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Problems of Modernizing the Constitutional Order

Is It Necessary to Revise Russia's Basic Law?

The author surveys different approaches to constitutional reform and summarizes the results of an expert study conducted by the Institute of Law and Public Policy.

The debate on strategies for modernizing Russia's political system does not assign constitutional reform a central place on the political agenda. To what extent does the existing constitution meet the needs of the current stage in the development of society? Are its principles and norms still relevant? On what scale should constitutional changes be planned? What should their direction be and how should they be implemented? The search for answers to these questions divides the country's social and intellectual elite and requires serious discussion. Some of the results of this search are presented in the present article.[1]

Law and fairness in post-Soviet Russia: Methods and areas of research

The values and principles of the 1993 Constitution of the Russian Federation are of fundamental political significance. The new constitution summed

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 "Problemy modernizatsii konstitutsionnogo stroia: nuzhno li peresmatrivat′ Osnovnoi Zakon Rossii?" *Vestnik Instituta Kennana v Rossii,* 2013, no. 23, pp. 28–39. Translated by Stephen D. Shenfield.

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up the results of the collapse of the communist experiment on a global scale and returned the country to the world community. It stands alongside other symbolic acts of the same kind, such as the 1949 Basic Law of the Federal Republic of Germany, the 1950 Indian Constitution, the 1996 Constitution of the Republic of South Africa, and the constitutions adopted by the countries of Southern Europe in the 1970s and by the countries of Eastern Europe in the 1990s. Restoring the historical continuity with the liberal legal tradition of prerevolutionary Russia that had been broken in the Soviet period, the 1993 Constitution laid down a certain system of future values that were supposed to be embodied in legislation and in judicial practice. To understand the evolution of post-Soviet constitutionalism, it is necessary to elucidate the social and institutional sources of this trend. The central problem of post-Soviet constitutionalism is the relationship between the principles initially established in the constitution and their subsequent application in legislation and in judicial and law enforcement practice.[2]

The relationship between the concepts of law and fairness is a central element in political debates at times of radical social change. Contemporary scholarship defines law as a specific form of social organization that appears as value, norm, and fact. A comprehensive examination of law as a multidimensional phenomenon is possible only if all three of these competing parameters are taken into account. The other side of the problem is how to define the concept of "fairness." Three main positions are represented in the contemporary literature—the idea of distributive fairness (formal equality of opportunity in the formulation of legal rules), the idea of legalistic fairness (priority of the norms of positive law over abstract moral norms), and the idea of combining positive law with the traditions of legal consciousness in a given society as the basis of fairness. The latter position moves the problem onto the broader plane of the interaction between law and the ethical conceptions of a society and the historical tradition of their interaction and application in practice.[3] The principle of proportionality is interpreted in the sense given it by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, Article 14, points 26 and 27) and requires that legal norms and their application in judicial practice be assessed in light of the relationship between goals and the means used to achieve them. In terms of the logic of the ECHR, the principle of proportionality is the basis for an "objective and rational" substantiation of legal rulings that both rest upon constitutional norms and reject interpretations of them that lead to disproportion or discrimination and therefore violate the principle of fairness.[4]

This approach focuses the European Convention for the Protection of Human Rights and Fundamental Freedoms on the following problems:

- the conflict between law and fairness in the legal construction of post-Soviet reality (current debates on the relationship between international and national law; issues of rupture and continuity in legal tradition; the relative weight of legal and political arguments in the adoption of crucial laws and judicial rulings that determine the vector of constitutional development);
- tradition versus norms (the conflict between the principles of equality and the social state and the principles of the market economy in the context of the privatization process, the establishment of new property relations, and traditional mental stereotypes);
- solidarity and domination: national identity and the state order (the influence of current disputes concerning the nation and national identity on the approach taken to problems of sovereignty, citizenship, federalism, and bicameralism);
- law and force: the legitimacy and legality of existing norms (debates concerning the adequacy of the constitutional construction of human rights, the form of government, and the type of political regime to the principles of fairness and proportionality; analysis of the directions and technologies proposed for the transformation of the corresponding constitutional values and norms); and
- the effectiveness of law in terms of the relationship among ends, means, and results (the cyclical trend of legal consciousness; issues of the interpretation of constitutional norms and the perception of these decisions by society; the problem of the legitimacy of such decisions and the need to substantiate their legitimacy).[5]

