



Contents lists available at [SciVerse ScienceDirect](#)

Journal of Eurasian Studies

journal homepage: www.elsevier.com/locate/euras



Law and justice in Post-Soviet Russia: Strategies of constitutional modernization[☆]

Andrei N. Medushevsky

Department of Political Theory, Faculty of Political Science, The National Research University Higher School of Economics (HSE), Moscow, Russia

ARTICLE INFO

Article history:

Received 10 December 2011

Received in revised form 21 February 2012

ABSTRACT

The relationships between notions of law and justice – the central argument in political debates of transition periods. The law is defined in contemporary political science as a special form of social organization which represents itself as a value, norm and fact. The complex interpretation of law as a multidimensional phenomenon is possible only if these three competing parameters are taken into consideration. Another side of the problem is the definition of justice as an ideal, norm or historical tradition. Our purpose in this article is to reconstruct on the basis of cognitive and information theory approach some basic parameters of law and justice in the process of searching solutions for fundamental problems of transitional Post-Soviet period. Among them are: the conflict of law and justice in current Russian political reality; social equality and new property relations; national identity and system of government; the form of government and the type of political regime; legitimacy and legality of political transformation; effectiveness of law. The establishment of a new constitutional order is simultaneously the result and the main premise of this transformation. At the focus of our approach is the comparison between conservative, liberal and pragmatic strategies of legal and constitutional transformation.

Copyright © 2012, Asia-Pacific Research Center, Hanyang University. Produced and distributed by Elsevier Limited. All rights reserved.

1. The conflict of law and justice: juridical construction of Post-Soviet reality

Cognitive-information theory demonstrates that the solution of the problem of humanitarian knowledge consists in investigation of any purpose-oriented human behavior which as developed in empiric reality definitely

involves the process of fixation of research activity results – intellectual products. These products as sources of information create the solid ground for reliable knowledge and rational construction of reality images (*Teoria i metodologiya kognitivnoi istorii*, 2010). In contemporary political philosophy three main theory of justice could be verified – the idea of distributive justice (formal equality of possibilities in the formation of legal order) (Rawls, 1971); the idea of legalistic justice (the priority of the existing norm of positive law over abstract moral norms) (Nozick, 1974); and the idea to combine positive law and legal consciousness of any concrete society as the basis for justice (Macintyre, 1984).

The last approach involves the broader spectrum of argumentation over relationships between positive law, ethical principles and historical tradition, and of their reciprocal relations and practical implementations. In globalized world this kind of problems actively debates by

[☆] The 2012–2013 Research Study was carried out within The Higher School of Economics Academic Fund - additional necessary information - "research grant No. 11-01-0038".

E-mail address: medushevsky@stream.ru.



Produced and distributed by Elsevier Ltd.

philosophers (Hare, 1998), moralists (Sandel, 2010) and political scientists (Walzer, 2007). Juridical constructivism (and political projects to resolve acute problems) is appeared in such conditions as a creative orientation for the understanding of society transformation process. From the one hand it actively construct a new legal reality, from the other hand it actualize problems of legitimacy of legal decisions. In Post-Soviet transitional period juridical constructivism cover three main dimensions – space, time and the essence of being to demonstrate a sharp conflict between law and justice.

Space as a category of juridical picture of the world becomes the object under construction in the context of sovereignty debate in the era of globalization. The construction of social space involves such items as the nature of Russian civilization, its place between West and East, the globalization debate (Mesto Rossii v Evrope i Asii, 2010). The scope of problems under debate is broader than pure juridical matters and can be interpreted as civilization type choice. Schematically formulated this concept is perhaps the starting point for the conservative romantic rescheduling of Post-Soviet intellectual debate. This concept of civilization is very unclear in modern historiography. There are a lot of civilization typologies, based on different criteria – religion (Orthodox, Islamic, Buddhist and other civilizations); regionalization in a global framework (European, Asian, African, or Eurasian civilizations), place in a global system of communications and distribution of technologies (central and peripheral civilizations); racial divergences (“white race” or “black race” civilizations, for example); national divergences (also varied in the context of ethnic or cultural interpretation of the term); states or empires (“Russian civilization”, “European” or “American civilization”), stages of development (civilization in process of formation or in process of degradation); main functional principles (religion, ideology, war, trade) or psychological orientations (hedonistic, paranoid etc.) (Zapad-Rossia-Vostok, 2011). The vagueness of the term provides possibility for different approaches and conclusions about “Russian civilization”: is it religious par excellence or there are some other (ideological, national, political) criteria for it, and how permanent features of this civilization could be found and described? The possibility to combine different criteria is a ground for opposed notions of “Russian civilization” – as part of European, as global (“Eurasian civilization”), or as a unique one (“Russian civilization” as such) (Obraz Rossii, 2010; Rossia i Zapad, 2009).

