The Russian Constitution: What it Means Today?

ANDREY N. MEDUSHEVSKY
National Research University – The Higher School of Economics in Moscow, Russia

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In the broad context of national and international legal, philosophical and constitutional experience, the author reconstructs the historical significance of the Russian Constitution of 1993,, analysing its basic principles and dynamic cycles of their realisation in the Post-Soviet period . His interpretation of the contradiction between legal norms and political practices is based on important recent empirical investigations and demonstrates the unstable balance between democratic and authoritarian tendencies in contemporary Russia. The article investigates the main areas of constitutional dysfunctions, and possible strategies and technologies for further constitutional modernisation.

Keywards

Constitutionalism, Russian Constitution, legal principles, constitutional cycles, constitutional dysfunction, constitutional modernisation.

The state of law at the beginning of the 21st century resembles in many aspects that of the 20th century: in both cases the crisis of law is interpreted with reference to the discrepancy between the positive law and public expectations or social reality; the contradiction between "Western values" and the legal traditions of the other regions of the

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world, the growth of legal nihilism, the relativity of many legal concepts, the weakening of parliamentarianism as a form of liberal democracy and the strengthening of non-parliamentary forms of political mobilisation are being stated. The development of bureaucratic expansion calling into question the traditional forms of civil society, the growth of manipulation through the law and through the categories of the legal conscience exercised both by the state authorities and by the media are becoming apparent, and finally the absence of clear moral perspectives of humanity is being indicated[1]. Does all this point to the rejection of the traditional values of civil society and the legal state enshrined in the theory and practice of liberal constitutionalism? Is it possible to revise the economic and political systems without destroying them, a viewpoint that anti-globalists insist on in the context of the current crisis? What can the juridical science offer in opposition to this? In this context it becomes urgent to go beyond the juridical positivism, the rigid formulas of normativism, and the search for clarifications through the sociology of law.

Constitutionalism is a term having three different meanings in current literature:

1) the Basic Law of the State and the system of public legal acts adopted for its development;

2) the system of political and public law institutions, the formation of which ensures the realisation of constitutional norms (rule of law, state sovereignty, separation of powers, the Parliament and independent judicial control over the constitutionality of the laws);

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[1] Право и общество в эпоху перемен. М.,2008; Конституционное развитие России: задачи институционального проектирования. М., 2007; Гражданское общество и правовое государство как факторы модернизации российской правовой системы. М., 2009; Основы конституционного строя России: двадцать лет развития. М., 2013.

3) a social movement with the aim of establishing civil society and the legal state, and with the aim of enshrining these principles in the fundamental laws of the state and in the practice of functioning of its institutions.
It is the third meaning of the term "Constitutionalism" that is particularly vital in the countries where the democratic institutions are in the phase of formation[2].

Currently with regards to Russia, as previously in history, it is first necessary to distinguish between the Constitution and Constitutionalism[3]. The central problem of the Post-Soviet constitutionalism is the relationship between the originally enshrined constitutional principles and their subsequent implementation in the legislation, judicial and law enforcement practice in general.

Actuality of Political Philosophy of Liberal Constitutionalism at the Present Stage

The Russian constitutionalists undoubtedly shared the values of individual rights, and the legal state and civil society, with the main elements of Western philosophy and political thought. Their ideas completely coincide with what Western liberals J. Locke and Ch. Montesquieu, A. Tocqueville and V. Humboldt, D.S. Mill and A.V. Dicey, and later M. Weber have written in their works. In the 20th century the crisis of law demonstrated the ineffectiveness of the formerly dominant classical positivist jurisprudence and led to demarcation and division toward several directions- schools of revival of natural law, the pure theory of law (which turned to the basis of normativism), "natural rights", "legal realism" theories focusing on ethics, legal norm or custom, and judicial construction of law. In their works G. Jellinek, P. Laband and later Weber, H. Kelsen, E. Ehrlich and C. Schmitt in Germany and Austria, A. Esmein, L. Duguit, M. Hauriou, R. Carré de Malberg in France, V. Pareto and D. Del Vecchio in Italy, H. Laski in England and O. W. Holmes and B. Cardozo in the United States, alongside other

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[2] Конституционализм, *Российский либерализм середины XVIII-XX века. Энциклопедия.* М., 2010, 455-458.
[3] Модели общественного переустройства России. XX век. М., 2004.

major lawyers of the early 20th century realised the crisis in law and attempted to develop solutions. Similar directions in research are present in Russian thought, in the political philosophy of constitutionalism and liberalism[4]. However, the key aspect of their political philosophy lies in the fact that their works contain clear understanding of the specifics of Russia's political system and the social layers in it capable of sharing and in fact supporting these social ideals.

In the classic works of political philosophy of Russian liberalism (theorists of state (legal) schools), a general concept of the Russian State has been developed. It covers the transition from the Absolutism to the Constitutional Monarchy and to the Republic. The formation of the political ideology of the Enlightenment period and the French Revolution, the constitutional revolution in the United States and the subsequent abolition of slavery resulting from the civil war, the lessons learned from the experience of the UK parliamentarianism and the legal basis of unification of Germany and Italy became those milestones in political history that stimulated comparative researches and impacted the development of the constitutional program of the post-reformed Russia's liberalism in the second half of the 19th century. The works of the Hegelians- B. N. Chicherin, K. D. Kavelin, A. D. Gradovski, and subsequent lawyers and sociologists of law (N. M. Korkunov, S. A. Muromtsev, M. M. Kovalevsky) laid the foundations for its comparative sociological interpretation and political assessment from the standpoint of liberalism[5]. The generation of political thinkers and actors who were active at the beginning of the 20th century and during the revolution period (L. I. Petrazycki, M. Y. Ostrogorsky, P. I. Novgorodtsev, P. N. Milyukov, V. M. Gessen, F. F. Kokoshkin)[6] comprehended the conflict of the social ideal and the positive law from the standpoint of Neo-

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[4] Конституционализм, *Общественная мысль России XVIII-XX века. Энциклопедия.* М., 2005, 220-223; Либерализм, *Российский либерализм середины XVIII-начала XX века. Энциклопедия.* М., 2010, 527-533.

