, "Ekonomicheskaya Povestka" [Economic Agenda], accessed August 19, 2018, https://2018.navalny.com/platform/9/.

usually have large labor costs are quite sensitive) and proactive support of exporters of high-tech products to international markets.

Current approaches such as creating special economic zones and special industrial parks, offering subsidies or tax breaks to start-ups (i.e. Skolkovo) are generally not favored, as they erect tax and policy havens within wider economic and political environments that are quite harsh, skewing intra-sector competition. Instead of creating exemptions for the few, the Russian opposition would aim to improve the business environment for everyone. While there may be a few exceptions (for example, establishing a tariff-free port in Vladivostok), it's unlikely that future economic plans would feature any "special zones" or multiply exemptions from the standard regime.

demand from Russian businesses for jobs they cannot fill with the domestic workforce.

On the other hand, most opposition groups agree on the need to unilaterally eliminate entry visa requirements and drastically simplify work permit application process for the nationals of developed countries – E.U. member states, the U.S., Canada, Japan, etc.

Virtually all democratic forces support free trade; abandoning the current aggressive style of foreign policy which has brought Russia under sanctions and into the international economic isolation; and minimizing "geopolitical expenditures", such as state propaganda, support of pro-Putin parties in foreign governments; and reducing defense spending, prioritizing border security.

Source: tvc.ru

Opposition stances differ greatly on the matter of immigration. While Alexey Navalny supports introduction of visa regimes with Russia's southern neighboring countries, the Yabloko and Parnas parties oppose that initiative. Yabloko and Parnas are adhering to the traditional liberal economic discourse that the domestic workforce available in Russia is insufficient due to the aging population. Navalny and his supporters argue that Russia lags so much behind developed countries in labor productivity, that linear forecasts of growing demand for workforce are simply irrelevant. Additionally, uncontrolled visa-free immigration drives up the crime rates while suppressing wages within lower segments of labor market. Russia's key shortage, however, lies in the skilled labor segment, not the type of workforce supplied by Russia's southern neighbors. Moreover, introduction of visa regimes with Central Asian neighbors would not preclude workforce imports: reasonable quotas for work visas will be established corresponding to the actual

The Eurasian Economic Union is not frequently mentioned directly, but Alexey Navalny's team generally leans toward abandoning it, as it only generates economic losses for Russia. Instead, Russia should pursue free trade agreements across the globe to stimulate its exporters, develop its high-tech industries and sectors with higher added value. In this effort, according to Navalny, priority should be given to trade and investment partnership and a common market with the European Union. Yabloko and Parnas programs also focus on cooperation with the E.U. as a policy priority.

Russia will demand a greater access to the Chinese markets. Cooperation with China will proceed on a new pragmatic basis: only deals promoting true economic interests of Russia will be signed. This would put an end to the current practice of selling oil and gas at steep discounts on terms unfavorable to Russia so that Putin's oligarch friends earn money by building pipelines.

## OTHER ISSUES

Alexey Navalny's program calls for the "humanization" of the Russian Criminal Code. Russia currently has the largest prison population in Europe numbering at 600,000. For most of them, the length of prison terms is excessive. The Criminal Code and Criminal Process Code contain numerous provisions with prison terms for very minor infractions that can be satisfied with alternative penalties. Imprisonment, to the extent possible, should be replaced with other measures such as bail, house arrests, cash penalties, confiscation of property. This plan would dramatically reduce Russia's prison, a move with a prominent economic component. It would reduce the size of bureaucracy and government spending on the Federal Penitentiary Service, which currently employs about quarter of a million people – a significant burden on taxpayers (RUB 260 billion from the federal budget in 2018, about 60% of what was spent on health care).

Another important issue for the Russian society and economy is the fate of the capital siphoned off the Russian state coffers and stashed abroad, as well as that of the Russian citizens targeted by various Western sanctions. The opposition plans to request and review the evidence against Russian individuals accused of corruption from Western governments. Validated information would initiate criminal cases against those involved in corruption and breach of law.

When it comes to offshore funds, they will be sorted into two groups: those of criminal and corrupt nature (which will be sought after, and Russia will seek the return of this money through legal means – Alexey Navalny's program envisages that), and the legitimately acquired capital exported because owners felt insecure about their ability to protect their property in Russia. Regarding the latter, there is no plan to specifically return "clean" money for re-investment in Russia – the opposition just aims to create a more favorable environment to all foreign investment.

## BRIEF COMPARISON OF PROGRAMS

Main differences between the Navalny Plan and platforms of other opposition groups can be explained as follows:

- The Yabloko Party program is built more like a detailed guideline on specific policy measures, as opposed to Alexey Navalny's focus on short manifesto of radical but necessary measures (such as a significant reduction of the payroll tax). In many respects, Yabloko's ideas are quite similar to those of Navalny (in its focus on social policy, in particular), but some of the ideas are very different (e.g. the immigration policy). Generally, Yabloko's program can be considered much more left-leaning than Navalny's rather centrist program. Navalny's plan envisages a range of pro-business measures that Yabloko is less focused on.

- The Parnas Party program is much more right of center, focused on classic economic liberalization agendas traditionally promoted by Russian economic reformers. Despite that, in general, it is fairly similar to Navalny's program.

- Alexey Kudrin's plan is more tolerant to the current system and is a lot more restrained with its approach to reforms within the system. Key areas where it shares approaches with Navalny include cutting spending on security agencies and increasing health care and education expenditures.

- When considering Khodorkovsky's ideas, it is worth noting that his Open Russia network has not put forth a consolidated comprehensive political and economic program. It has, however, issued an array of separate policy papers, whose gist is generally in line with Navalny's proposals. Khodorkovsky has focused more on his idea of transitioning Russia to a parliamentary republic, which, in his opinion, will solve problems of the Russian political system and society. Navalny also supports significant shift of power from the President and the executive branch to the Parliament, but not an ultimate transfer to a Parliamentary republic.