In these context such problems are debated as approach to European law and, particularly, to judgments of European Court on human rights concerning Russian internal politics (Edinoe pravoe prostranstvo Evropy, 2007). Three main positions are represented – the priority of international law over national; the priority of the national law over international; and compromise between them – the thesis that these judgments could be adopted by national courts only under precondition that they are not contradict the sovereignty, promulgated international treaties and basic rights, stipulated in Russian constitution (Implementatsia reshenii Evropeiskogo suda, 2006).

Time as a category of juridical picture of the world – an important factor of legal development. The construction of

time by means of juridical interpretation is in connection with a problem of historical legitimacy of law: in which size Post-Soviet break with legal tradition is logical or was made by chance, how long should be than the historical continuity of contemporary legal system (is it principally new phenomenon, prolongation of Soviet or pre-Soviet legal reality) and which should be permissible scope of the retroactive interpretation of law (Konstitutsia Rossiiskoi Federatsii v resheniach Konstitutsionnogo suda RF. Moscow, 2005).

Historicism is proclaimed by many conservative critics of current Russian legal system as a key method of argumentation regarding not only general retrospect orientation of sociological theory but romantic idealization of future as return to the past (Rossiiskii konservatism, 2010). That means the search of explanation of current social events in framework of the so-called “national spirit” just in the sense of German historical school of law of the XIX century (100-letie “Vekh”, 2009). The “Providence”, “Holy Russia”, “Russian soul”, “Messianic impetus”, “The Empire” and other metaphysical constructions of an old conventional wisdom are recollected, updated and reproduced by neo-romantics. For many scholars even of academic position it became obvious that “main ideologems” of Russian history – “Moscow- the Third Rome”; “Orthodoxy. Autocracy. Populism” and “Marxism-Leninism” – are similar in structure, spirit and social functions. The conclusion is that “Russian idea” is a profoundly anti-modern and anti-western (Gosudarstvo i nacia, 2008).

All these problems are important in the context of Post-Soviet legal decisions, which construct legal reality not only for present and future, but also sometimes for the past: the change of property relations (restitution – the return of property to former owners); the rapid change of economic beliefs which put under question the principle of equality in legal protection (decisions on bancs, taxes and insurances in period of crisis); even the rewriting of legal history (for example, decisions on lustration legislation – debate about possible rejection of employment rights for the individuals collaborated with political and repressive institutions of former communist government which at the same time was not in contradiction with the positive law of those time) (Istoria Rossiiskogo Konstitucionalizma, 2010, № 1; Konstitucionnye prava, 2002).

The sense of being – is defined by decisions on symbolical questions concerning with search for the national identity in the changing world. The example is a long and unfruitful search of the so-called “National Idea” as a formula of a national self-identification. National idea as important romantic cliché is interpreted broadly as a self-identification of the nation (Nacionalnaia ideia, 2009). But on which grounds and priorities? National idea in this interpretation is not a phenomenon of historical experience, or a result of academic investigations, but rather a phenomenon of mass culture, “collective unconsciousness”, artificially created project – combination of images of past and future. How old then is Russian historical memory and what has been done in terms of nation-building to date? What are the cognitive contradictions that face the ruling class today? All such questions are under debate but nor substantive answers were proposed by conservatives. Ethical (extra-legal) arguments appeared to be crucial for

political romantics in definition of social significance of fundamental legal acts – Constitution and main Codices. “Patriotic” component is always present in interpretation of “symbolic” judicial decisions to start from Communist Party process to UKOS affaire, including controversial positions of Post-Soviet countries Constitutional courts on historic memory: in some cases it was the blame of Soviet past, in another’s – the restoration of value of former symbols – monuments, state symbols, and hymns (Mommson & Nussberger, 2007).