Our analysis must therefore focus on the fields of legal regulation where a "fair equilibrium" between the provisions of international and national law, between individual rights and collective interests is violated, where various forms of inequality and discrimination arise in terms of rights and freedoms, ambiguous interpretation of their meaning, and the differentiated application of the corresponding norms in lawmaking and judicial practice, and where jurisprudence is politicized or selective. Thus, we are concerned with the current post-Soviet "dispute over law" from the perspective of objective and subjective constitutional rights, on the one hand, and the way in which these rights are interpreted in the legal consciousness of contemporary Russian society, on the other hand.[6]

How are we to study problems of the substantive evolution of constitutional values and principles? An answer to this question is provided by the results of a research project of the Institute of Law and Public Policy (ILPP) titled "Twenty Years on the Path to Democracy: Strengthening the Constitutional

Order in Contemporary Russia," reflected in the collective monograph *The Foundations of Russia's Constitutional Order: Twenty Years of Development,* and also by the data obtained by the ILPP through its monitoring of application of the most important constitutional principles over this period.[7] The project, whose results are presented below, rested on an analysis of the following leading constitutional principles: fairness and equality; pluralism; the law-based state; secularism; the social state and the market economy; federalism; local self-government; the division of powers; and an independent judiciary. The method of analysis was the cognitive theory of law, which uncovers the relationship among initial orientations, the motives guiding decision making, and the systemic and semantic logic underlying the formulation of concepts and norms—or, in general, the logic of the legal construction of political and legal reality. Using the methods of comparative legal studies, sociology of law, and political analysis, the book presents a systematic analysis of the values, principles, and norms of legal regulation, indicates the degree to which they have been realized, and reveals the main tendencies of post-Soviet political and legal development since the adoption of the 1993 Constitution. All of the project experts who drafted the various chapters of the book followed a single research schema. Each of them was assigned a specific principle and asked: to give a theoretical definition of that principle and its place in the Russian legal system; to lay bare the structure of the principle and its relationship (and contradictions) to other constitutional principles within the overall system; to expose the discrepancies that attest to inadequate application of the principle; to explain why these discrepancies occur, with reference to the aggregate of historical, social, political, and legal circumstances under which they arise and develop; and to formulate recommendations for changing this situation, with specific proposals for amendments to the constitution and to legislation and for reforms in law enforcement practice.

To discuss the results and conclusions obtained and reach a consensus view, in 2011 and 2012, five seminars were held on the application of specific principles, with the participation not only of the project experts but also of specialists from other leading research centers, universities, and various administrative structures. The results of these sometimes quite heated discussions were published in issues of the monitoring bulletin, and this makes it possible to trace the logic of the discussions and the nature of the argumentation.[8] The main merit of this work (in comparison with the many other publications on the same topic) is that the authors not only describe the existing situation but also register the parameters of constitutional contradictions and discrepancies and recommend ways to rectify the situation. Drawing upon extensive information about legislation, judicial practice, and political and administrative decisions over recent decades, they sum up the results of

past constitutional transformations and discuss the prospects for and goals of future constitutional transformations and the technologies and instruments to be used to accomplish them. The problem is to understand how the gap that we observe today arose between the symbolic meaning of the constitution and its instrumental meaning. Why are constitutional principles inoperative in many areas? Can the constitution ensure further democratic transformation, and to what extent can its principles obtain practical application in society and in the democratic movement?

How serious are the contradictions of constitutional regulation?