[5] Государственная (юридическая) школа, *Общественная мысль России XVIII-XX века*. М., 2005, 117-119.

[6] **Петражицкий Л.И.,** Теория права и государства в связи с теорией нравственности. М., 2010; **Острогорский М.Я.**, Демократия и политические партии. М., 2010; Кокошкин Ф.Ф. Избранное. М., 2010; **Гессен В.М.**, Основы конституционного права. М., 2010.

Kantianism suggesting a consistent program of constitutional reforms and legal policy in the context of the revolutionary crisis of the early 20th century[7]. “Legal State” theory, developed in the Russian classical liberal jurisprudence in the 19th-20th centuries, represented a generalised world experience of these transformations, was an integral strategy for the modernisation of Russian society, and the basic elements of which retain their importance to date on the most important parameters[8].

In this context the basic paradigms of Russian philosophy of law are of importance: revival of natural law theory, the psychological theory of law, and the sociological theory of law. These theories contain the answers to several current issues: the nature of the crisis of law in the context of rapid social changes; the relationship between law and morality; natural and acquired rights; negative and positive rights of an individual; objective and subjective constitutional rights; the possibilities to overcome the phenomenon of legal dualism; the definition of the right to a dignified human existence as prerequisite for a legal state[9]. The political philosophy of Russian Constitutionalism is significant for its constant aspiration to understand the peculiarities of the Russian historical process and its political system, and on these grounds to identify the ways of achieving the social ideal[10]. Currently, the basic ideas of the political philosophy of Russian Constitutionalism are topical in understanding the role of the Government in Russia, and the relationship between the society and the state in the context of political system of the transition period.

The Significance of Constitutional Principles of 1993 in Comparative and Historical Perspectives

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[7] Конституционные проекты в России XVIII- начала XX в. М., 2010.

[8] **Медушевский А.Н.,** Диалог со временем: российские конституционалисты конца XIX- начала XX в. М., 2010; **Медушевский А.Н.,** Российская правовая традиция – опора или преграда? М., 2014; **Медушевский А.Н.,** Ключевые проблемы российской модернизации. М., 2014.

[9] **Туманова А. С., Киселев Р.В.,** Права человека в правовой мысли и законодательстве Российской империи второй половины XIX- начала XX века. М.,2011.

[10] «Муромцевские чтения». Труды 2009-2013. Орел, 2014.

The values and principles of the Russian Constitution of 1993 are of fundamental political significance. The Constitution stands among the other symbolic acts of this kind, such as the Basic Law for the Federal Republic of Germany (1949), the Constitution of India (1950), the Constitution of South Africa (1996), the Constitutions of the countries of both Southern Europe (1970s) and the Eastern Europe (1990s). The Constitution of Russia summarised the collapse of the communist experiment on a global scale[11].

The most important merit of the Constitution of 1993 was the restoration of the historical continuity of legal development, lost in the communist period. Modern Russian disputes over the legal state generally correspond to those represented in the classical jurisprudence. First, they reflect the difference of the philosophical concepts of law and morality, respectively viewing in a legal state the ethical ideal, the norms of positive law, reflecting the socio-psychological or behavioural stereotypes of society, or rather, the efficient sociological structure representing the realised choice of the particular epoch. Second, conceptual scope reflects the clash of ideological social movements- pro-Western liberals, conservative nationalists and pragmatic realists, borrowing from them the basic arguments (the adoption of the Western model of a legal state, rejection of it in the name of preserving "identity", or the creation of hybrid versions). As a result the typology of forms of legal states focuses on the various substantive components: it distinguishes the liberal legal state (the proclamation of the rule of law, the principle of separation of powers and individual liberties); the democratic legal state (supplementing the concept with the broad rights of political participation) and social legal state (including the principles of social guarantees and their implementation); and, finally, it brings in theis concept the elements of social democracy, nationalism or environmental doctrines generated by modern disputes over the Constitution (including those associated with biological, environmental, and information rights of the third and fourth generations).

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[11] **Медушевский А.Н.**, Сравнительное конституционное право и политические институты. М., 2002; **Medushevsky A.**, Russian Constitutionalism. Historical and Conemporary Development. New-York, 2006.

Third, the difference between the positions is determined by the strategy of building a legal and constitutional state, with the correlation of these two close concepts having key importance[12]. Within the framework of one approach, a legal state is an essentially extralegal concept, covering both the constant and variable elements, as well as understanding the goals and means of achieving them. The second concept, "constitutional state" means the realisation of an ideal legal state in the historical and legal framework of a particular society. This means that the realisation of an ideal of a legal state is possible as a direct solution to the practical political problem- the formation of a constitutional system, and the implementation of its principles[13].

When restoring historical continuity in respect to the pre-revolutionary Russian liberal legal tradition, torn in the Soviet period, the Constitution of 1993 entered into force, but also laid for the future a set of values, the realisation of which was to be the subject of the practical implementation in both legislative and judicial practices. The reconstruction of these values (and the constitutional principles of expressing them) is possible in the case of introducing a considerable variety of sources on the history of elaboration and adoption of the current Constitution. These are the shorthand records of the Congress of People's Deputies, the documents of the Constitutional Commission[14], the Constituent Assembly[15], a set of studies on its subsequent development, dedicated to the selection of the form of government, the practice of constitutional justice, the electoral system and various governmental institutions[16]. All these introduce the historical peculiarities of the era of the adoption of the Constitution[17], the problem of choosing the economic

[12] Гражданское общество и правовое государство как факторы модернизации российской правовой системы. Спб., 2009. Ч.1-2.
[13] Философия права и конституционализм. М., 2010.
[14] Из истории создания Конституции Российской Федерации. Конституционная комиссия: стенограммы, материалы, документы (1990-1993 гг.): В 6 т. М., 2007-2008.
[15] Конституционное совещание: Стенограммы. Материалы. Документы. В 20 т. М.,1995-1996.
[16] Конституционное развитие России. Задачи институционального проектирования. М.,2007.
[17] Эпоха Ельцина. М., 2011; Понимая «девяностые». М., 2013.

system[18], the judicial reforms[19], and the political struggle over the constitutional issues[20].