This interpretation involves some sort of fatalism – the idea of national predestination or the world mission which is based on history and could not be changed. From this angle alternative paths are impossible as well as variety of historical forms. Such ideas are typical for some influential interpretations of Russian revolutions in historical retrospective (K 90-letiju Fevral'skoi Revolucii, 2007, N. 6; K 90-letiju pervoi Rossiiskoi Konstituancy, 2008, N. 2; Oktabr'skaia revolutsia, 2008, N. 6). European alternatives in the form of feudalism, Enlightened absolutism, representative government has not been realized in Russia. Russian statehood could not be compared with European as well as Asiatic countries. The idea of historical mission correlates with the idea of “separate way” of historical development predetermined by some invariants of Russian political culture (Ideologia “osobogo puti” v Rossii i Germanii, 2010). Among them are the following: geography of the country (the poor soil and climate as an explanation of extensive forms of agriculture), unstable borders (external invasions and colonization), the special type of social organization (peasant community and serfdom), permanent state-society struggle, combination of property rights and administrative control in the hands of the bureaucracy, special social functions of despotic state (Billington, 2004). This historical trends probably really determined the formation of the Russian statehood in the past, but as it was shown by classic Russian historiography, they lost their absolute character in the modern period and definitely should not be exaggerated in contemporary history (Rossiiskaia Imperia, 2011).

The juxtaposition of legal construction parameters of social reality excerpt's the contradiction between law and justice as well as opposite strategies for overcoming it – on the basis of reason, historical tradition, positive law in action or experience, orientation of these decisions on past, present or future.

2. Tradition versus norm: social equality and new property relations

An important dimension of justice debate in Post-Soviet period became the process of property distribution (in Soviet time property was under total control of the state). In Perestroika-time debates the category of property was exposed more as an ideological then as a legal item. Opposite approaches were presented to relationships of state and private property, combined with different visions of market reforms. These debates were marked by the absence of rational understanding of what is market, fears of reform consequences and hesitations about ideological and political priorities of the time. The conflict between

property and justice (interpreted mainly as equality) formed the basis for traditionally motivated protest. This put under question the very legitimacy of the institute of property and its legal protection (*Sobstvennost na zemlu v Rossii*, 2002).

Legitimacy or illegitimacy of property is defined by three main dimensions – the order of its distribution in society; methods of acquiring in the past and tools for its protection in present. In history of Russia of the 20-th century property relations changed three times (nationalization in 1917, collectivization in 1929 and return to privatization after 1993). Every time it was made with destruction of legal continuity. In contemporary Russia instability of private ownership legitimacy is determined by the absence of a long historical legitimacy which many times was broken in history or in any case was put under question in Russian history. If one part of society appellate to former Soviet tradition which in principle excluded private property on land and industrial objects, another – to pre-Soviet forms existed before the Bolshevik revolution of 1917. To go deeper in history we find a problem of legal dualism – the conflict between positive law of privileged land owners and peasants with it's common law and undefined rights on land using. The three-dimensioned conflict over land legitimacy demonstrated itself very clear in the process of so-called “agrarian question” solution. The problem of property distribution is represented in Post-Soviet debates over constitutional fixation and enforcement of the state or private property on land (Medushevsky, 2005a,b).

The sharp conflict between traditionalist vision of justice (equality) and new legal norms on private land property (as a path to commercial redistribution of land and creation of inequality) conveyed the elaboration of basic juridical documents. A long Post-Soviet discussion resulted with legal adoption of land private property close in Russian Constitution of 1993 and Land Code of 2001 enforced by the government in spite of the resistance of powerful conservative elements. The 2001 Land Code was adopted after a protracted struggle between the advocates and opponents of the constitutional principle of private property on the land. This document (as well as the legislation adopted to elaborate it, above all the Law on Turn-over of Agricultural Land) undoubtedly represented a fundamentally new phase in legal regulation of the use of the land. An analysis of the conflicting circumstances of the Code's adoption and its content, as well as the prospects for its realization, enable us, however, to characterize the document as a compromise, the functioning of whose norms will depend on several factors to be determined in the future (Medushevsky, 2002).