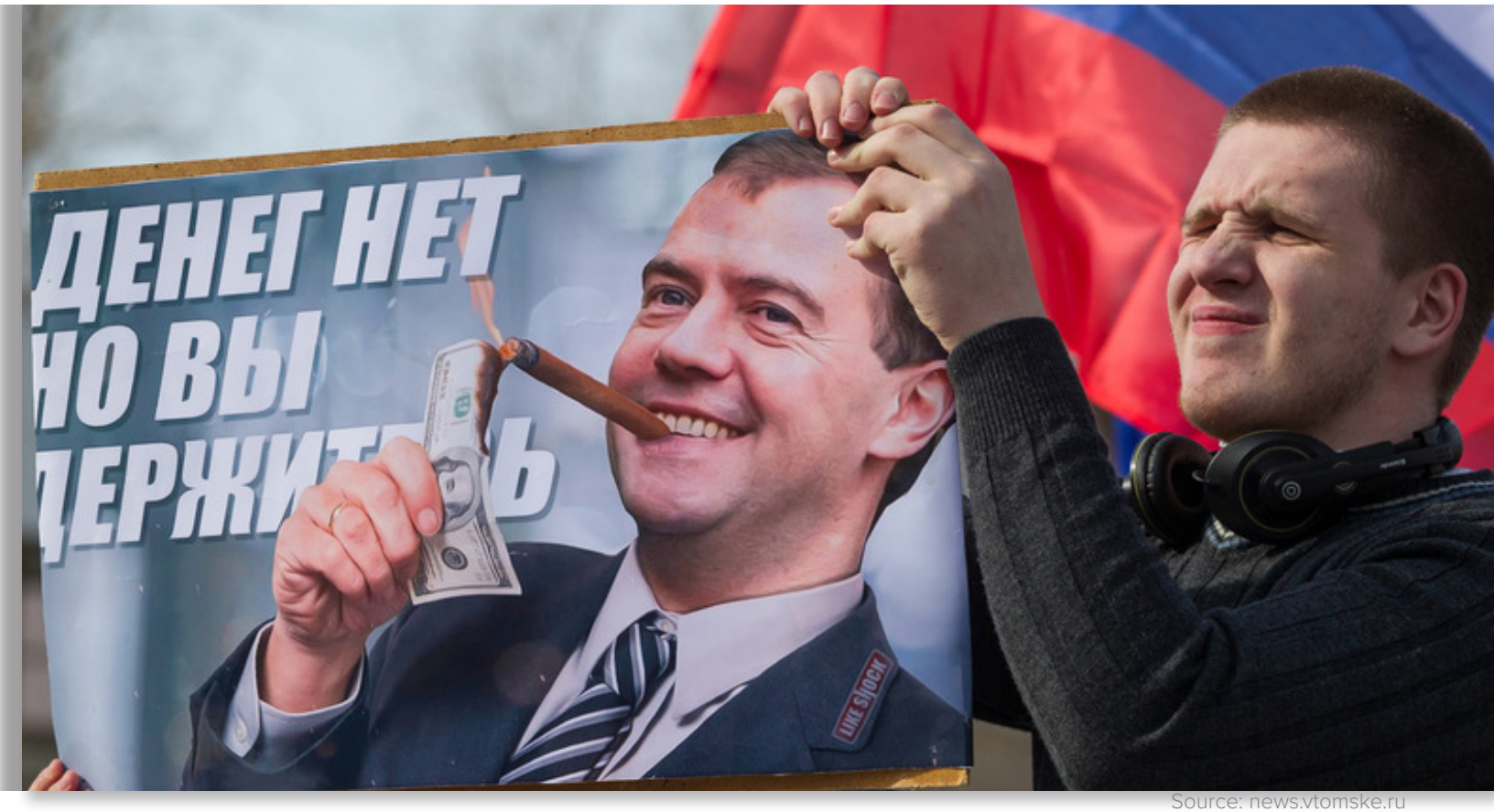
# Comparison of Programs by Issues

| Issue | Yabloko | Parnas | Sobchak | Navalny |
|---|---|---|---|---|
| Windfall privatization tax | Yes | No | No | Yes |
| Tax cuts | Mostly tax exemptions for low-income groups | No | Not clear; details are not publicized, only generic phrasing | Significant tax cuts on labor tax (from 30% to 15%), abolishing taxes for small businesses |
| Health care and education | Notable increase in spending | Mostly regulatory improvements, no mentions of increased spending | Notable increase in spending | Notable increase in spending |
| Parliamentary Republic | Transfer of major powers from the President to the Parliament | Transfer to parliamentary system in regions, abolishing current Presidential super-powers | Full-fledged Parliamentary Republic | Transfer of major powers from the President to the Parliament |
| Significant transfer of powers to local self-governance | Yes | Yes | Yes | Yes |
| De-monopolization of the economy | Mostly regulatory measures against monopolies | De-monopolization is a priority | Privatization + “improving efficiency” of governance in monopolies | De-monopolization is a priority |
| Development of a high-tech economy, reversing Russia’s brain drain | Mostly increasing spending on science and tax exemptions for R&D | Not mentioned | Repatriation of Russians mentioned as general goal | Specific chapter in program on development of high-tech economy and reversing brain drain |
| Significant simplification of regulations and reduction of regulatory and tax burden for small businesses | Yes | Yes | Yes | Yes |
| Humanization of the Criminal Code and reduction of prison population | Yes | Not mentioned | Yes | Yes |
| Visa regime and international relations | Partnerships with EU and China, visa-free regime with OECD countries, strong pro-immigration sentiment re. Central Asia | Free-trade zone with the EU | Partnership with EU, nothing on China, visa-free regime with Central Asia and “social integration of migrants” | Visa-free regime with the EU vs. introducing visa regime with Central Asian countries |

## SUMMARY: VISION FOR THE COUNTRY'S FUTURE

It is evident that despite minor internal differences, the Russian democratic opposition can articulate a comprehensive and viable vision for the country's future – a vision very different from the system that Vladimir Putin has built. Russia today is a repressive state with a high degree of concentration of political and economic power and wealth in the hands of a narrow circle of ruling cronies, meager benefits and bleak prospects for the majority of ordinary citizens. We envision a smaller government at the service to its people focused on a narrow number of issues (primarily developing human capital, health care, education, environment and infrastructure). We want to give power back to the people, small businesses, regions, municipalities, in what stands to become a biggest-ever de-centralization effort in Russia's history. De-centralization, as opposed to Putin's over-centralization of regulatory and economic powers within the infamous "vertical of power", is arguably the main idea of the Russian democratic opposition– another way of saying "power to the people."

Economic reform on its own may be sufficient to boost growth and propel Russia out of the "lost decade" set in with the financial crisis of 2008. It was then that Russia's economy began to fluctuate without being able to grow beyond the pre-crisis levels. The past few years have seen significant drops in the living standards and consumer purchasing power and marked the longest streak of falling real incomes of the population since the collapse of the Soviet Union. Increasing productivity achieved through reforming and de-monopolization of the inefficient state sector and increased investment incentivized by the reduction of regulatory and monopoly barriers, strengthening of the rule of law, protection of private property and support of independent judiciary, normalization of relations with the West and lifting of sanctions, — are key factors that would stimulate rapid economic growth from the current low base, shall the democratic opposition receive a practical opportunity to carry out its vision of economic policy for the country. •




Source: news.vtomske.ru

By Dr. Andrey Medushevsky

Source: pravo.media/

# Constitutional Reform in Russia:

## Substance, Directions and Implementation

## EXECUTIVE SUMMARY

A quarter of a century has passed since the Constitution of the Russian Federation was adopted in 1993, yet the issue of the results and the prospects for constitutional transformation has not disappeared from the political agenda. For some, the Constitution signifies an ultimate break up with the communist past and a legal foundation for the advancement of the Russian society toward democracy and the rule of law; for the others, it is exactly the Constitution that is the culprit for the authoritarian trend that has prevailed, and for the sustained stagnation in Russia's economic, social and political development.

The author of this chapter is in the middle of these extreme viewpoints. He believes that the Constitution has truly played a pivotal role in Russia's move toward democracy by establishing the basic principles of civil society and the rule of law, and in this respect, it remains of everlasting and paramount importance. Nevertheless, that does not mean that it should be utterly inaccessible for changes, especially given the elapsed time and the negative experience of the authoritarian transformation of the political regime, the amendments that were introduced between2008 and 2014, and the current objectives of the democratic movement.

The rationale for changes is to return to the constitutional principles, reaffirm their initial democratic meaning by rejecting the excessive concentration of the Presidential power, the results of counter-reforms and the adulteration through legislative and regulatory compliance practices.

Some of the proposed remedies aim to establish a new form of government (Presidential - Parliamentary), which would necessitate Constitutional amendments — adjustments that would regulate the separation of powers and redistribution of authority. Others seek to transform the system without changing the text of the Constitution through legislative reforms, judicial interpretation and the policy of law. Yet, the third approach prioritizes institutional reforms. Not everything in social development depends on the provisions of the law, political improvisation and practice can prove just as critical.

In their cumulative entirety such initiatives can help avoid the two extremes: that of constitutional stagnation gravitating toward the bureaucratic asphyxiation, and that of constitutional populism which has a tendency to destabilize the political system. In its practical activities to transform the political regime, the opposition ought to remember the maximum repeatedly confirmed by experience, — the further a party is from power, the more radical tend to be its constitutional proposals. Conversely, empowered groups tend to be more moderate in their initiatives.

When it comes to conducting constitutional reforms, three crucial distinctions have to be made. First of all, one has to distinguish between the notions of "amendments" in the Constitution (the text of the Basic Law proper) and the "transformation" of the Constitution, a much broader concept, signifying an actual revision of the meaning of constitutional norms without changing the text of it (by reviewing constitutional and customary legislation, judicial interpretation of the Constitution, and the application of a specific policy of law in general). Secondly, one must distinguish between the legal aspects of the reform proper and the political ones, connected with the current political regime and its activities. Thirdly, one must keep in mind the difference between the legal norm and its implementation, since the norm can be adequate, but the implementation can deviate from it, and even be contradictory to it. It, therefore, follows, that the program for constitutional reforms in Russia should assess: the Russian political and legal systems and reasons for their dysfunction; the correlation between the Constitution and the political regime; the system of government; possible constitutional amendments within the line of the separation of powers; changes, which can be made without changing the text of the Constitution; the scope and the instruments of the transformation of the constitutional system; mechanisms and targets of transformation under the conditions of the leadership change.

## I. RUSSIAN POLITICAL AND LEGAL SYSTEMS

When considering transition processes throughout history, distinction can be made between the following two situations:

1. when the transition from authoritarianism to democracy is built upon preexisting democratic values and institutions temporarily suppressed by the authoritarian rule; and

2. when these institutions have not been created yet, or have been completely destroyed, and have to be established from scratch concurrently with the transformation process.

While the first situation is descriptive of East European countries during the de-communization period, the second one is typical of Russia.

The Constitution of 1993 was a true achievement of the transitional period, it symbolized the renunciation of the nominal Soviet constitutionalism and reaffirmed the internationally recognized guarantees of the human rights (in its first two chapters). However, having adopted the model of the Presidential-Parliamentary Republic, it has introduced into practice a super-centralized mechanism of power by concentrating it in the hands of the President in order to overcome the crisis, stabilize the system and shore up the shift toward market economy. Therefore, the Constitution has not predetermined an authoritarian modernization vector of development, but neither did it exclude it. This vector became dominant not so much the result of constitutional norms, but due to general societal reasons, the spontaneous reaction to the collapse of the state (for the second time in the same century), the lack of mature democratic institutions, as well as the absence of consistent institutional reforms, and, in the long run, the elite's choice in favor of authoritarian modernization.


Source: ilnitsky.photoshelter.com

The logic behind the transformation of the Russian political system is made apparent by the outcomes of the Great Post-Soviet Constitutional Cycle. Within that cycle, the country has gone through three main phases:

**1. De-constitutionalization**— abandonment of the Soviet system, along with its expression of ideological values and standards of the nominal law (1985-1991);

**2. Constitutionalization**— adoption of new "rules of the game" embodied in the Constitution of 1993 (constitutional revolution of 1991-1993); and

**3. Re-institutionalization** —transformation (especially, beginning with the 2000s) of the constitutional principles, including a targeted correction of rules and norms in accordance with the altered social and political reality. This phase ended with a return to a situation in many aspects similar to the one, which has existed at its beginning – an illusory professed constitutionalism (not identical to a nominal one), as well as to the super-centralized model of power.[13]

13 The classification of constitutional regimes introduced by us by the degree of implementation of established political rights is a real, nominal and imaginary constitutionalism. In the first case, constitutional rights receive real protection (a citizen can defend them in court). In the second case - the Constitution is not implemented entirely - it is a constitution only by title (hence the name): it is a part of the ideology of the state, does not reflect the real structure of power and governance, or backs up the dictatorship, does not contain legal mechanisms for the implementation of the declared rights, in general has nothing to do with social reality, acting exclusively as an element of the political - legal legitimization of the one-party regime. In the third case, the situation is implied in which the constitution is very real, however it entails a number of restrictions on its implementation in the interests of the political regime, the supremely over-represented institution of the leader of the state (monarch or President), the subsequent interpretation of the separation of powers, the existence of a significant number of the default modes, gaps and contradictions, which are always interpreted in favor of the leader of the state, the guarantor of the Constitution. This includes the ability of the executive power to exercise pressure on the courts in important ("landmark") cases, which determine the policy of the law. Schematically, these three types of constitutionalism correspond to the political regimes of democracy, totalitarianism and authoritarianism (in various historical and modern forms). In the context of modern Russia, it means that the regime is no longer totalitarian (as it was in the Soviet period), however it has not yet become democratic, balancing in the space of limited constitutionalism with a trend to an illusion (that more or less allows control over the regime over the exercise of constitutional rights and freedoms).