They are systemic in character. The overall logic of the constitutional design includes lacunae and contradictions connected with both the formulation of certain principles and the transformation of their content over the course of time. Theoretical analysis of constitutional principles shows that disproportions remain with regard to the following parameters:

- *first*, the tension between values and the principles that express them, on the one hand, and their interpretation in terms of the goals of constitutional development, on the other hand;
- *second*, the continuing vagueness in the interpretation of a number of fundamental principles (democracy, the division of powers), due to special features of their legal formulation and to the logic of the political process;
- *third*, the changes made to the content of a number of principles embodied in the constitution by filling corresponding norms with a different meaning (the principles of federalism and local self-government);
- *fourth*, the intersections between principles that find expression in the changing interpretation of the correlation and scope of regulated norms (the principles of the market economy and the social state);
- *fifth*, the possibilities of opposed interpretations of the meaning of the same legal principles and norms (secularism);
- *sixth*, the different character of the positivization of different principles in existing law: some principles (like the division of powers or the social state) are embodied in the constitution, while others (like the market economy) are not embodied in the constitution but are derived from the aggregate of its norms and principles; and
- *seventh*, the dysfunctional manner of the application of a number of principles in terms of the criteria of proportionality and commensurability with significant goals of the constitution.[9]

The cyclical trend of constitutional development makes situations possible in which certain strategies of constitutional transformation that earlier were rejected by designers again acquire public support and become a source of constitutional amendments. Analysis of the formation and development of the constitutional principles of 1993 reveals the motives underlying the construction of legal norms, the origin of alternative strategies of transformation, and the causes of their cyclical reproduction. The chief contradiction of the Russian constitution has been the conflict between a broad interpretation of human rights and freedoms and the excessively authoritarian construction of the political system, which has concentrated state powers at a single center—the institution of the presidency. This origin of constitutional principles opens up the way for the final phase of the post-Soviet constitutional cycle—restorationist tendencies that appeal to the preconstitutional (Soviet) past with its entire system of ideas and concepts.[10] This pattern, as has been shown in the contemporary literature, is not an exclusively Russian phenomenon and is connected with the weakness of civil society institutions and of the law-based state in societies of the transitional type. But in Russia it is especially clearly expressed and has already led to the repeated historical alternation of periods of constitutional development and periods of nominal and illusory constitutionalism.[11]

To what extent have constitutional principles been applied in the most recent period? Simply posing the problem suffices to reveal polar positions in society. The principle of the law-based state presupposes the active functioning of an entire complex of component constitutional principles, including: the supremacy of law; the priority of protecting human and civil rights and freedoms; respect for the individual; the right to judicial defense; the judicial system as a guarantor of fairness; the legal possibility of appealing in court against decisions and actions of bodies of state power, bodies of local self-government, public associations, and officials; and the right to state compensation for damage caused by the illegal actions (or inaction) of bodies of state power or their officials. But it would be premature to speak of the consistent application of these principles. The constitutional principle of secularism has not halted the growing clericalization of society, which has the official support of the structures of state power: the increasing presence of the Church in public life and neglect of the need to restrict Church–state interaction are strengthening a tendency for the state to merge with the largest religious organizations—above all, with the Russian Orthodox Church—and facilitating the clericalization of the constitutionally secular Russian state, which still has no coherent and scientifically substantiated conceptual model of its policy in the sphere of freedom of expression.

Over the twenty years since the adoption of the new Russian constitution

we have not succeeded in bringing the real condition of the economic system into conformity with the ideal of the market economy proclaimed in the constitution: due to the existing formal and de facto constraints on freedom of economic activity, the economic system of the Russian Federation is still assigned to the category "mostly unfree" [This presumably refers to the country assessments published by Freedom House.—Trans.]. The influence of populist ideas is reflected in the search for a balance between the competing constitutional values of the social state and the market economy. Both in legislation and in the practice of the Constitutional Court there has been a recent tendency to prioritize the more popular principle of the social state—a tendency that endangers the principle of the market economy and is especially disquieting in view of the fact that the cost of legislative initiatives is imposed upon private actors.