They enable one to reconstruct alternative interpretations of the basic constitutional principles, and approaches that were rejected or substantially modified in the course of the final adoption of the Constitution of 1993, but are revived in the form of modern amendments to it[21]. It is important to understand the motivation behind the decision-making and the meaning of subsequent changes in the overall context of the development of Russia's political system.

Methods and Goals of Studying the Trends of Modern Constitutionalism

Analysis of the program of constructing the modern theory of law and the constitutional design from the standpoint of the liberal tradition is advisable on the following parameters: the theoretical grounds of solving the problem of correlation between law and justice, the concept of legal state, the general approach to the solution of the constitutional issue (the role of the Constituent Assembly and the political projects it has put forward); the concept of a transition period from authoritarianism to democracy and the possible failures on its way; the problem of continuity and discontinuity of law, social content and authenticity of the constitutional guarantees of human rights.

These are the questions that were at the center of a large-scale research project entitled “Twenty years of democratic path: strengthening of the constitutional order in modern Russia”, carried out by the Institute of Law and Public Policy (hereinafter, ILPP) in 2011-2013. Its objective was to determine the outcomes, problems and perspectives for the formation of a new legal order, the grounds of which were laid during the adoption of the current Russian Constitution of 1993. The method of the analysis became the cognitive theory of law disclosing the ratio of the

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[18] Верховенство права как фактор экономики. М., 2013.

[19] Стандарты справедливого правосудия. М., 2012.

[20] **Румянцев О.**, Конституция девяносто третьего. История явления. М.,2013.

[21] **Медушевский А.Н.**, Конституционные принципы 1993 года: формирование, итоги и перспективы реализации, *Сравнительное конституционноеобозрение*, 2013, 1 (92), 30-44.

initial settings, the motives behind the decision-making process, the systematic and semantic logic of formulating the concepts and norms, and in general the logic of the legal engineering of the political-legal reality[22].

The project is based on the analysis of the most essential liberal constitutional principles: justice and equality; pluralism; secular state; legal state; democracy; separation of powers; social state and market economy; federalism; local self-government; independence of the judiciary; guarantees of political rights and freedoms of an individual. From the standpoint of the methodology of cognitive constitutionalism the process of development of the constitutional principles, their positivisation in law and practical implementation were revealed. Most importantly, a solution to the problem of variations in their implementation on an evidence level was proposed.

Three phases of the Project development are presented in separate publications. The first phase of the project focused on the overall reconstruction of the transformative meaning and the legal content of the principles. Based on its outcomes, a collective monograph entitled "Fundamentals of the Constitutional System of Russia: Twenty Years of Development" (2013)[23] has been published. The second phase of the project had the task of conducting a sociological survey of the expert community on the issues of the implementation of the Constitution. Within the framework of this part of the project a sociological questionnaire was prepared and directed to 300 respondents (to the experts in the field of constitutional law), the results of the answers of which proved to be informative in solving the problem of the constitutional deviations in the framework of implementation of the basic principles. Purposes and methods of monitoring the most important constitutional principles for the latest period were formulated[24]. Based on

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[22] **Медушевский А.Н.**, Когнитивная теория права и юридическое конструирование реальности, *Сравнительное конституционное обозрение,* 2011, 5, 30-42.

[23] Основы конституционного строя России: двадцать лет развития. Под ред. А.Н.Медушевского. М., ИППП, 2013.

[24] Мониторинг конституционных процессов в России: аналитический бюллетень. М., ИППП, 2011-2012, № 1-4.

the results of the expert survey conducted by the ILPP, in spring of 2013, the character of implementation of five key principles has been traced (pluralism, separation of powers, federalism, independence of the judiciary and guarantees of political rights and freedoms of an individual) on the basic substantive parameters and zones of the constitutional practices- in the Legislation, judiciary branch, in the activities of state authorities, as well as in the informal practices that enabled a revealing of areas of constitutional deviations and modification to their quantified expression, special research and the monitoring of ongoing changes. The results of the second phase of the project are presented in the book entitled "The Constitutional monitoring: concept, methodology and results of the expert survey in Russia in March, 2013"[25]. The third phase of the project included the synthesis and critical analysis of the monitoring data undertaken by a group of leading analysts. According to its results, the Analytical report of ILPP, "Constitutional principles and the ways to implement them: the Russian context" (2014) has been presented[26].

In the course of this work, we sought to link three levels of research- theory, practice and analytical recommendations. This explains the interdisciplinary approach- three types of concepts were used: legal (reconstruction of the principles); sociological and statistical-mathematical (reflecting polling parameters); and political (mechanisms for implementing the principles). The principal substantive novelty of the proposed concept and method of the constitutional monitoring enabled to switch from descriptive to quantitative parameters of measuring the Russian constitutionalism, receiving evidentiary conclusions about the tendencies of its development, existing deformations and the possible ways to overcome them.

The problem is to understand how the gap between the symbolic meaning of the Constitution and its instrumental value, which we witness today, emerged. Why don't constitutional principles work in several

[25] Конституционный мониторинг: концепция, методика и итоги экспертного опроса в России в марте 2013 года. Под ред. А.Н.Медушевского. М., ИППП, 2014.

[26] Конституционные принципы и пути их реализации: Российский контекст. Аналитический доклад. Под ред. А.Н.Медушевского. М., ИППП, 2014.

directions? Can the Constitution ensure a democratic transformation in the future and to what extent can its principles be practically implemented in the society and in the democratic movement?

The Main Contradictions of Constitutional-Legal Regulation of the Post-Soviet Period

In modern jurisprudence and political sociology more attention is drawn to the mechanisms of the implementation of constitutional norms that determine the effectiveness of the democratic institutions. This problem is being studied both from the perspective of classical legal institutionalism and the neo-institutional theory. From the standpoint of the presented theory the institutions are regarded as 'play-rules', forms of interaction, social conventions that are defined both by the formal (legally enshrined) rules and by the informal norms of behaviour. Institutions include "means by which the rules and norms are practically implemented"[27]. The presented approach opens the perspectives for a complex political study of constitutionalism, both as a combination of norms, institutions and practices of their functioning in the context of a certain social order, the duration of their existence, and as a setting of elites to achieve certain goals of social development.