The basic conditions of the Constitutional Contract of 1993, and the current Constitution as its formal preservation, have been changed three times since the establishment of the constitutional order:

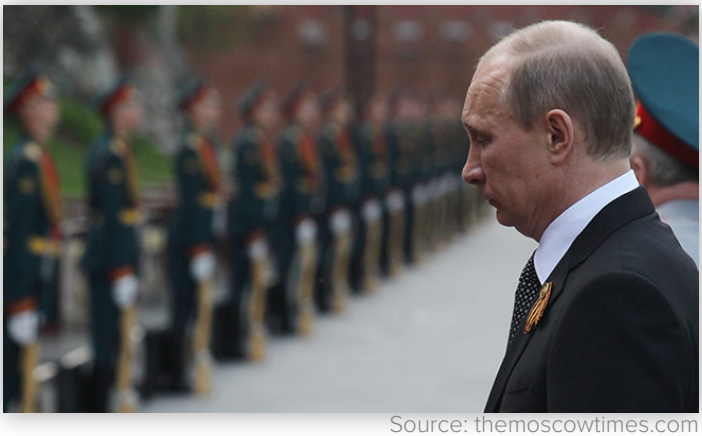
1) Between 2001-2005, within the framework of the doctrine of the "dictature of law" - the subdivision of the positive law and its detailed content (phasing out of federalism, bicameralism, multiparty system and the build up of the vertical of power);

2) In 2008, within the framework of the Sovereign Democracy Doctrine (a claim for the revision of the position of the state within the context of global politics and under the premise of maintaining "security"); and

3) Currently ongoing, starting with 2014, within the framework of the Overwhelming Majority Doctrine, —consequential transition to democratic Caesarism.

The contemporary regime in Russia is a plebiscitary authoritarianism. Its typical manifestations echoing the Bonapartist-Gaullist tradition include formal committal to the Constitution, double legitimacy (democratic, through elections, and authoritarian-paternalistic), anti-parliamentarism, lack of trust in political parties, non-partisan technical government, centralism, bureaucratization of the state apparatus, and the emerging cult of Strong Personality. Its final consolidation by the regime became possible by securing the mass social base , —establishment of monopolistic control by the ruling party in Federal and regional parliaments (the emergence of a qualified majority after the 2016 elections to the Duma) and, especially so after the Presidential elections of 2018, which in fact, was a plebiscite of public trust in the leader in the face of growing external challenges. Legitimizing formula of power combines three historical forms: Republican (theoretical elections of the head of state), Soviet (ideological functions of the leader) and monarchical (the scheme of the separation of powers that gives priority to the head of state). Quasi-constitutionalism becomes the political lawful expression of the trend: the factual delegation of power (and responsibility) to the leader, whose success is the single predetermining criterion of the legitimacy (electoral populism).

The emergence of this regime makes the system unstable, having depleted previous democratic resource of legitimacy, having been placed face to face with the new powerful challenges, and now turning to oppression to maximize control of the society. Transforming the quasi-constitutionalism into a genuine one without renouncing the current constitution,[14] and with a minimal alteration of its text entails shifting the center of gravity toward legislative, institutional and political reforms.



Source: themoscowtimes.com

## II. THE CONSTITUTION AND POLITICAL REGIME: THE CURRENT VECTOR

Hallmark features of the contemporary Russian political and legal regime are its declaratory commitment to the Constitution (the 2008 and 2014 amendments, though important, do not amount to radical revisions), and an accentuated intent to maintain its stability (preservation of the Constitution is an important element of the legitimization of the regime) against the backdrop of content erosion of the main constitutional principles.

The overarching dynamics of constitutional deviations among most vital legal principles (pluralism, democracy, federalism, separation of powers, local self-governance, independence of the judiciary, insurance of the rights and freedoms) are the following:

1. Their growth has been registered over time (mainly from 2000s);

2. Transition from more general constitutional provisions to concrete elements (sub-principles) for each of the principles examined. As a result, the general definition of the principle remains intact, however, its structure and meaning undergo significant modifications;

3. Transition from formal practices (legislative and judicial) to less formal: institutional and informal;

4. A drastic increase in the volume of constitutional deviations occurring with the transition from the federal level of legislation to legal regulation, and, especially with legislative and regulatory compliance practices at the level

14 The refusal from the current constitution is unviable due to the following reasons: first of all, due to its symbolic significance, that on of a rupture, both coherent and fundamental, with the communist experiment and law legacy of the Soviet nominal constitutionalism; second of all, due to the liberal values, rights and freedoms enshrined in it in their international legal understanding (Chapters 1 and 2), especially so in the recognition of the fact that in Russia "universally recognized principles and norms of international law" are "an integral part of its legal system "and are utilized in a priority order (in case they contradict with the international contracts of the Russian Federation) (item 4 of item 15); thirdly, because the current constitution paved the grounds for Russia's integration into the European legal space (accession to the Council of Europe, ratification of the ECHR and other important international documents, Russia's acceptance of the jurisdiction of the ECHR, etc., especially so, the imposition of a moratorium on the use of the death penalty executions), which have become the basis for the modernization of the entire legal system; fourthly, a radical transformation in the Constitution (not to mention its replacement with another one) would lead to the creation of a legal vacuum, the need for a colossal, long term and expensive work in order to transform all the constitutional and customary laws, including sectoral codes and regulations; fifthly, the adoption of a new constitution (or amendment of Chapters 1,2 and 9 of the current Constitution) would mandate the inclusion of the procedure for convening the Constitutional Assembly, which is possible only in accordance with the "federal constitutional law" (paragraph 2 of Article 135). However, such a law has not been passed yet, and its existing projects do not demonstrate, as a minimum, the unity of positions on the issue (in reality they indicate a potentially plausible conflict between the branches of power over the issue of which one of them will be dominant in the process); sixthly, in the conditions of a low legal culture of the society and the weakness of the liberal opposition, the beginning of a procedure for a large-scale constitutional review is hardly able to stop the uncontrolled rise of populism (both the right and the left one), which means that the result of this revision may be the failure of the constitutional reform-the loss of those provisions of the Constitution, which should be recognized as its historical achievement without a clear guarantee of real progress; seventhly, the current Constitution does not exclude the gradual transformation of the political regime and without its abolition at all, it can be done through the introduction of amendments (to Chapters 3-8, within the framework of Article 135), reforming legislation, political practices, etc., namely by fully incorporating the institutions of political democracy, competition, responsibility of the power and the change of leadership. If this will not suffice, it would be possible to provide other arguments in favor of keeping the current Constitution, however, in my opinion, these arguments are specific and sufficient enough.

of the subjects of the federation, at the regional and local level (where the phenomenon of monopolization of all types of power and control by the regional elites has been established).[15]

The system of limiting constitutional principles is a smorgasbord of built-in "shock absorbers," which block their actions at the institutional level. The principle of pluralism is distorted by a system of double standards the existence of which is based on specially "reserved zones," where the executive power has considerable discretion in determining both the meaning of relevant norms and their practical application. The principle of separation of powers is obviated by the extraordinary concentration of Presidential authority and powers, which gives the head of state not only constitutional, but also the metaconstitutional prerogatives[16] for intervening in activities of all three branches of government. The situation is exacerbated by the factual predetermination of the results of their activities through informal influence on their creation and the present "corrections" of the significant political topics.