The principle of federalism has at various times encompassed diverse interpretations—from "the solution of the nationalities question" to the decentralization of state power under conditions of a complexly organized society. The "pendulum" model of post-Soviet federalism has evolved from decentralization to centralization. This does not cast doubt on the principle of federalism as such, but it compels us to think about the criteria for its stable development—for example, budgetary relations between the center and the regions, a clearer demarcation of powers, stronger democratic foundations for the formation and answerability of state institutions, expanded participation of subjects of the Federation in the formation of state institutions at the national level, and a new strategy for the reform of federal relations. Analysts acknowledge the signs of the degradation of federalism in Russia and look for ways to save it within the framework of the concept of subsidiarity. This entails the broad development of local self-government. The principle of local self-government has not only received different theoretical interpretations in legislation (involving stronger or weaker correlation with administrative structures) but has also undergone modifications during periods marked by the predominance of centralizing and decentralizing tendencies.

When we turn to the structure of state power we find an even wider gap between the constitutional norm and the reality. The most important special characteristic of the existing model of the division of powers is a significant imbalance in favor of presidential power. There is a growing tendency toward the erosion of constitutional norms and at the same time toward a decline in the effectiveness of institutions. The instability of norms and institutions bears witness to the fragility of the constitutional order in Russia.

Three approaches are currently represented in public debates concerning a strategy for constitutional reforms—the conservative approach, the left-radical approach, and the liberal approach. The program of constitutional

revision advocated by *conservative political romantics* includes exactly the same arguments as those discussed at the beginning of the 1990s but rejected at that time by the drafters of the constitution—the need for a state ideology; the priority of social obligations over the norms of a free economy; critical reconsideration of the entire system of individual rights (restrictions on the freedom of conscience, restoration of censorship and the death penalty); rejection of the principle of secularism; constraints on federalism and transition to a de facto (if not de jure) unitary and monoethnic state with a single power vertical; supersession of the principle of the division of powers in the context of the rebirth of statehood of an imperial (in some cases quasi-Soviet) type; in general, rejection of the liberal values and institutions adopted in the 1990s, which are supposedly incapable of striking root in Russian soil.[12]

Supporters of the left-radical approach criticize the constitution from similar positions, viewing its principles as a result of the uncritical borrowing of Western models, which has led to the destruction of the Soviet model and the loss of its economic and social achievements. Typical of this school of thought is a refusal to recognize the validity of Russian constitutionalism and a commitment to radical (in some cases revolutionary) change in the existing political system.

The *liberal approach,* to which the participants in our research project adhere, is based on a positive appraisal of the constitutional revolution of 1993 and of the principles associated with it. Liberal analysts of the constitution see the reason for failures to observe its norms not so much in the norms themselves as in the underdeveloped legal consciousness of the public and the state authorities, in the "unrealized potential" of constitutional norms. However, they are by no means optimistic regarding the prospects for a law-based state. Some of them think that Russian constitutionalism can be defined as simulative and that given the psychology of the population it will remain simulative for quite a long time to come.[13] The issue of the relative importance of political and strictly legal technologies in transforming the Russian constitutional order remains a matter of debate.[14]

What needs to be done to modernize the constitutional order

The proposals for constitutional modernization presented within the framework of the project of the ILPP encompass the general conceptual foundations of the political regime, institutional design and the division of powers, and mechanisms for constitutional oversight, administration, and the legitimation of state power. The first group of recommendations includes the following proposals: to make the conception of the law-based state the firm basis of the strategy for constitutional modernization; to overcome vagueness and

conservative-restorationist tendencies in the interpretation of basic rights; to ensure fully fledged economic competition and the protection of property rights as the foundations of a market economy; to activate a system of feedback between society and the state and give a more significant role to institutions of direct democracy.