The theoretical analysis on the constitutional principles enabled us to ascertain the preservation of imbalances: first, on the one hand, the existence of tension between values and principles that express them, and, on the other hand, their interpretation in terms of the objectives of constitutional development (justice and equality); second, the preservation of the continued uncertainty in the interpretation of certain fundamental principles (legal state, democracy, separation of powers), connected both with the peculiarities of their legal formulation and with the logic of the political process; third, changes in the content of a number of enshrined principles through enriching the relevant norm with variant meaning (the principles of federalism and local self-government); fourth, the intersection between the principles that find their expression in

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[27] **Норт Д., Уиллис Д.,Вайнгаст Б.**,Насилие и социальные порядки. Концептуальные рамки для интерпретации письменной истории человечества. М., 2011, с. 429.

the changing interpretation of correlation and volume of regulated norms (the principles of the market economy and the welfare state); fifth, the possibilities of the opposite interpretations of the meaning of the same legal principles and norms in different wording (secular state); sixth, different character of positivisation of the principles in existing law: some principles are enshrined in the Constitution (such as the separation of powers or a welfare state), others are not (such as market economy), and are derived from the aggregate of its norms and principles; seventh, the dysfunction in the implementation of a set of principles in terms of the criteria of proportionality and adequacy to the significant goals of the Constitution[28].

The general logic of the constitutional and institutional design includes gaps and contradictions associated with the wording of the relevant principles, as well as with the transformation of their content over time. The restriction of the constitutional principle of pluralism and other important principles of 1993, such as freedom of conscience, federalism[29], local self-government, independence of the judiciary[30], and individual freedoms are being stated. The constitutional parallelism results from the basic unrealised legal principles. The manifestation of parallelism (or para-constitutionalism) has become a "harmonisation" of the Constitution with reality, which significantly alters the substantive content of the basic norms without their formal textual changes: the development of legal regulation of federal relations in the direction of centralisation; restriction of mechanisms of separation of powers through establishing non-constitutional institutions that are endowed with the constitutional functions; restriction of the independence of judiciary and the expansion of the scope of administrative discretion, as well as the delegated administrative powers; changes in the electoral system aimed at providing benefits to the party that dominates in the Parliament (or to quasi-oppositional parties), the creation of a special status for its

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[28] Основы конституционного строя России. М., 2013.
[29] **Умнова И.А.,** Конституционные основы современного российского федерализма: модель и реальность, *К новой модели российского федерализма*. М., 2013.
[30] **Морщакова Т.Г.**, Российское правосудие в контексте судебной реформы. М.,2004; **Морщакова Т.Г.**, Судебное правоприменение в России: о должном и реальном. М., 2010.

political leader (expressed by the term "imperial presidency" or "personal power regime"). The evolution of the Post-Soviet political system, largely predetermined by the constitutionally mandated wording of separation of powers, in the framework of the concept of "stabilisation", "rule of law" and "sovereign democracy", has been occurring with the restrictions on the principles of separation of powers, federalism, local self-government, and particularly with pluralism, political diversity and the multiparty system.

The analysis of the overall structure of the constitutional deviations, conducted as part of the statistical data compilation undertaken by the experts, primarily revealed the general heterogeneity of the implementation of constitutional principles. On the level of deviation of the norms of constitutional practice from the Constitution of the Russian Federation, the examined spheres of the constitutional regulation are arranged in the following order: political, ideological, spiritual, cultural and other diversity (pluralism); the principle of separation of powers; federalism; independence and autonomy of the judiciary; guarantees of the individual political rights and freedoms. Hence, the study enabled to differentiate three fields of constitutional regulation: relative well-being (the principles of pluralism and separation of powers), relative ill-being (the principles of federalism and the judiciary), and full ill-being (the principle of guaranteeing political rights and freedoms)[31].

At the same time, a comparison of the implementation of the principles along the zones of constitutional practice enabled the identification of those that are mostly responsible for the failure of the constitutionalism. The data from a survey on the implementation of the constitutional norms in four fields of constitutional practice were summarised: the Legislation (i.e., the sphere mainly associated with the activities of the Chambers of the Federal Assembly), the work of the judiciary, the activities of the other governmental bodies (i.e., first and foremost, of the executive bodies), as well as the sphere of the so-called "informal practices". This schematic division reveals the general logic of

[31] Конституционный мониторинг: концепция, методика и итоги экспертного опроса в России. М., 2014.

the constitutional dysfunctions. The parameters of the deviation are not so much the general legislative norms, formal institutions and practices, but less institutionalised and normatively regulated practices, with the informal practices dominating. Systemic failures in the interpretation of the principle of pluralism begin with the transition toward other principles- from different (for society and government) substantive content of the principle of democracy, the determination of the factors of its implementation and their practical implementation in the activities of the executive branch at various levels and courts. These failures, in their turn, are efficiently growing as they move from one zone of practice to the other- the weakening of the normative regulation of the administrative practice and its transition to the area of the informal spontaneous responses to current life challenges. This indicates that in the case of the stability of the overall legislative regulation of pluralism and the separation of powers, a special "reserved zone"- a kind of "nature reserves" is observed in the course of their implementation, where the executive branch is more independent and is ready to step directly into the legislative process and law enforcement activities.

The main issue is how to achieve the stability of democratic institutions in the historically-unprepared social environments of the countries inexperienced in the fully-fledged democracy. In political agenda it is the issue of the relationship between democratic and authoritarian modernisation, and the selection of socially acceptable scenarios of it. The alternatives are modernisation from the "top", and movement toward liberal democracy, with the support of society or the "deferred democratisation".