Same mechanisms are at work when it comes to the principles of federalism, with the executive power vertical neutralizing their constitutional basics and severely limiting the independence of the subjects of the federation. In the field of the judiciary, the part of such a "built-in mechanism" is performed by the institute of appointed chairmen of the courts, the existence of which degrades independence and adversarial justice competition for the sake of pleasing the executive power. Finally, in the area of observance of guarantees of basic political rights and freedoms, this corrective mechanism is

15 The mechanisms of transformation of the constitutional principles and standards without their formal revision can be explained through the following examples: as far as the principle of pluralism goes the absence in the federal laws (on the fundamental guarantees of electoral rights, political parties, public associations, the media, elections of State Duma deputies, etc.). of a clear-cut regulation of the conditions for the fair political competition, the legal status of the political opposition and, on the contrary, the inclusion of limits to exercise the rights in the purposes of protesting; practically leading towards the established dominance of one party; with respect to the principle of the freedom of conscience, such provisions in the legislation (on freedom of conscience and religious associations), which do not secure the neutrality of the state in terms to all denominations, practically stimulating the predominance of one of them; with respect to the principle of federalism - a multiple revisions of the legislation (that of the federal law on the general principles of the organization of legislative (representative) and executive authorities in the subjects of the Russian Federation, in particular),reflecting the trend towards unification and centralism in general (since there is no clear-cut definition of the limitations on the expansion of the powers of the federal legislator in resolving issues in the subjects); with respect to the principle of local self-government, the revision of legislation (of the federal law on the general principles of organizing local self-government in the Russian Federation in particular); which resulted in its nationalization, hierarchization and bureaucratization; as far as the principle of separation of powers is concerned it was the adoption of a whole set of laws resulting in the progressive expansion of the authority of the Presidential power, the introduction of new powers (there are several hundred of them), that are not directly outlined in the Constitution, and sometimes are contradicting it (their main directions are: funding, control over subjects and the judiciary power); as far as the principle of independence of the judiciary is concerned the adjustment of federal laws (on the status of the judges, on the judicial system and on the institutes of the judicial community), which is perceived as a judicial counter-reform as it creates channels for the administration to influence courts and qualification board of judges (we are referring to the innovation as the institute of president of the court of justice upon which the career of the judges factually are dependent). As far as the guarantees of political rights and personal freedoms are concerned the amendments of 2012 to a number of federal laws (on non-profit organizations, on public associations and the Criminal Code of the Russian Federation) present fundamental importance, tied to the introduction of the provision on "NGOs performing the functions of a foreign agent," namely those who receive money from a foreign state to participate in "political activities." The latter concept was deciphered by the Ministry of Justice as putting general influence on decision-making, which results in an unjustifiably broad interpretation of the range of organizations and restrictive measures (special registration procedure, reporting, unscheduled inspections and liquidation of the organization in cases when these requirements are not met). This should also include the restrictions the activities of the opposition under the law on assemblies, rallies, marches and pickets, having to do in general with the replacement of the declarative order of their conduct as permissive.

16 The notion of the metaconstitutional prerogatives of the leader of the state means that he has such prerogatives that do not stem from the text of the Constitution and the norms enshrined in it formally (nor do the originate solely from them) but can be introduced on the grounds of a directed political interpretation. As a matter of fact, we are talking about the prerogatives arising from the status of the head of state as the guarantor of the constitution, the representative of the nation, the political leader, the highest arbiter in providing resolution to all the acute social and international issues, conflicts among the branches of power, etc. These metaconstitutional prerogatives can rely on the constitutional norms (in case of them being ambiguous or, on the contrary, excessively transparent on the topics of the concentration of power), however their real - life implementation depends primarily on the consciousness of the public, the willingness of the society to accept such a role of the head of state. In Russia, this readiness is largely explained by the historical tradition of sacralization of power, both during the monarchy and in the Soviet era, reflecting the belief of the population in the ability of a strong leader to resist negative systemic challenges and protect the "common folks" from the tyranny of the officials in the field (perceptions actively used by the current power in order to legitimize its regime).

manifested through the expansion of administrative oversight and discretion, backed by the uncertainty of constitutional norms (the absence of an exhaustive list of administrative authoritative powers of the head of state along with the Presidential Administration), the utilization of official (legislation and by-laws), but especially the use of informal leverages of influence against civic engagement.

Based on these observations it is possible to diagnose the current situation and determine the scope of desirable changes. Contrary to what many believe, the present situation does not amount to a constitutional crisis,[17] but rather a constitutional stagnation (the concept of "deferred" or "guided" democracy and "constitutional parallelism").

17 We have already had to explain our position on this topic. If the concept of a constitutional crisis is used as a scientific term rather than a publicist one, then it stands for the following: The constitutional crisis consists of the three parameters: 1) the fundamental law loses its legitimacy in society (there is an unbridgeable conflict between the formal positive law and legitimacy); 2) different constitutional norms cannot be agreed upon by the opposing social forces on the grounds of the present fundamental law; 3) the constitution (or some portion of its norms) comes into conflict with the political reality. The classic examples of the full-blown constitutional crises (when all of the three parameters are present) are: the crisis of the Weimar Republic of 1933 (and its Constitution of 1918), or the constitutional crisis in Russia of 1993. This is represented in a narrower extent, for example by the constitutional crisis in Poland in 2015. If we were to give assessment of the current situation in Russia from these perspectives, we cannot locate a single parameter that would allow us to define it as a constitutional crisis: 1) the legitimacy of the 1993 Constitution is not being questioned by either the public, or by the authorities (as it has been confirmed by various opinion polls); 2) the conflict of opposing social forces can be resolved theoretically within the framework of the current Fundamental Law (which does not preclude the coming into power of even a non-systemic opposition and the implementation of its program of constitutional amendments from a formal point of view); 3) the Constitution is not contradiction with the existing reality in any way, and even on the contrary it promotes self-preservation (in this context the official explanations of the preservation of constitutional stability, the undesirability of constitutional revision, etc. are clear). Overall, we can state that maintaining constitutional stability is a crucial part of the legitimization of the present political regime. That is why it makes sense to talk not about the crisis in real life, but rather about the constitutional stagnation. The stagnation of legal development when the values, the principles and the standards of the Constitution cease to function adequately, and the political regime is practically forced to deviate from them further and farther in order to maintain stability. This trend can result in a political crisis, which can morph into the constitutional one (however not necessarily). And it would make sense to overcome that one (and it would be socially less costly) without the abandoning of the current Constitution through the return to the full utilization of its norms, regime transformation and, to the partial amendments of the Constitution on when needed basis

Therefore, the current constitution should not be renounced, but its standards should be optimized for better efficiency. Priority vectors for corrections are the constitutional, legislative and institutional.

## III. FORM OF GOVERNMENT: THE SYSTEM OF CHECKS AND BALANCES

The question of the form of government is the theme of political and not legal debates, because its revision would have required some very substantial changes to the Constitution. The transition to a monistic parliamentary form of governance, or the so-called Westminster system, is not advantageous for Russia for three reasons. Firstly, it is does not match well with federalism, which has been declaratively built on the basis of the national and territorial principle (there are practically no successful examples of setting into effect a parliamentary republic in this context). Secondly, under the existing system of the imitation of the multi-party system and the absence of a stable party system its introduction would be premature. And finally, it is poorly aligned with the Russian political tradition.

A purely presidential form of government (based on the U.S. model) is not ideal either in the absence of an independent and self-governed judiciary (the Supreme Court), as it leads to irreconcilable conflicts between the Congress and the President. Therefore, its introduction might lead to a permanent state of incompetency of power, or a coup with the subsequent installation of an authoritarian model (in other words, the implementation of a typical Latin American scenario).

The authors of the Constitution of 1993, having given a careful consideration to international experience, had the good sense to come up with a combination (Presidential-Parliamentary) form of governance, the closest approximation of which was the Constitution of the Fifth French Republic of 1958. However, the Russian iteration at times is contradictory to the original. Historically, when mixed (semi-presidential) systems were established ( for example, in the constitutions of the French Fifth Republic, the Weimar Republic, Austria, Finland, Portugal, and partially in the projects of the Russian Constituent Assembly of 1918) they included the following fundamental elements: 1) President of the Republic elected by universal vote and endowed with considerable authority; 2) Prime Minister and

ministers, endowed with executive governmental authoritative power as an opposing force to the President;[18] 3) Parliamentary acquiescence as the condition for the government staying in power. The typologies of dualistic (combined, or semi-presidential) systems range from those close to Parliamentary (Parliamentary-Presidential regime) to almost Presidential (Presidential-Parliamentary regime of the "republican monarchy"). Nevertheless, all of them stipulate the presence of all three of these elements. The last element (parliamentary responsibility of the government) is factually missing in Russia, which poses a problem with defining its system of government as either an authentic "mixed" model, or a dualistic one.

The French Constitutional Reform of 2008, which gave a powerful stimulus to the factual transition from a Presidential-Parliamentary to a Parliamentary-Presidential system could serve as a model for Russian reforms. The aims of constitutional amendments could be grouped along three directions: correction of the imbalance of the separation of powers, expansion of the authority of Parliament and government, and curtailing the prerogatives of the President.

18 In a mixed form of government of the French model, the president has the prerogative of appointing the Prime Minister from the party that won the election (or the coalition of that party), however he does not have (like the Russian president does) the constitutional right to dismiss the government or dismiss the ministers at their discretion. This option in France is only carried out if the President and the Prime Minister both rely on the majority of the same party, as it was the case with De Gaulle, for example). This way the principle of parliamentary responsibility of the government and bicephalism (the two-headed nature) of executive power (divided between the President and the Prime Minister) is implemented. The question of whether the President could oust the Prime Minister was initially interpreted positively (it was believed that the authority to appoint also includes and the power to dismiss). For a long period of time this issue remained uncertain in the theory, however it was resolved in practical use. The key part was in the presence or the absence of a parliamentary majority at the Presidential disposal (the situation changed during the emergence of a "coexistence" regime between the two parties, one represented by the President and the other by the Prime Minister). In a result, the real responsibility of the Prime Minister towards the Presidents who had the parliamentary majority of that kind was replaced (after 1986) by the formal responsibility of the government to the National Assembly. In the future (especially beginning in the 1990s with the adoption of vital constitutional amendments), the entire system has evolved towards parliamentarism. The expansion of the authoritative powers of the Prime Minister at the expense of the corresponding weakening of the powers of the President. This trend was continued and established formally in France by a large-scale of the new series of constitutional amendments in 2008. The possibility of such vector of the evolution in Russia is blocked by Art. 117 of the Constitution of the RF.