From the standpoint of the ideal of the law-based state, it is expedient to discuss the following topics pertaining to the modernization of the Russian legal system: criticizing the myths of contemporary conservative political romanticism on the basis of professional knowledge and revealing the potential of constitutional norms for the development of fully fledged democratic modernization; expanding guarantees of pluralism in public life (the multiparty system, the roles of nongovernmental organizations and media outlets); tackling problems of federalism (more clearly demarcating the spheres of responsibility of the Federation and its subjects, expanding and concretizing the powers of the legislative and executive authorities of subjects of the Federation, budgetary federalism) and bicameralism in the light of world experience; switching to a functioning mixed presidential-parliamentary system; enhancing for this purpose the oversight functions of parliament and achieving clarity in the division of powers between the president and the government (a responsible government); strengthening the independence of the judiciary; solving problems of legal provision for local administration and self-government in their relations with bodies of state power; creating a system of administrative justice; and finally, overcoming traditional stereotypes of social consciousness connected with the rejection of law as an instrument of social regulation and with the underdevelopment of mechanisms for stimulating the demand for legal services and providing access to justice.[15]

In substantiating the principles of the law-based state, secularism, federalism, the division of powers, and local self-government, our experts consider it necessary to achieve the greatest possible conceptual clarity and the greatest possible consistency among doctrine, legislative regulation, and judicial interpretation of the corresponding concepts. First of all, they emphasize the importance of reorienting general norms, procedural norms, and law enforcement practice to give the individual priority over the state. They propose to optimize procedural legal regulation in conformity with the presumption that public bodies and public officials should not be assigned (figuratively speaking) to a single weight category—subjects of public authority, who by their nature are all organized in a complex manner, should not be equated with citizens in terms of legal defense (they have fewer options and as a rule are legally weaker). Second, they propose that attention be devoted to legal regulation of emerging informal relations, to establishment of the status of subjects and objects of political competition, to regulation of ties between

rivals within the system of state power, and to maintenance of a balance between their rights and their obligations, their guarantees and their liabilities. Third, they emphasize the importance of developing technologies and instruments of constitutional and legal transformation that will be effective in terms of parameters such as maintaining the stability of the political and legal system, overcoming the alienation between society and the political authorities, and setting new priorities in administrative work based on the rights of the individual.

Another group of recommendations concerns tasks pertaining to reform of the political system. The project experts propose: to make parliament more representative and the government more answerable; to switch to a real multiparty system and guarantee the rights of the political opposition; to apply in full the principle of the division of powers and limit presidential prerogatives; to make federalism more effective; to adjust the relative strength of centralizing and decentralizing tendencies and overcome the excessive unification and bureaucratization of state administration; to apply the principle of subsidiarity to issues of regional and local significance and demarcate the functions of institutions of administration and self-government; to activate institutions of local self-government and provide for the legal regulation of self-government. They recognize that the existing political and legal system is dysfunctional in terms of parameters such as the ineffective and insufficiently legitimate functioning of the main institutions of democracy—referendums, elections to the State Duma and to regional parliaments, and municipal elections. They emphasize that continued regulation of elections, referendums, and other traditional forms of direct and representative democracy will not yield significant improvements. They consider it necessary to make central and local government more public and achieve a balanced combination of institutions of representative and direct democracy so that decisions affecting the vital interests of the people should be made by the people themselves or on the basis of obligatory public hearings. Improvement of the quality of Russian democracy also depends on liberalization of the criminal and administrative legislation that establishes the liability of organizers of and participants in public events. One of the most important tasks is to form institutions and mechanisms that will limit the monopoly of certain political parties in the state. A positive role in this connection will be played by initiatives aimed at the establishment of firm ties between the [ruling] party and the population and at the development of intraparty democracy.

In the field of federal relations, the experts recommend substantiating the idea not of a "power vertical" but of a strong state power exercised at two independent levels. In light of the principle of federalism, the combination of universalization and differentiation also appears as a central theme in the