The Cyclic Dynamics of the Russian Constitutionalism and its Expression at the Present Stage

The Russian model of constitutionalism could well be interpreted as cyclic. Moreover, an understanding of the specifics of this cyclic dynamic is essential to explain the prospects of its development. A constitutional cycle is the time period in which a change of the basic states of constitutional regulation in the society is occurring over certain periods of time- from the loss of the old Constitution (de-

constitutionalisation) to adoption of a new one (constitutionalisation), and then the transformation of the latter under the influence of the reality (re-constitutionalisation). On the one hand, the constitutional cycles in Russia represented an objective consequence of the movement towards democracy and in this sense were by no means an elusive form. The conflict of law (as a normative system) and its social efficiency formed the basis and the content of the constitutional cycle, like in the other countries. On the other hand the general peculiarities of the Russian constitutionalism could not but affect the configuration of the Russian cycles, the continuity of their separate phases, as well as the intensity of the relevant changes. These peculiarities of the Russian constitutionalism are apparent in a broad comparative perspective: the lack of social prerequisites for constitutionalism in the form of developed civil society and legal state; the conflict between society and state, between social and legal modernisation as its two main types, as well as a permanent sacrifice of legal modernisation to a social one; constitutional backwardness of the country; radical constitutional revolution as the primary (and still the only) way to adopt new constitutions in the course of all constitutional cycles[32].

The latest constitutional cycle began to develop with the growing awareness of the futility of the model of nominal constitutionalism and the one-party dictatorship, especially in the period of the so-called "stagnation", with the emergence of the alternative political culture (human rights dissident movements). In this cycle all three main phases can be traced: de-constitutionalization- a crisis of legitimacy of the Soviet model of nominal constitutionalism in a union scale over 1989-1991, and then in Russia, in 1991-1993; constitutionalisation- adoption of the new Constitution on December 12, 1993, as a result of the constitutional revolution, and currently, especially after 2000, the signs of the third phase, re-constitutionalization started to appear. In this phase, we have witnessed a complicated search for the correlation between new constitutional norms (partly borrowed, partly corresponding to former Russian traditions) and a changed social reality, the determining dynamic

[32] **Медушевский А.Н.,** Теория конституционных циклов. М., 2005.

vector of which became the authoritarianism[33]. The cyclic dynamics of constitutional development, as shown by the experience of many countries, makes possible the situations in which certain previously rejected strategies of constitutional reforms regain social support and become a source for the constitutional amendments[34]. The analysis of the formation and development of constitutional principles of 1993 reveals the motives behind the construction of the legal norms, the genesis of alternative strategies for change and the reasons for their cyclical reproduction. This genesis of constitutional principles opens the door to the final phase of the Post-Soviet constitutional cycle- the restoration trends that appeal to the de-constitutionalized (Soviet) past with all its system of ideas and views.

The genesis of constitutional contradictions and their explanation is rooted not only in the views of the authors of the current Basic Law, but comes out from the deeper historical and sociological reasons. The central focus of their research became the study of radical institutional changes, which gained urgency due to the democratic revolutions of 1990s in the Soviet Union and in the countries of the Eastern Europe. It demonstrated that real social revolutions lead to the establishment of a new social organisation and the creation of an efficient system of democratic institutions. Whereas, the ordinary coups are forms of destabilisation, terminated by a return to the historical tradition and the restoration of the old institutions in a changed form. The periods of power vacuum, de-institutionalisation (as was registered in Russia in 1917 and 1991), may therefore be terminated with the diametrically opposite result- democratic consolidation, the establishment of federalism and the market economy or the rejection of that consolidation - the restoration of traditional forms of ownership, nomenclature and the authoritarian structures of power, the return of the country to “imperial trap”. On this basis modern institutionalists solve the problem of searching for an optimal correlation between tradition and evolution, norms and functionality of political and administrative institutions, and

[33] Конституционный суд как гарант разделения властей. М., 2004.
[34] Пробелы в Российской Конституции и возможности ее совершенствования. М., 1998.

discuss the problem of designing institutions, their adoption or development on a national basis, taking into account factors of time. The weakness of democratic institutions is recognised by the foreign analysts as one of the sources of political instability and restoration trends in contemporary Russian politics[35].

The failures of Russian democracy are recognised by almost all, but their political-legal analysis is far from being complete. It is stated, firstly, that the "basic values of Russian culture" remained largely unchanged, rejecting the ideas of liberal democracy, the legal state and the priorities of individual freedoms[36]; second, it is recognised that the lasting influence of the Soviet legal stereotypes are retained in the interpretation of the principles of freedom, justice and equality, as well as social and political rights[37]; third, the "gap between legal (written) constitution and actual constitution (with a glance to the law enforcement practice and state of the economic system)" in economic regulation is introduced[38]; fourth, the fact of not overcoming the artificiality of the Soviet model of federalism (in the national-territorial basis) in its Post-Soviet structures is stated[39]; fifth, the incompleteness of the transformation of the Soviet judicial system which "continues to focus on the principle of the strict centralism, ultimately providing control system" is highlighted[40]; sixth, the low confidence in political institutions and the general cultural and personnel succession of modern Russian elite in relation to the Soviet experience is stated[41]; seventh, the dangerous tendencies of transformation of the Russian system of separation of powers in the direction of a personalistic regime is marked[42]. The thesis

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[35] Power and Legitimacy – Challenges from Russia. Ed. by P.Bodin, S.Hedlund and E. Namli. L., 2012.
[36] **Степин В.,** Цивилизация и культура. Спб.,2011. С.330-341.
[37] Права человека: энциклопедический словарь. М.,2009; Права человека и правовое социальное государство в России. М., 2011.
[38] Конституционная экономика. М., 2010. С.29.
[39] **Захаров А.,** «Спящий институт». Федерализм в современной России и в мире. М.,2012
[40] **Абросимова Е.Б.**, Очерки российского судоустройства: реформы и результаты. М.,2009. С. 169.
[41] Властные структуры и группы доминирования. Спб., 2012.
[42] **Краснов М.А., Шаблинский И.Г.**, Российская система власти: треугольник с одним углом. М., 2008.

of the Russian political regime as a “defective democracy on the verge of authoritarianism” has turned to the general expression of these ideas[43]. The main contradiction of the Russian Constitution became the conflict between the broad interpretation of human rights and freedoms and the extremely authoritarian structure of the political system, which contributed to the concentration of power in one centre- Institute of the President.

It is possible to state drastically various outcomes of the post-communist transition period in Russia and in most countries of Eastern Europe, where the principles of legal state turned to the basis of a modern political system[44]. In general, the latest researchers ascertain the lack of implementation of the basic principles of the current Russian Constitution. Such a result of the transition process needs a systematic explanation: whether it is a “rebirth” of new democratic institutions or a reproduction of a traditional Russian “matrix” of a political system?