## IV. CONSTITUTIONAL AMENDMENTS ON SEPARATION OF POWER

The main problem of the Russian political system is the weak connection between the government and the parliament, and practically a total dependence of the government on the President. From that perspective, relevant amendments will alter the general balance of power between the parliament, the government and the President in favor of the former. To that end, it is necessary to overcome contradictions of the Constitution in the resolution of the issue of government responsibility, since the Russian model design combines the elements of various systems: on the one hand, the State Duma gives its consent to the appointment of the Chairman of the government, which is an element of his parliamentary responsibility (paragraph 1, Article 111), on the other hand, it enforces the capability of the President to make a uniliteral decision on the resignation of the government, which is an element of the Presidential system (art. 117, paragraph 2). This contradiction can be resolved by adopting a formula of parliamentary accountability of the government, immanent in an authentic combined form of government.

Duplicity must be eliminated from regulation of the relationship between parliament and government. The Duma can express its lack of trust to the chairman of the government three times, nonetheless, that does not result in the automatic resignation. The President has the right to choose whether to send the government into resignation, or to dissolve the Duma itself (which is a deterrent factor of its self-preservation) (Article 111, paragraph 4). In Russia, the ministers are only accountable to the President, but not to the Parliament. The parliamentary responsibility of the government and its effective mechanism should be clearly identified in the Constitution.

It makes sense to introduce certainty in the correlation of the legal and political responsibility of the government to the President in accordance with the following parameters: whether this responsibility of the government should be viewed as a single one, or rather as two different types of responsibility (before the Parliament and the President); one should speak about the collective responsibility of the government, or the individual responsibility of ministers (in the form of the resignation of the cabinet as a whole, or the resignation of its individual members); how should the constructive or destructive vote of confidence look like (constructive or destructive) should look, and finally, to what extent should the position of the

government and the Prime Minister be viewed as one (does the resignation of the Prime Minister mean the resignation of the government as a whole)?

The topic of the mechanism of the governmental legal responsibility to the President needs to be clarified: what would be the course of action if the government makes a decision to resign and the President turns it down? Whether we are talking about the collective responsibility of the government, or about an individual responsibility of each of the members of the government (consequently, what we are talking about is the automatic resignation of the whole cabinet, or of its individual ministers).

In order to solve the issue of the mechanism of implementation of the collective responsibility of the government in the event the issue of the responsibility of the government to the Duma is raised, the Chairman of the government (part 4, article 117) has to determine whether he expresses the collective will of the government, or that one of his own, and how the situation ought to develop if the government should take a reverse decision by a majority vote.

It is important to articulate in greater detail the responsibility of the government under the conditions of the transition of the Presidential power, specifically how this responsibility is to be enforced by the government, which is mandated (Article 116) to resign before the newly elected President takes office, if the latter has not yet taken it.

Providing concrete detailing of Art. 71 and 72 makes sense in the field of federalism, establishing subjects of joint jurisdiction by taking into account the limits of the powers of the federal legislator in order to regulate issues in the subjects to overcome the unitarist vector.

It is advisable to think through the issue of delegating to the Constitutional Court the function of the guarantor of the Constitution (as it is in the majority of countries of the continental legal family), after having deprived the President of the corresponding function (endowed in Article 80). In this context, it will be necessary to revise the law on the Constitutional Court in the sense of expansion of its prerogatives, by the parity of reasoning with the relevant institutions for monitoring the constitutionality of the Western countries.

Consequently, the question arises about the adequacy of the official interpretation of the formula on the separation of powers (articles 10-11), which is essentially putting the President above all the major branches (there could be only three branches of power, not four, the definition of the President as a special “body of state authority and power” is the continuation of the monarchical tradition).[19]

To resolve the issue of the future destiny of the parallel quasi-constitutional institutions (such as the Public Chamber) by abolishing them, or by reflecting their authoritative powers in the Constitution.

19 The sequence of aligning these 10 positions is identified by the degree of necessary intervention by reformers in the text of the Constitution for its transformation. The first ones are related to the introduction of amendments or clarifications of a number of articles, the subsequent ones with a proposal to consider a number of provisions (since that entails the discussion), the final ones with a change in the policy of the law, particularly in the official interpretation of the principle of separation of powers. It does not come out directly from the texts of Art. 10 and 11 that the President is placed above them. Art. 10 simply states that the state power “is carried out on based of the separation into legislative, executive and judicial branches of power.” Art. 11 states that the state power is exercised by the President, the Federal Assembly, the government and the courts, and in the constituent subjects of the Russian Federation it is carried out by the state power institutions that they form. Based on the literal reading of these articles, the Presidential predominance over the three branches of power does not stem from it. In this case, we are talking about the interpretation of these provisions by the Constitutional Court (as well as a number of the other ones) and by the official doctrine which defined the President as a special body of the state power in general. That provided a very broad interpretation of his powers “on resolving the disagreements between the state power institutions” in art. 85 (as a matter of fact, they are reduced to their subordination) and recognition of the fact that he has some implied (hidden) authoritative powers to issue decrees on those topics which are not directly regulated by the Constitution, provided that this law-making activity does not spill beyond the general constitutional framework. There is no doubt of course that the practice of absolute domination of the Presidential power also contributes to this official interpretation.

Duma | Source: moscvichka.ru

## V. CONSTITUTIONAL AMENDMENTS PERTAINING TO THE RESTRICTION OF THE PRESIDENTIAL PREROGATIVES

1. Revision of the norm, according to which the President unliterally "determines the main trends of the domestic and foreign policy of the state" (art. 80, para. 3), and he is also "the Guarantor of the Constitution of the Russian Federation, human and civil rights and freedoms of a citizen" (Article 80, part 2);

2. Restricting the number of mandates for the stay of the same person in this position by two terms (without the word "in a row", clause 3 of article 81), and the prolongation of the mandate (a discussion is possible in here);

3. Introduction of a mechanism for legally binding consultations of the President and the Prime Minister in putting into effect the most crucially important decisions. By the parity of reasoning with the French model, where this institution assists in achieving a consensus between the President, the Prime Minister, the Chairmen of the chambers of Parliament, and in some cases with the Constitutional Council in adopting crucial legislative decisions (referendum issues, dissolution of the National Assembly, emergency authority and powers, etc.);

4. The introduction of the counter-signature institute (the most important acts of the President are confirmed by the Prime Minister, and, if it is necessary by the ministers in charge), so that the President could not impose upon the Parliament the laws he discards and exercise his legislative prerogatives (with the inclusion of the legal right) without the consent of the majority of the Parliament;

5. The clear-cut implementation of the principle of dual responsibility of the government: before the Parliament and to the President (and not just before the President), which opens the possibility of evolution of the political system from a more Presidential one, to that closer to Parliamentary. To implement the principle of double responsibility of the government, it is necessary to abolish the right of the Russian President to send the government into resignation at his own discretion (clause 2, article 117);

6. Putting into effect a clear-cut delineation between the two sectors of responsibility and the administrative competence of the President and the Prime Minister, the demarcation of the number of issues depending on to whom (the President or the Prime Minister) the supreme power of decision-making belongs to; the revision of the status and authority and powers of the Presidential Administration, and avoiding such a situation which makes the government an exclusively "technical" tool of the President;

7. It is advisable to endorse constitutionally the institution of coordinating the transfer of the entire scope of the exclusive powers to the President, namely, in the situations (circumstances, procedures and deadlines) when the President consolidates all the entirety of state authority and powers and becomes the Supreme, and the one and only administrative power;

8. To narrow down the interpretation of the arbitration of the President in the line of coordinating the activities of the branches of power. The corresponding powers of the Russian President to "resolve differences between the bodies of state authorities" (Article 81) do not have explicit restrictions and exclude the possibility of the expansion of the powers of the Prime Minister in this area, at the expense of a corresponding weakening of the Presidential powers;

9. To restrict the decree and emergency powers of the President (as was the case in a number of combination systems of the French model). In Russia, the President can introduce military or state of emergency situation all over Russia, or in some of its regions, with the subsequent approval by the upper chamber (articles 56, 87-88), however human rights and freedoms can be limited by the federal law and without its formal introduction (part 3, Article 55), and the subsequent measures were introduced by the decrees and executive orders of the President, which are "mandatory for execution throughout the entire territory of the Russian Federation" (Article 90);

10. To constitutionally restrict the possibility of expanding the prerogatives of the President, provided to him by legislation inside the constitution, as well as outside of it. The subsequent expansion of the Presidential powers can be traced in such vital fields as fiscal control (giving the President the right to introduce the Chairman of the Accounting Chamber and its auditors), power wielding agencies (all locked in around the President), the judiciary

system (giving the President the power to introduce to the Federation Council candidatures for the posts of Supreme and Constitutional Courts, their chairs and deputies), regional governance (multiple changes in the procedure of empowerment of the heads of regions);

11. To return the functions to initiate and discuss bills back to the Parliament with the appropriate restriction placed on (cancellation?) of the Presidential legislative initiative; expanding the accountability of the President and the Prime Minister to the Parliament, ensuring the control authority and powers of the Parliament. In order to do that, it makes sense to increase the control prerogatives of the Parliament (the expansion of the scope of competences of the parliamentary commissions in the investigation inquiry); the introduction of the norms on the activities of parliamentary groups of deputies, while ensuring the rights of the opposition groups and groups, which are representing minority rights; the resolution of the issue of the discipline of parliamentary voting, and inner-party discipline within factions (these norms can be specified by the State Duma's Regulating Rules);

12. The revision of the position of the Constitutional Court on the existence of the so-called hidden (or intended) powers of the President as a "guarantor" to issue decrees on topics that are not directly regulated by the Constitution, in those cases when they do not go beyond the general constitutional framework.