legal regulation of local administration and local self-government. Existing federal legislation entails an immoderately rigid standardization in the municipal sphere, does not allow the consideration of diverse local interests and historical or other local traditions, and unjustifiably holds back municipal development. It is therefore necessary to expand the scope for the political self-organization of local communities and give them greater opportunities to influence how national tasks are tackled. This part of municipal legislation needs to be revised in order to move away from the impermissible fetishization of legal uniformity. It is also necessary to substantiate theoretically a concept for the development of federal relations that resolves the issues of the status of subjects of the Federation, permissible differences among them under conditions of an identical legal status for all the country's citizens, and approaches to the distribution of powers and funds between the center and the regions. The experts put forward proposals for a differentiated approach to regulation of the center's relations with individual subjects of the Federation. They suggest that federalism be regarded not as an end in itself, let alone as a means of ensuring electoral loyalty (as it is currently regarded in practice), but as a path to the innovation-based development of all regions of the country. The foundation of federalism—the financial component of relations between the center and subjects of the Federation—must be worked out in light of the specific objective features of the geographical and economic position of individual territories, with a view not only to ensuring transparent mechanisms of "equalization" but also to releasing the developmental potential of subjects of the Federation. As federalism is ideologically inconsistent with the monopolization of state power, it requires political diversity and an active position on the part of regional political elites, which might provide a counterweight in the process of making decisions concerning state governance. Here a significant role can be played by processes of party building and by general improvement in democratic institutions at all levels, including those at the level of subjects of the Federation.

The imbalance in the current system of the division of powers compels us to ask whether there is a need for constitutional reform in this field. Here the chief recommendation is a general wish for the creation in Russia of a system of state power under which the principle of the division of powers will be consistently applied at the constitutional, legislative, and institutional levels, with a clearly tested system of mutual checks and balances. For this purpose the experts propose, first, to introduce constitutional amendments that modify the existing construction of the division of powers. The powers of the president would be reduced; the role and independence of the judiciary would be strengthened and it would be reoriented toward the constitutionally embodied priority of human rights and freedoms; the role of the government

in the "president–government" nexus would be strengthened, or else the president would be incorporated into the executive branch as its head and the post of prime minister abolished. Second, they consider it necessary: to eliminate the practice of creating quasi-governmental and other clandestine executive structures "parallel" to the government that are beyond the reach of parliamentary and public oversight; to create conditions and guarantees for restoring to parliament the real (not simulative) functions of initiating and discussing draft laws; and to improve the mechanism for holding the president and the government accountable to parliament. Third, they regard it as essential to provide guarantees for the free functioning of civil society, human rights organizations, and media outlets, embody the basic principles of the electoral system in the constitution, and strengthen guarantees for the creation and activity of parties. A return to a balance of powers within the framework of the existing constitution requires above all: political will; revision of all legislation connected with the distribution of powers among the executive, legislative, and judicial branches; abolition of the additional powers that have been given to the president over and above those directly stipulated in the constitution; and rectification of the positions of the Constitutional Court on these issues.[16]

The third group of recommendations is aimed at enhancing the effectiveness of the judicial system. In this area the experts propose: to reform the judicial system and enhance its role in applying the principle of the law-based state; to present a doctrine for the substantiation and legitimization of judicial rulings on controversial economic and political issues; to develop technologies of constitutional reform with a view to achieving set goals; to define stages, timescales, and instruments for the conduct of transformations and criteria of their effectiveness; to establish institutions of independent specialized expertise and monitor the application of constitutional principles. As the key element that enables us to assess the extent to which the principle of the law-based state is applied in a country is the effectiveness of its judicial system, the top-priority measures to rectify the situation lie mainly in the sphere of judicial reform, which must be aimed at ensuring that citizens have real access to justice. The experts offer recommendations that may partly strengthen the role of the judiciary in the existing system of the division of powers. They have in mind a complex of measures aimed at making judges more independent and at eliminating excessive hierarchy inside the courts and the subordination of some judges to others, as this makes them less independent and undermines their guaranteed identical status. An important component of reform may be the establishment of a system of administrative courts, as autonomous as possible from the existing judicial hierarchy.

Within the framework of the interpretation of constitutional principles

and subsequent judicial practice, it is necessary for the Constitutional Court to elucidate questions such as how to understand the principles of fairness, equality, and proportionality, the relationship among them, the relationship between their formal-legal and substantial interpretations, and criteria and tests for their application in specific cases. Within the framework of this approach it is expedient, first, to define clear criteria for constructing a balance of constitutional values, and, second, to more deeply analyze the goals of constraints to be imposed upon the corresponding principles and the adequacy and proportionality of the means chosen to achieve these goals.