The Gap between Norm and Social Reality: Parameters of Constitutional Dysfunction

The gap between norm and reality is present to a greater or lesser extent in all political and legal systems, expressing the elementary reality of legal regulation lagging relative to rapid social dynamics. The Russian situation is specific in the following aspects: first, the degree of discontinuity (in many directions now bordering on the opposition between norm and reality); second, the general vector of transformation of the political-legal system (aside from the proclaimed constitutional principles) and, finally, the speed with which these constitutional deviations and deformations are strengthening.

The overall dynamics of the constitutional deviations based on five principles is as follows: first, their growth over time (mostly in the last decade) is stated; second, an increase on moving from more general constitutional provisions to specific elements (sub-principles) of each of the considered principles (as a result the general formulation of the

[43] **Ясин Е.Г.,** Приживется ли демократия в России. М., 2012. С. 804.
[44] Материалы интернациональной дискуссии: Путь в Европу. М.,2008.

principle remains constant, but its structure and meaning undergo significant modifications); third, increase on moving from a more formalised types of practices (legislative and judicial) to the less formal-institutional and informal; fourth, a sharp increase in the scope of constitutional deviations, with the transition from the federal level of legislation toward legal regulation, and especially law enforcement practice at the federation subjects, regional, and local levels (where phenomenon of monopolisation of power and control by the regional elites is stated).

The mechanisms of the transformation of constitutional principles and norms without the formal review of their detection based on the results of a sociological survey are presented by a number of practices. These include the utilisation of the uncertainty of the constitutional norms for their interpretation in favour of the executive branch of power; the implementation of several constitutional rights to restrict the others or the politicised interpretation of these rights; expansive interpretation of the concept of “security” and the competences of the law enforcement agencies, the selective application of restrictive constitutional norms in relation to non-governmental oppositional associations and parties; blurring of the constitutional and administrative law; paving the way for a broad interpretation of the delegated administrative powers, the selective application of criminal repression and the appropriate interpretation of the norms of criminal procedure; the weakening of the judiciary through its bureaucratisation; and finally, the application of the reviewed informal practices both for the “adjustment” of relevant legislative norms, and their actual revision at the level of law enforcement practice.

The tools of blocking the constitutional principles have proved to be varied. The study showed how the embedded “shock absorbers” block the action of each of the five principles at the institutional level: the principle of pluralism is deformed by the system of double standards, the existence of which is based on the special “reserved area”, in which the executive has considerable discretion in determining both the meaning of the relevant norms and their implementation in practice; the implementation of the principle of separation of powers is blocked as a result of over-concentration of presidential powers, endowing the head of the state with not only constitutional, but also meta-constitutional

prerogatives to intervene in the activities of all three branches of government, moreover, in the actual prejudgment of the results of their activities through informal influence on their formation and the ongoing "adjustment" to significant policy issues. Within the framework of the principle of federalism the same functions are carried out by the vertical system of executive power which "neutralises" the constitutional foundations for federalism and in fact limits the independence of the subjects of the Federation. In the field of the judiciary this "built-in mechanism" is being functioned by the Institute of the appointed Presidents of the courts, the existence of which significantly reduces the level of independence and competitiveness of justice in favour of the executive. Finally, in the field of the guarantees of basic political rights and freedoms, the adjustment mechanism has been found in the expansion of administrative control and discretion, based on the uncertainty of the constitutional norms, the use of formal (legislation and subordinate regulatory acts), and especially informal key factors of impact on manifestations of civic engagement.

The ongoing uncertainty and contradictions in the formulation of the legal positions of the Constitutional Court on the issues of the interpretation of key constitutional principles lead to legal challenges and psychological conflict in a transitional society: overestimated legal expectations, relying on a high rating of constitutional justice and based on its previous role in the liberalisation of legislation, face the unpredictable, contradictory and unjustified decisions that can not be explained to the society through a single logical formula[45].

The overall conclusion with regard to the implementation of the principles of the legal state, pluralism and separation of powers is defined as the unstable *balance between the constitutional and unconstitutional practices*. At the level of the Constitution, Legislation and most of the judicial practice, the presented principles continue to function, albeit with certain failures. However, this functioning is limited along with a number of other interrelated principles (democracy, political freedom and independence of the judiciary) which greatly devalues the content of the

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[45] Конституция Российской Федерации в решениях Конституционного Суда России. М., 2005.

principle of pluralism. Political interpretation of this process is described by such formulas as “limited pluralism”, “guided democracy” and “alleged constitutionalism”.

This transformation resulted in the situation defined by political scientists as the concept of “deferred democracy”. The essence of the phenomenon of deferred democracy is expressed by the following formula: the liberal provisions of the Constitution (on human rights, federalism, separation of powers, administrative and judicial systems, etc.) remain formally constant, but their practical implementation is by default considered impossible at the moment and is postponed for an indefinite term. The political space between the provisions of the Constitution and political practice is not formatted on the basis of formal legal structures, but on the basis of the practical needs of the relevant period. If this requires the well-known adjustment to the constitutional norms from a realism viewpoint, then it is realised from the standpoint of political expediency rather than the strategy of constitutional development. Hence, the total inconsistency of the politics of law becomes apparent: not formal renunciation of democracy, but its actual folding; not the rejection of the principles of the Constitution, but their gradual restriction on the level of legislation, as well as, especially, on the law enforcement level.

Strategies of Constitutional Reforms in Current Public Debates

In the current debates on the Constitution the difference of positions is represented at the level of ideology of the expert community and political practitioners.