## VI. CONSTITUTIONAL TRANSFORMATIONS POSSIBLE WITHOUT CHANGING THE TEXT OF THE CONSTITUTION

The transformations targeted at overcoming constitutional and institutional deviations are important parts of the constitutional reform. It stipulates the following:

First of all, to comprehend the constitutional setbacks not as an aggregate set of phenomena, but as a systemic problem of the Russian constitutionalism; to alter the legal policy towards the authentic guarantee of constitutional principles functioning; to cancel the results of the modern times counter-reforms, that are responsible for the dysfunction of the institutions and administrative procedures.

Second of all, to bridge the growing gap between formal and informal practices, in particular to take into consideration the role of the latter in the magnitude of constitutional deviations in all of the principles; to differentiate the informal practices proper, having eliminated, first and foremost their dangerous anti-constitutional substrate.

Thirdly, to overcome the ever-growing deeply rooted logic of double standards for the comprehension of the constitutional principle of pluralism - the priority of the interests of the executive power, the abolishment of the surreptitious existence of the special zones that are free from the constitutional oversight (and excessively broad interpretation of the delegated powers of the administration).

Fourthly, to reconsider the predominant interpretation of the principle of separation of powers, which connects the operations of the branches of power with the activities of the super arbitrator – the President, enabling presidential power to exercise unconstitutional (extra-constitutional) influence on the elections, the legislative process, and to influence the judiciary when there are politically significant decisions being taken.

Fifthly, to reconsider the existing interpretation of the principle of federalism, which had practically led to the triumph of unitarist tendencies: to revise the standards of the federal legislation, which have factually replaced the Constitution of the Russian Federation, and the constitutions and the charters of the regions, in terms of identifying the status of subjects of the Russian Federation, separating powers in subjects of joint jurisdiction; in order to overcome excessive administrative centralization in the subjects in the line of regional budgetary powers, institutions and their functions.

Sixthly, to adjust the system of bicameralism in the terms of altering the order of formation of the Federation Council. However, the widespread thesis on the direct elections of the members of the upper house does not seem uncontestable, both in the context of the world experience and the Russian situation. The creation of two chambers, which have the same elective legitimacy leads to undesirable consequences: it endows the existing (and in many aspects inefficient) model of federalism; it leads to a possible conflict between the chambers, which get their equal legitimacy; the conflict proves difficult to be resolved under the circumstances of the contemplated weakening of the Presidential power of an external arbitrator.

Seventhly, to overcome the excessive deviations from the principle of separation of powers in the regions, which enable the heads of subjects of the Federation to cajole the local parliaments and courts into submission of their influence, despite the fact, that the latter have formal federal status, except for magistrates and constitutional (statutory) courts.

Eighthly, to re-examine the extremely stern unification in the municipal field in the area of local self-government, to provide the subjects of the Russian Federation with the opportunity to choose one out of several models for their territorial organization of the local self-government; increase their financial capacity to redistribute income and set up local fees; to overcome the practice of redistributing public property between state and municipal entities without taking into consideration the opinions of the latter; to ensure the rights to get compensated for expenses incurred in the result of decisions made by the public authorities; to harmonize the mechanism of coordination of legislative decisions making between the subjects and the municipalities that are affecting the interests of the local self-governance.

Ninthly, to de-bureaucratize the judicial system, by excluding legislative norms and institutional conditions, that are assisting in the establishment of a special judicial bureaucracy (appointed chairmen of the courts), in practice, putting the adoption of key decisions in the judiciary community under the strict control. To develop a doctrine of legitimizing judicial decisions in the area of Constitutional Justice by applying an appropriate interpretation of constitutional principles, criteria and tests, as well as any deviations stemming from them.

Tenthly, to take the legislative reforms that can restore a real multi-party system and respect for the rights and freedoms of citizens the rights of citizens to legitimate disagreement with the policy of state power in the form of meetings, rallies and demonstrations. The implementation of electoral legislation and control over the democratic practice of elections, ensuring equality of public associations before the law and guarantees of the activities of the political opposition remain relevant.

All these transformations can be implemented without the changes in the text of the Constitution, within the framework of legislative, administrative and judicial reforms, however, they stipulate a change in the general policy of the law.

## VII. THE MAGNITUDE AND THE LEVERAGES OF THE CONSTITUTIONAL SYSTEM TRANSFORMATION

The scope of constitutional review would be determined by the mechanisms described in Chapter 9.

A radical version of the reform (or a complete revision of the Constitution) with the amendments of Chapters 1, 2 and 9 stipulates the convocation of the Constituent - the Constitutional Assembly (Article 135). Theoretically this version is justified in the conditions of the constitutional revolution, on the wave of expectations placed by the society upon the Constitution under a well demonstrated presence of a strong democratic consensus and the existence of the parliamentary forces, which are capable of leading and implementing this initiative step by step. Otherwise there will be a constitutional crisis with some rather unpredictable consequences.[20]

20 In this case of developing events (a complete revision of the current Constitution), the fate of the Constitutional Court is theoretically decided upon by the Constitutional Assembly, which is called in accord with the federal constitutional law (which has not been adopted). The law itself (if it is adopted) may just as well be considered by the Constitutional Court for compliance with the current Constitution. However, the Constitutional Assembly, either confirms further down the line the inalterability of the Constitution or accepts the draft of a new one (in case the necessary majority of votes is obtained) or takes it out for a popular vote (clause 3 of Article 135). Nonetheless, the Constitutional Court, cannot determine the constitutionality of decisions taken by the Assembly. First of all, due to the fact that the resolution of these issues is delegated to the Assembly by the Constitution itself. Second of all, due to the fact that in the event of the termination of the previous Basic Law, the legal basis for judgments about constitutionality disappears. Thirdly, due to the limited competence of the Constitutional Court in the matters of reviewing even the existing constitution. On the grounds of the law on it and the adopted doctrine, the Constitutional Court of the Russian Federation (unlike the German one, for example), as it itself has explained (in 2008), cannot make decisions on the constitutionality of legal drafts on amendments to the current Constitution before the get adopted (because they have not yet become a law) and, even more so, after their adoption (because they have already turned into a part of the Constitution, and the Court is not entitled to rule on the constitutionality of the provisions of the Constitution). Therefore, in the case of the Constitution being revised completely, there is a need for a new law on the Constitutional Court with the definition of its competences, composition and the order of formation. Nevertheless, as the experience of transitional processes in different countries has demonstrated, from the political viewpoint the Constitutional Court can play a very different role in them (in case political parties agree to it in the constituent assembly) from the guarantor of the entire transitional process (determining the standards for established principles of the democratic system, for instance) all the way up to being the passive observer and registrar of these changes or their victims (in a number of post-Soviet countries, the constitutional revolutions in the history of the modern world resulted in a radical transformation of the Constitutional courts, or even their abolishment based on the incriminating charges of collaboration with the regime overthrown).

Another version is to introduce separate constitutional amendments into Chapters 3-8 (in accordance with Article 136). It looks less radical as it does not put into question the constitutional system, as a whole (in theory, some of the amendments can be canceled out by the others). This version of changing the Constitution stipulates the availability of qualified (or close to it) majority in the chambers of the Federal Assembly for the reformers.

The third version appears when the proposed amendments to Chapters 3-8 spill beyond their boundaries and result in the transformation of the foundations of the constitutional system. It then brings us back to the square number one. At present moment there has been a strategy for a radical revision of the Constitution proposed under the guise of separate amendments. It has been proposed to incorporate them through the Preamble to the Constitution by the introduction of new chapters, or additions made to the final clauses. Nonetheless, a question of holding a repeated national vote would arise in this case, at the very minimum, similar in analogy to that one instance that occurred on December 12, 1993 (and as a result it demands a predictable wide social support for these initiatives).

It depends whichever version might be in demand on the content of the changes, the standards applied to the revision of the constitution, the arrangement of political forces and the objectives of the initiators of change.

The version of the Constituent Assembly (Constitutional Assembly) for the adoption of a new constitution is not an obvious priority, neither from a legal, nor from a political point of view. First of all, the launch of this mechanism generates a wave of populistic expectations and, as a consequence, the threat of unprofessional decisions being made to appease the current emotional sentiments; second of all, the law on the Constitutional Assembly has not been adopted and the existing projects demonstrate a drastic conflict between the branches of power and the political parties on the issue of what its provisions could be; thirdly, there is an evident threat of the situation getting out of control, and the loss of the liberal standards of the current Fundamental Constitutional Law (it is not for nothing that the extreme right forces have been vouching for this option of the political spectrum).

The strategy of the majority among the modern democratic states is more acceptable: they are reserved in their attitude towards the creation of the omnipotent and autonomous bodies of constituent power, rather opting in favor of the temporary provision of parliaments with limited constitutional functions for carrying out constitutional reforms (that was the exact practice of successful transitional processes in Southern and Eastern Europe at the end of the 20th century) for them. The experience demonstrates that the best constitutions (and amendments) turned out to be those ones, that have been designed in a closed mode and involved professional experts, that were subsequently approved in their finalized versions at a referendum and have not been not the results of convocation of the Constituant[21], and in the public quest for compromises for the political forces.