The persistent vagueness and contradictions in the formulation of legal positions on these issues lead to legal difficulties and psychological conflict in the transitional society: heightened legal expectations (generated by the high rating of constitutional jurisprudence, based on its earlier role in the liberalization of legislation) come up against the unpredictable, contradictory, and unsubstantiated character of rulings that cannot be explained to the public in terms of a single logical formula. Ways to bridge the gaps among the key principles of fairness, equality, proportionality, and legality in post-Soviet society must be sought by reconciling reason and tradition, ideal and reality, solidarity and domination, legal norm and force, legitimacy and legality, the ethics of public law, legal doctrine, and the effectiveness of law—in general, by consistently tackling the tasks of democratic modernization with the aid of scientifically substantiated legal policy.

Possible technologies of constitutional transformation

The technologies of the proposed constitutional transformations may be divided into three groups according to the degree to which they intervene in the existing constitutional and legal order. The *first position* is represented by the idea of radical constitutional reform and explicitly or implicitly proceeds from the assumption that the conflict between law and the ruling regime has to be settled in a constitutional manner. The current Russian political system is becoming unreformable; it is therefore necessary for society to make active efforts to transform it, culminating in the convening of a new constitutional convention and the adoption of a package of radical constitutional amendments.

The *second position* is represented by the idea of individual constitutional amendments that do not affect the constitution as a whole. While sharing the first position's assessment of the situation, this position proceeds from the assumption that it is possible to rectify the Basic Law gradually by changing individual norms—that is, through amendments aimed at reflecting the new reality, filling in gaps, and making constitutional norms less vague. Advocates

of this view consider the stability of the constitution a very important condition of its legitimacy, and therefore propose to carry out all changes without any substantial revision of its text—by means of legislative innovations and judicial interpretations. But this position also encompasses various approaches: some assume that over the course of time the cumulative effect of amendments to a number of crucial laws may (and should) lead to modernization of the constitution; others reject this idea, assigning greater importance to practice and to change in legal consciousness.

The *third position* links the prospects of constitutional modernization not to change in legislation but to the practice of its application. This approach focuses upon change in the political system, in institutional design, and in the mechanisms of the functioning of parties and social movements. This position proceeds from the assumption that the cause of constitutional dysfunction lies not in defects of the legal system but in the circumstance that the constitution and its principles have simply not been adequately applied. Thus, the solution to the problem is to change not the constitution and legislation but the practice of the existing regime, which this interpretation views as unconstitutional. Therefore, according to these experts, it is necessary to renounce the system of bureaucratic excrescences, practices, and procedures that deform constitutional provisions and create a situation of monopolism in the economy, politics, and culture.[17] To change the regime in accordance with the constitution and compel it to observe the constitution—such is the slogan of this tendency.

Some experts insist upon immediate change to the constitution, while others say that it is preferable to make gradual changes in the legal system without touching the text of the Basic Law—by rectifying constitutional legislation and judicial interpretation. Correspondingly, they propose different instruments of reform—from the convening of a constitutional convention, which is unavoidable if a new constitution is to be adopted or if the existing one is to be radically revised, to specific changes in legislative norms and procedures, law enforcement practice, and the legal consciousness of society. The experts regard these approaches not as mutually exclusive but as complementary to one another, as future political practice may apply any one of them or some combination of them.[18]

The political component of constitutional modernization is to achieve it within the framework of the contractual model and avoid the rupture of legal continuity. As comparative research on democratic transitions shows, the crucial moment in the transition period is the positive consolidation of society, which should culminate in a constitution that provides for democratic values, clear, equal, and transparent "rules of play" for all civil society actors, and effective political institutions. At the same time, it is necessary to avert the

danger of constitutional populism: the negative consolidation of society, based on simple negation of the existing system, very easily becomes a substitute for its positive consolidation.