At the level of ideology three approaches to constitutional reforms are schematically presented: conservative, radical leftist and liberal. The conservative approach brings forth the most severe criticism of the Constitution as a result of uncritical adoption of the Western experience and defends the idea of its radical revision from the “national” positions: the need for a unified state ideology, the priority of social obligations to the norms of free economy, a critical review of the entire system of individual rights (restriction of freedom of conscience, the return of censorship, restoration of the death penalty); rejection of the

principle of secularism; restriction of federalism and the transition to the actual (if not legal) Unitarianism in the form of the state with a single power vertical; overcoming of the principle of separation of powers within the framework of the revival of the imperial (sometimes quasi-Soviet) type of statehood, and the rejection of liberal values and institutions, adopted in the 1990s, allegedly rejected on a national ground. The radical leftist approach denies the Constitution as an illegitimate fundamental law, which led to the destruction of the Soviet model and the abandonment of its economic and cultural achievements, which are understood primarily as mobilised ideology, egalitarian and redistributive economy supposedly corresponding to the principles of equity and social justice and to the tasks of ensuring the military power of the state. The liberal approach derives from the positive assessment of the constitutional revolution of 1993 and its formulated principles. The liberal analysts on Constitution see the reason behind the failures of its norms in the low legal awareness among the population and the state authority, and in the "unrealised potential" of the constitutional norms. They are far from being optimistic about the perspectives for a legal state in the short term[46].

At the level of the legal expert community the positions are more differentiated and can be reduced to five basic postulates:

1) The current Constitution reasonably corresponds to the reality and does not require any significant reforms. The changes that have already been made or are in progress at the present stage are not considered to be reforms, but insignificant "technical" adjustments to certain provisions of the Constitution. In perspective, the need for a substantial revision of the constitutional provisions is not being highlighted. This view is mainly expressed by the representatives of official structures.

2) The Constitution is a utopia. It was imposed on the country in 1993, it does not correspond to the reality and it is rejected by the Russian society. The Constitution, therefore, must be radically revised in the direction of the Russian historical reality. There is a need to move to

[46] Реализация Конституции: от идей к практике развития конституционного строя. М., 2008.

the traditional forms of public representation - "parliamentarianism" in its Russian specifics (i.e., the Soviet system or Zemsky sobor). Since the Constitution and the political regime are incompatible we need a new constitutional revolution or radical reform - the convening of the Constitutional Assembly to historical legitimacy, which lost its power in 1993, if not in 1917. This position is put forward by the representatives of the radical opposition- critics of the contemporary political regime, of both right-wing and left-wing. Radicalism of requirements claimed by the communists and the nationalists of different directions is increasing as they separate from the power and from the desire to benefit from it.

3) The Constitution can be preserved as a legal phenomenon due to its symbolic significance, but in a case of limited social support it should be significantly reformed at the level of values, principles and norms. The transformation of the text of the Basic Law through the incorporation of the provisions on "national ideology", the reflection of the spiritual (clerical) values, rejection of Western interpretation of rights, reform of property relations under the motto of overcoming the results of the "predatory privatisation", and, on the whole, a movement towards the conservative revision of the constitutional principles are being expected. The method of such review is the introduction of the amendments to the preamble section on the transitional provisions of the Constitution or the addition of new chapters in it. The advantage of such a solution is seen by its supporters as the rejection of radical methods of the constitutional review - the convocation of the Constitutional Assembly in the actual process of making amendments of all significant principles. But the problem of legitimising these changes remains: if the Constitution was adopted through popular vote, then in order to modify its key principles it is necessary to repeat it the vote, or to hold a referendum. This raises the issue of the referendum and even the convocation of the Constituent Assembly in the future. This position is close to the conservative part of the bureaucracy and the clergy.

4) The Constitution is a full basis for legal development. It is quite consistent with the social reality, but its provisions are significantly deformed at the legislative level, and the law enforcement practice. These deformations are explained, in the first place, by the imperfection of legal wording of certain provisions of the Constitution; secondly, by the

contradictions of institutional parameters on development; thirdly, by the dysfunctions in the law enforcement practice. It is therefore advisable, to make the adjusted amendments to the Constitution, primarily related to the interpretation of the separation of powers, or rather, to the creation of an efficient system of checks and balances. The presented position is typical of the liberal part of the scientific and expert community of lawyers.

5) The Constitution of 1993 is an ideal which modern society still needs to grow toward. The Constitution adopted under the conditions of fierce confrontation with the supporters of the old Soviet system, strengthened the values of a democratic choice among the Russian society. The values and principles of the Constitution are completely in compliance with the international legal standards, as well as with the prospects for the development of democracy in Russia. The potential of the constitutional norms is far from being exhausted, and the thought of their revision regardless of whether more or less radical is a political mistake that can call into question the legitimacy of the Basic Law. The deviations from the constitutional development are not connected with legal, but rather with political factors. It is necessary to struggle not with the Constitution, but with the unconstitutional practice of the political regime. Hence, the slogan of this (radical-liberal) direction comes out- “Hands off from the Constitution”[47].

The political technologies of the designed constitutional reforms, being currently discussed, can be divided into three groups on the degree of interference in the existing constitutional-legal order[48]. *The first position* is represented by the idea of radical constitutional reform. This either explicitly or implicitly derives from the assumption that the conflict between law and authority requires constitutional permission- the modern Russian political system becomes non-reformed, and, therefore, requires active efforts of the society for its transformation up to the convocation of the Constituent Assembly and the adoption of a new package of radical constitutional amendments (in order to introduce a new parliamentary form of government). *The second position* is

[47] **Шейнис В.Л**., Власть и закон: политика и конституции в России в XX – XXI вв. М., 2014.
[48] Основы конституционного строя России. М., 2013. сс. 310-312.

represented by the idea of separate constitutional amendments not affecting the Constitution as a whole: while agreeing with the first assessment of the situation, it proceeds from the possibility of gradual adjustment to the Basic Law by modifying certain norms - the amendments are aimed to reflect the new reality, eliminating the problems and reducing the uncertainty of constitutional norms (amendments primarily aimed at improving the presidential-parliamentary dualistic system). *The third position* relates the prospects for constitutional modernisation not with the changes of constitutional law, but with its practical implementation. The focus of this approach lies in the modification of political system, institutional design, and functioning mechanisms of parties and public movements. In the current political situation - the conservative re-constitutionalisation - it is preferable to talk not about a radical revision of the Constitution (through convening a Constitutional Assembly leading to unpredictable consequences), but rather about partial amendments, legal transformation of the political regime- changes in the electoral system, the establishment of a real multiparty system, and restoration of a competitive environment in the media.