It is apparent, in the light of all the arguments presented, that in the long run one should strive to avoid both extremes: the constitutional stagnation and the full-scale revision of constitutional provisions (even more so, in the conditions of the transition period). In real life we should talk about targeted amendments to the Constitution, aimed at the revision of the legislation, and most importantly, at the legal transformation of the political regime. Constitutional reform is not a task for the street mob, but rather for the professional lawyers and politicians.

21 The constituant is the legislative assembly in the general sense, endowed with the constituent (constitutive) power, which is convened specifically to discuss, draft and adopt the Constitution. In history, There is a whole gallery of constituents – of the constituent assemblies, which differ by the order of their creation (on the grounds of the current constitution or contrary to its norms); by the real volume of their established powers (all power or the restriction of its scope by the constitution or by a specific legislative act); by the order of formation (elective, self-proclaimed, appointed, combining these principles, etc.); by the order of their formation (elective, self-proclaimed, appointed, combining all these principles, etc.); by the system of organizations in the period of transition (the principles of relationships with the government and the other institutions of power); by the circle of the issues discussed (they are identified by the assembly itself or by the corresponding law on its convocation); by the order of approval of the results of their activities (the issue of whether the final word or the draft of the constitution belongs to them is referred to a referendum). Finally, by the nature of the results of their activities whether they succeeded in adopting a consolidated draft of the constitution, or they did not achieve that goal (they turned out to be dissolved before it was adopted), or whether during the discussion they revised the very purpose itself (they "dissolved" or, on the contrary, usurped power for their own benefit for instance). It stipulates a very scrupulous legal and political preparation, and, in case of its nature being inadequate (or due to the irreducibility of the political differences) there is a risk of going beyond the control of the law and ending up with the destabilization of the political system, or the of putting an authoritarian regime in power. This is what the discussion in Russia about whether it is necessary to pass a law on the Constitutional Assembly in general (for the mere fact that its emergence can provoke a constitutional crisis) is connected with in particular. That is why modern democratic regimes exercise restrain towards convening omnipotent constituants (in some of the modern history constitutions, their complete revision is not at all stipulated, or the so-called "eternal norms" have been taken out) in favor of the temporary empowerment of the Parliament with the functions of the executive power with a clearly defined authority range on the issues of constitutional revision, re-examination period and approval procedures to them. Th historical examples of the constituant entities in Russia are the All-Russian Constituent Assembly, which was dissolved by the Bolsheviks in 1918, and, with certain reservations, the Constitutional Consultation which drafted the Constitution of 1993... The modern era Russian analogue of the Constituant is the Constitutional Assembly (Article 135). For more details see: A.N. Medushevsky, "Political History of the Russian Revolution: Norms, Institutions, Forms of Social Mobilization in the Twentieth Century M.-St.Pet.: Center for Humanitarian Initiatives, 2017.

## VIII. MECHANISMS AND SUBJECTS OF CONSTITUTIONAL TRANSFORMATION UNDER THE CONDITIONS OF LEADERSHIP CHANGE

There are three possible scenarios of development for constitutional, legal and political systems:

**1. Continuation of stagnation**— reproduction in the new forms of the system of imaginary presumed constitutionalism (the probability is great; however, it is not indisputable);

**2. Collapse of the system under the influence of internal and external factors** (a negative version tied to the possible triumph of populism and potential reproduction of authoritarianism in other forms, including the parliamentary one);

**3. Internal reformation of the system** caused by the increased alienation of society and power, which puts the continued control of the current elite in jeopardy (a theoretically possible version). The latter version seems to be the least burdensome for the society, but it implies some strenuous work for the elite consciousness, its flexibility and pragmatism in its thinking.

Under the conditions of apathy of the civil society and the conservatism of the elite, the most viable option is a gradual shift from the authoritarianism to the "elite democracy," namely, the introduction of such a system of restricted pluralism, which stipulates the expansion of political competition within the ruling class, the creation of clear cut rules of the game, as well as political and legal conventions being in line with the balance of the ruling party and the parliamentary opposition.

The instruments for maintaining this contract for the elites (following the steps of the international and especially the European experience of transitional processes) could be - the division of the ruling party into two (tentatively speaking into the "conservatives" and "progressives"). The introduction of limited political competition, followed by a subsequent creation of conditions for the transition from the imitation of the multi-party system to the real one; the organization of the "round tables" with the legally binding contracts (with the possible involvement of the extra-parliamentary opposition); preservation of the agreements reached by the external arbiter (by the Constitutional court for example); in the final reckoning, overcoming the alienation between the power and the society along the lines of the common goals of the program of change. In principle, this evolution could look like a transition from the regime of plebiscitary authoritarianism to the modern form of a combined Presidential-Parliamentary (or Parliamentary-Presidential) Republic: the head of the state turns from Caesar into Princeps (number one among his equals), the arbitrator in the disputes among the branches of power, but not the dominant one.

*As comparative analysis of the transition processes indicates there are three possible:*

1. The head of state embraces these reforms in the face of the growing political system crisis in order to reserve the support of a part of the elite (and of the opposition) against conservative opponents;

2. The current leader stimulates the introduction of new "rules of the game" before leaving power (to maintain predictability of the course, and to preserve personal security guarantees against political or legal prosecution);

3. A new leader establishes these rules under the conditions of awareness of the fragility of the support that was provided by the elite (in order to contradistinguish one party against the other). The very fact of the realization of this dilemma by the leader provides the opportunity to prepare the corresponding reforms and train personnel in the depths of the old regime.

A major advantage of such reform is that it avoids a full-blown constitutional crisis with the risk of destabilization of the political system. It maintains positions for the elite based on new "rules of the game," and keeps the situation under control through the transition period. The acceptance of the model of the liberal-authoritarian consensus makes it possible to transform the acting (authoritarian) system without a conflict, to implement a constitutional change in a non-public dialogue mode, and to resolve convoluted disputes throughout the inside circle of the elite agreements, to create a system of formal and informal standards, which ensure the evolutionary liberalization of the regime.

The role of the liberal opposition in a similar critical situation (the change of the leadership) is extremely important, and it is comprised of the following: presenting the society with a full-bodied project of constitutional reforms; opposing the conservative restoration tendencies of the political system; advancement of the liberal agenda of the constitutional reforms in the society; building a dialogue up with that part of the political elite, which stands for the transformations (the union of the public and the enlightened bureaucracy); preparation of a publicly trusted and professional counter - elite - a "non - ruling elite" (or "the government of the national popular trust"), which just might in the course of time become the nucleus of a new ruling elite. •


Source: europeansworldwide.wordpress.com

# Annex

## COMMENT BY V. MILOV ON A. MEDUSHEVSKY'S ARTICLE

Despite being very rational and well thought through, Dr. Medushevsky's chapter is, like many of the texts on the changes to the Constitution, is excessively focused on the redistribution of powers in the triad "President-government-Parliament." Meanwhile there are a lot of other crucial issues which are neglected. For instance, ensuring true independence of the judiciary branch of power, and powerful local self-governments, pass – through electivity of the majority of the elements of the state governance. Essentially, narrowing the discussion to the "President - government - Parliament" triad reproduces the birth trauma of the present Constitution, in which the main body of the articles in the state system are devoted to the structure of federal government, and the power and authority of the regions and the judicial power, and the local self-governments are not paid proper attention to, as the result of that the institutional basis for their operating activities is weak, their independence is nominal, and, as a consequence, they would have easily transformed from the independent institutions into appendages of the federal government.

It is necessary to write in greater detail about the judicial system as it is, in general, the key moment in the possible forthcoming changes in the Constitution. Along the lines of this topic one can only find in Medushevsky's note the dissatisfaction with the institution of the Chairman of the court, however, this is by far not the one and the only thing, nor is it the key issue that predetermines the dependence of the judiciary power over the executive one (for instance: the topics of appointing judges and the stripping them off their judicial status is by far and large more important, the system of funding for the courts). Similarly, since it is also crucial to speak more about the guarantees for the local self-governance, the pass – through transparent election process for all of the representatives at all the levels of governmental power (as of today we are moving de facto towards the abolishment of the electivity at all levels, in a sense, keeping just one system of the plebiscite type confirmation of the Presidential power in place).

The magnitude of attention Medushevsky allots to the topic of the separation of powers (executive branch, legislative and judicial) is seriously deficient. All the amassed experience demonstrates to us that ensuring a strict separation of powers must

be the central constitutional principle, otherwise the prerequisites are being created for the taking of power over by one of the branches. It appears to me that Medushevsky's tone in regard to the separation of powers focuses very narrowly down upon only the topic of super Presidency. As a matter of fact, however, the key problem is that the text of the Constitution does not contain a single end-to-end guarantee, ensuring the independence of the independent branches of power, which in principle, makes the subjugation of some of them to others easier, even if such seizure of power would be attempted, let us say for the Parliament being seized by one party, and not by the President. Serious constitutional guarantees are required for the non - interference of one branch of the government in the operations of the others. On the contrary, the current Constitution contains direct provisions that make such interference formal (for instance when it comes to the appointment of judges).