Thus, the convening of a constituent assembly (or constitutional convention), the adoption of a new constitution, or immediate transition to a monistic parliamentary system—all slogans put forward by the conservative and left-radical opposition—do not seem obvious priorities under conditions of social apathy, the weakness of federalism, the absence of a real multiparty system, and an authoritarian model of state power. In reality, we should aim instead at a legal transformation of the political regime—changes to the electoral system, the introduction of a real multiparty system, and the restoration of a competitive milieu in the mass media. Part of this program should be an independent discussion of various constitutional reform projects—above all, of improvements to existing laws, in judicial practice, and in law enforcement mechanisms.

Notes

1. The article is an expanded version of my lecture at the Ninth Starovoitova Readings—"Civic Consolidation in Contemporary Russia: Problems, Potential, and Perspectives" [Grazhdanskaia konsolidatsiia v sovremennoi Rossii: problemy, potentsial i perspektivy] (Moscow, November 22, 2012). A transcript of the readings is available at the Web site of the Kennan Institute in Russia: www.kennan.ru.

2. *Grazhdanskoe obshchestvo i pravovoe gosudarstvo kak faktory modernizatsii rossiiskoi pravovoi sistemy* (St. Petersburg, 2009).

3. A.N. Medushevskii, *Sotsiologiia prava* (Moscow, 2006).

4. *Konstitutsiia Evropeiskogo soiuza s kommentariem* (Moscow, 2005); *Evropeiskii soiuz: osnovopolagaiushchie akty v redaktsii Lissabonskogo dogovora s kommentariiami* (Moscow, 2008); *Standarty Soveta Evropy v oblasti prav cheloveka primenitel´no k polozheniiam Konstitutsii Rossiiskoi Federatsii* (Moscow, 2002); *Edinoe pravovoe prostranstvo Evropy i praktika konstitutsionnogo pravosudiia* (Moscow, 2007).

5. See the transcript of the discussion "Is a Law-Based State Possible in Russia?" in *Vestnik Instituta Kennana v Rossii*, 2011, no. 19, pp. 57–84.

6. A.N. Medushevskii, "Pravo i spravedlivost´ v politicheskikh debatakh postsovetskogo perioda," *Sravnitel´noe konstitutsionnoe obozrenie,* 2012, no. 2(87), pp. 14–33.

7. *Osnovy konstitutsionnogo stroia Rossii: dvadtsat´ let razvitiia,* ed. A.N. Medushevskii (Moscow: IPPP, 2013).

8. *Monitoring konstitutsionnykh protsessov v Rossii: analiticheskii biulleten´* (Moscow: IPPP, 2011–12), nos. 1–4.

9. *Osnovy konstitutsionnogo stroia,* pp. 291–99.

10. A.N. Medushevskii, *Razmyshleniia o sovremennom rossiiskom konstitutsionalizme* (Moscow, 2007).

11. See the collection of articles under the heading "15 let rossiiskoi Konstitutsii"

in *Otechestvennaia istoriia,* 2008, no. 6 and under the heading "Istoriia rossiiskogo konstitutsionalizma," in *Rossiiskaia istoriia,* 2010, no. 1.

12. See *Ideologiia "osobogo puti" v Rossii i Germanii: istoki, soderzhanie, posledstviia*, ed. E. Pain (Moscow, 2010); Per-Arne Bodin, Stefan Hedlund, and Elena Namli, eds., *Power and Legitimacy: Challenges from Russia* (London: Routledge, 2012).

13. *Realizatsiia Konstitutsii: ot idei k praktike razvitiia konstitutsionnogo stroia (sostoianie i perspektivy rossiiskogo konstitutsionalizma na obshchemirovom fone). Mezhdunarodnoe issledovanie* (Moscow, 2008).

14. *Konstitutsionnoe razvitie. Zadachi institutsional´nogo proektirovaniia* (Moscow, 2007).

15. *Osnovy konstitutsionnogo stroia,* pp. 299–310.

16. *Konstitutsionnyi sud kak garant razdeleniia vlastei* (Moscow, 2004); *Konstitutsiia Rossiiskoi Federatsii v resheniiakh Konstitutsionnogo suda Rossii* (Moscow, 2005).

17. *Osnovy konstitutsionnogo stroia,* pp. 310–12.

18. Ibid., pp. 8–9.