The review of the afore-named positions enables the identification of cognitive dissonance in the society on the issue of the place and role of the Constitution after 20 years of its adoption; the diametrically opposite vision of its historical significance and performed social functions, its meaning, substance and technologies necessary for the changes. Three questions proved to be crucial 1) the degree of compliance of the constitution with social reality; 2) the extent of the gap between values (principles), norms and practices; 3) the extent of the necessary adjustments to the Constitution.

Perspective Directions of Constitutional Modernisation

The proposals on constitutional modernisation, presented within the project of ILPP, can be grouped into three major sections, covering, first, the general conceptual bases of political regime; second,

institutional design and the separation of powers; third, the mechanisms of constitutional control, management and the legitimacy of power[49].

Along with general suggestions to overcome the constitutional dysfunctions, the Project participants raised a number of priority tasks in the field of constitutional reforms, the implementation of which is necessary and possible in a short term.

Firstly, it is proposed to change the policy of law in the direction of authentic assurance of the activities of constitutional principles. It means to establish a competitive environment in politics, to implement a system of checks and balances at the level of providing the separation of powers, and to abolish the legislative restrictions and recent bureaucratic growths. In order to return the efficiency of constitutional principles it is proposed to carry out legislative reforms, to abolish the innovations of modern counter-reforms, and to change institutions and administrative procedures.

Second, to perceive the constitutional failures not as a set of individual phenomena, but as a systemic problem of the Russian constitutionalism; to overcome the increasingly growing logic of double standards in understanding the constitutional principle of pluralism within the scope of public law; the priority of interests of executive power, abolishing the tacit existence of special zones free of constitutional control. This can be attained through transforming the public and legal ethics, the expansion of judicial independence- first and foremost the control over the constitutionality of the adopted laws and their practical implementation.

Third, to overcome the growing gap between formal and informal practices, especially considering their role in the latter (in their scope) constitutional deviations on all principles; to differentiate informal practices by eliminating, above all, their dangerous unconstitutional substrate. This can be achieved through pointed legislative regulation, institutional reforms, an increase in the independence of the judiciary,

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[49] **Medushevskii A.,** Problems of Modernizing the Constitutional Order: Is it Necessary to Revise Russia's Basic Law? *Russian Politics and Law*, **52**, 2, March-April 2014, 44-59.

through legal definition and the restriction of the delegated administrative powers, and creation of administrative justice.

Fourth, to revise the dominant interpretation of the principle of separation of powers, which links the operation of the branches of power with the activity of the umpire – the president. Of key importance in this context are the following: the elimination of conditions that enables the presidential power to have unconstitutional influence, especially in State Duma elections and the adoption of laws in the State Duma and the Federation Council, to influence the judiciary in cases in which there is an interest of the political authorities, seeking "pleasing" decisions by the courts.

Fifth, to revise radically the formulated interpretation of the principle of federalism, in fact, led to the triumph of the Unitarian tendencies. To achieve this it is necessary to review the norms of federal legislation, in effect replacing the Constitution of the Russian Federation and the constitutions, the statutes of regions in terms of determining the status of the subjects of the Russian Federation, and the demarcation of powers in areas of joint jurisdiction; to overcome excessive bureaucracy and administrative centralisation in the federation subjects through regional budgetary authority, institutions and their functions, to achieve at regional level the expansion in the action of principles of political pluralism, multi-party system and direct democracy, to raise the profile of the Federation Council as the chambers of regions of the Russian Parliament. The need to overcome the excessive deviations from the principle of separation of powers in the regions is being emphasised.

Sixth, to lessen the levels of bureaucracy in the judicial system, eliminating the legislative norms and institutional conditions contributing to the formation of a special judicial bureaucracy (appointed presidents of the courts of justice) actually put under strict control the decision-making of key issues in the judicial community. In order to strengthen the constitutional basis of an independent judiciary it becomes urgent to implement a set of measures directed to the modification of the status of the president of the court of justice and strengthening the independence of the judiciary, specifically: increasing the efficiency of procedural control over the quality of judicial decisions; institutional and functional assurance of the effective judicial control over the result in criminal

proceedings; organisation on an extraterritorial principle of judicial areas, not coinciding in their boundaries with the administrative division of the state.

Seventh, to take legislative reforms capable of restoring a real multi-party system and respect for the rights and freedoms of citizens. The aim of these reforms should be full implementation of the constitutional provisions guaranteeing freedom of the media and the avoidance of informal censorship, as well as ensuring the functioning of norms on the right of citizens to legitimate expression of disagreement with the policy of the government in the form of meetings, rallies and demonstrations. The implementation of the electoral legislation and the control over the democratic practice of the elections, ensuring equality of public associations before the law, and guarantees of the activity of political opposition retain their current value. The implementation of the project of establishing an independent public television might have had a key importance. These recommendations have received a solid grounding in the final analytical report of ILPP, in 2014[50].

What is the current meaning of the Russian Constitution? How much are its provisions consistent with the traditions of Russian liberal constitutionalism or are at variance with them? To what extent do its values and principles retain their value? The Constitution, adopted under the conditions of anti-communist revolution at the peak of the democratic reforms of the 1990s clearly marked a new civilised choice of the country enshrining the basic liberal principles of law. These principles, firstly formulated by Russian liberal philosophical-legal and political thought at the turn of the 19th-20th centuries, are absolutely in tune with the tasks of the current political modernisation of the country.

It must be acknowledged, however, that at the beginning of the 21st century, their implementation is still far from being optimal; it demonstrates the contradictions and challenges in the legislation and judicial practice of the post-Soviet period, which results in the proposals on reforming the Russian legal and political system demanded. The

[50] Конституционные принципы и пути их реализации: Российский контекст. Аналитический доклад. М., ИППП, 2014.

Constitution increasingly becomes the ideal, rather than a practical guide to action for society and political institutions.

The essence of the recommendations resulting from the study lies in the idea of a coherent constitutional modernisation. Its content should become the formation of a new public-legal ethics, to change the policy of law in the area of implementation of the most essential constitutional principles, specifically, full implementation of the system of political competition, the separation of powers and an independent judiciary, and the achievement of public awareness in realising the importance of reforms in this direction.