We should dwell upon the topic of a possible transition to a parliamentary form of government within the same context. The key problem is that we can move towards a Parliamentary form of government, nonetheless, it does not provide guarantees against authoritarian seizure of power and the dismantling of democratic institutions, in the same exact fashion similar to the Presidential one (such examples are found amidst not just a number of post-Soviet countries, but also the EU member states: Hungary, Poland, and Turkey as well). Medushevsky tells us nothing about this, however there is a somewhat difficult for me to wrap my mind around it phrase in his text saying that the Parliamentary form of government is allegedly "poorly coordinated with federalism, declaratively built upon the foundation of the national and territorial principle (there are practically no examples of a successful implementation of the parliamentary republic in that context)." Well, what about Canada, Great Britain then? … This is not where the problem of transition to the Parliamentary form of government nests, but rather in the fact that it also does not provide guarantees against spiraling down into authoritarianism, just like the Presidential one does not either. In principle, from this perspective, the strict observance of the principle of separation of powers is more important than the discussion on which form of governance is better.

Medushevsky's text does not include a proper consideration of the experience of dismantling democratic institutions between 2000-2018, in order to formulate a TOR for such a design of the future Constitution, which would create a system of checks and balances against similar trends in the future. It seems to me that any changes should be the consequences stemming from such analysis. Instead, Medushevsky writes extensively about what ideas were imbedded in the Constitution by its authors in 1993, and how it differs from Soviet constitutionalism, although, all of this is of no relevance for today anymore. Only the experience of applying the Constitution starting with 2000 has remained relevant.

The same applies to the implementation of the basic constitutional rights and freedoms of the citizens. The first two chapters of the current Constitution give citizens a fairly good set of rights and guarantees, however, it gets broken into pieces when placed against the notorious part 3 of Article 55: "The rights and freedoms of a man and citizen may be limited by the federal law, only to the extent that is necessary for the purposes of protecting the foundations of the constitutional order, morality, health, rights and legitimate interests of others, ensuring the defense and state security of the country." Authorities apply this rule arbitrarily to restrict the constitutional rights of the citizens in general, and to practically revise the basic constitutional principles; this is the issue of the most cardinal importance for the future constitutional reform, which in its importance weighs in even more so than the balance of powers between the President and the Parliament. There should be a clear-cut definition of permissible interference limits in the constitutional rights and freedoms of citizens, to cancel out any arbitrary interpretation of such standards in the future. It is also mandatory to provide a detailed specification of the liabilities for the authorities for the interference of that nature (as of today, the authorities do not bear any responsibility for frivolous restriction of the rights of citizens). •

# COMMENT BY A. MEDUSHEVSKY ON V. MILOV'S ARTICLE (ON THE CONSTITUTIONAL PART)

I agree with the general formulation of the question and the recommendations by V.S. Milov. Overall, they are well thought out, and do coincide with my own. In other words, I agree with the proposals of partial revision of the constitution, with the importance placed on the revision of the balance of the institutes of power, with limitations and a detailed clarification of the Presidential powers provided, with the expansion of the powers of the Parliament, and the introduction of the full responsibility of the government (to the Parliament and the President, and not just to the latter), with making court system independent, the development of self-government, the change in the information policy, and so on and so forth.

I also agree with the fact that we should not immediately launch the procedure of a full revision of the constitution, but rather start with the amendments to sections 3-8. However, the style of his note is excessively journalistic, he identifies the goals, but does not provide the details on how to achieve them.

Here is what I deemed to be unconvincing, or controversial:

1. I am not certain that one can possibly accept unconditionally the initial thesis claiming that: "the present constitution serves as the main obstacle to building of a normally functioning democracy" (even with the concession that this is a wide consensus among the opposition). In my point of view, the main obstacle is not the constitution, but the political regime and the interpretation of the constitution imposed by it (unconstitutional in its essence). To what extent has the regime emerged because of the constitution in place is quite another issue, however, I think that it opened (and it opens) various vectors for political development. as does indeed, any other one (for example, the US Constitution could have very well laid the foundation for the authoritarian regime if its provisions have not been corrected by the fight between the federalists and anti-federalists, by the latest amendments proposed in the form of the Bill of Rights and by Washington's refusal to accept the crown). And vice versa, where is the guarantee that under another constitution the regime would have been less authoritarian? (Singapore is the example of a Parliamentary form of government of the Westminster type with an authoritarian one-party system). And the constitution is too serious of a matter in general to have it altered completely every single time when the regime changes. It undermines the legitimacy of the legal system of the state as such. This is a pivotal issue as the position of the opposition depends on it: whether it will move towards the abolition of the constitution or fight to implement its principles.

2. The argument that in Russia there is a super Presidential regime, and that it has been imposed by the constitution is controversial. Firstly, this is a political science definition and not a legal one. Secondly, this concept (of super Presidency), literally means that the regime relies on the Presidential form of government (with its typical concept of checks and balances as it is the case in the US), however, it significantly different (the President has more significant presidential rule by decree right, as it is the case in Latin America). In Russia, there is no Presidential form of government and this mechanism of checks and balances does not apply (for under it the President cannot dissolve the Congress, and our President in here can dissolve the State Duma). The Russian system represents a mixed form of the French model, but with the limitations and defects, which do not allow it to function in its authentic manner and create the foundation for the super concentration of the Presidential powers). It is important to comprehend this for the sake of the strategy of the amendments, whether we do want to move to an authentic mixed form of governance, or perhaps, to the Presidential one (such proposals are also present in the discussion). However, if it is the move towards to the Presidential one, we should not talk about the Parliamentary responsibility of the government (in the Presidential system it is accountable only to the President). Thirdly, what does it mean: "imposed by the constitution"? Can the constitutional norms impose a regime (in such a case one would have to admit that any democratic regime has also been "imposed" by the constitution)? What in this case is a primary matter and what is the secondary one?

3. The thesis that the members of the Federation Council must be elected by directly by the will of the people (for the reasons stated in my note) is debatable. The upper chamber in a federative state should represent the subjects, not the population. Otherwise, why do we need it there at all? (In theory, one can have a unicameral parliament). If the upper chamber is being elected, then how

does it differ from the lower one, and how can the conflict of the two chambers with the same legitimate power be resolved? The time when that system was functional in Russia (direct elections) is identified as a "parade of sovereignties". A return to it can bring the problem back (threats of secession of the subjects based on the national identity), which, in addition, does not get resolved in the future perspective due to the supposed restriction of the Presidential authority and power. And to what extent does this proposal take into the account prior international experience? Where else in the world do the proponents of this idea see the examples of the effective operations of an elected upper chamber under the conditions of federalism, built upon a national and territorial (and as some do believe on an ethnic) principle? Why is the combined model of the formation of the chamber with the participation of the subjects and the lower chamber (as it is done in Germany) not satisfactory?

4. Milov, when talking about the total dependence of the judiciary branch of power over the executive one argues that it is happening due to the fact that all judges are appointed by the President. However, first of all, this is not true because it does not apply to the judges of the Constitutional and the Supreme Courts (who are appointed by the Federation Council). Second of all, even in a number of democratic regimes, judges are appointed by the President (based on the recommendation from the judiciary community). Thirdly, the judges of the other federal courts in Russia are appointed by the President based on the grounds of the federal law. In accordance with the law on the status of judges (art. 6), the President appoints judges if there is a positive conclusion of the Qualification Commission of Judges available. The problem, therefore, stems in the lack of independence of these Commissions of Judges and the inability of the judiciary community to influence the situation. Then, the key issue is not the changing the constitution, but rather the amendment in the law, the organization, the effective functioning of the mechanisms of the Commissions of Judges and how to achieve that. These nuances are important. And what is the proposed alternative procedure for appointing judges in return? The appointment of judges by the Parliament causes the creation of their dependency on it, or on the ruling party (as for example it is happening now in the modern-day Poland, or Hungary).

5. It is being said, not in any definitive words, however, that the presence of the idea of "abolishment of the position of the President and moving towards a Parliamentary Republic" is exists in the opposition. Nonetheless, is there no President in the Parliamentary Republic? I believe that the President of Germany would be offended after having read this.

6. It is not clear what is meant by "the proposal to include guarantees of the independence of the local self-governance in the constitution" Should it be understood as creation of a system in which local self-government would be completely independent from the executive power? Or, is it rather, the creation of such a system, in which the local self-governance would have enjoyed a greater autonomy from the administration in defending local interests and carrying out economic activities? It is not the same thing. And, it is worth to alter the constitution for this purpose, if all these issues can be completely resolved at the level of updating the law on local self-government?

7. The call to ensure "an equal subdivision of powers among different branches of power" misses the target, because the principle of separation of powers does not imply having equal authority (the legislature has a preponderance over the other two, since it can legally change the competence and the order of their activities). If anything, we should be talking about the redistribution of powers.

In conclusion, it is crucial to clearly define the concept of "broad consensus amidst the opposition" or detail the methodology that helped arrive to such conclusion. Has someone studied this issue in a sociological way (through polls), and is there data available (what does the concept of the opposition entail and what are its moods)? Or is that just a rhetorical ruse? I've got a feeling that there is no consensus, because the discussion participants use the very same concepts, while filling them out with different meanings. However, even if we were to accept the fact that there is a consensus, it really provides little help to the cause. In my view point, the issues of constitutional reforms are not at all being decided upon by the consensus of opinions of some people in general, but rather by a professional analysis of the arguments presented by the parties in the dispute. In the other case, it can happen so that a broad consensus has been developed on a precarious ground. •

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