When considering how existing legislation relates to the government program for social and economic development, it should be remembered that transition economies and legal systems have their specific peculiarities. One of the peculiarities, as can be seen not only in the example of Russia but also all of Eastern Europe in general, is the absence of a consensus in society toward the nationalization, privatization or restitution of landed property (Dam, 2006). The question of the extent to which property rights are guaranteed and the results of privatization are irreversible in Russia, which had seemed to be settled, has

once again become the object of acute political debate. All the components of ownership, the possession, disposal and use of land, are involved. The main viewpoints in this debate can be reduced to those that propose the full realization of land ownership, and those that advocate a compromise in allowing private ownership of the land in principle, but in effect, by giving authority to regional legislation to regulate critical issues, to postpone its practical realization for the indefinite future. It is important to emphasize that in the moment of Land Code adoption the majority of peasant population were against private land property right. The consequent period demonstrate the situation of “legal instability” which involves, from one hand, fundamental changes (the main is the very fact of the beginning of commercial using of land), from the other hand – this changes are mainly of spontaneous character and only in limited scope are under legal regulation. The absence of legal instruments of property regulation on regional level makes it necessary to use paternalistic quasi – legal methods of regulation in order to prevent the acceleration of social dysfunctions and neuroses on collective and individual level (*Diskurse der Personalität, 2008*).

Success in implementing the initiatives of economic policy and market enabling legislation is determined by the extent to which there exists consensus regarding the securing of stable national development in the context of the global economy. This compromise has been attained between opposing forces in relation to the reform's basic values and aims, thereby neutralizing its opponents. The implementation of reform is also dependent on how relations are regulated at, and between, the three levels of government, federal, regional and local; that legislative acts do not contradict one another, and that the fundamental principles of private ownership and the separation of powers have been instituted. A single approach to the problems of economic reform must be achieved throughout the structure of power: the implementation of the reform program undertaken by a government that continues to retain public legitimacy and social confidence (*Transformation and Consolidation, 2004*).

The situation experienced in Russian over the past ten years is unique in world history: there is a transition, on the one hand, from an economy based on state ownership and centralized planning to a market economy based on the pluralism of forms of ownership, and on the other, from an authoritarian one party regime to a political system based on democratic principles. The main feature of the preceding system was in simplistic terms the de facto merging of personal and state property, society and state. Crucially, the bureaucracy played the decisive role in the economy. By contrast, the proclaimed features of the new economic system have been the strengthening and protection of private property, and the erection of legal safeguards against interference in it by the state. The liberal conception of economic reform has been implanted in a country where traditions of private property, political democracy and individual economic enterprise were destroyed during the Soviet period (*Velikaja reforma i modernizacija Rossii, 2011, N. 1*). For this reason, modernization was carried out by means of reforms implemented

«from above», and the main instruments or effecting change was the development of new legislation, institutions and mechanisms of administrative control.

3. Solidarity and power: national identity and system of government

Solidarity as a definition which implies a degree of social integration and cognitive consensus in transitional society represent itself in organic or mechanic forms. Solidarity is connected with the implementation of power in institutionalized forms of legitimate and illegitimate rule. The search for their conjunction in order to reach social homogeneity reflected in construction of Post-Soviet national identity. The concept of the nation and ‘national interest’ is very controversial and involves different definitions of the term – civic nation, ethnic nation, combination of both, or some supra-national identity; nation as embodiment of a state (or an empire) or a rival of uneven state; nation as a real historical phenomenon or sociological fiction. The items of “uneven nation”, “state-building nation”, “national priorities” are in debate about Russian identity. But how should the “Russian factor” be considered without harming the national integrity of the country; how do nationalism and democracy correlate with one another; is it possible to overcome archaic ethnic sentiment by means of fairer social and economic policy; how should the proper national policy be conducted and centrifugal tendency be fought against? (*Nazionalizm v mirovoi istorii, 2008*).

The issue of federalism in Russia is genetically linked, practically speaking, with the battle of the central authorities to preserve the unity of the country in the face of internal striving for separatism and autonomy. For this reason federalism in Russia has evolved differently than it has in western culture. There are certain very difficult issues of federalism which require special attention and discussion, namely, the vertical organization of government and securing the rights of the Federation's subjects; the legal, ethnic and economic asymmetry of the Federation; protecting civil rights in the Federation's regions; and local self-government, among others. Specific character of the Russian federalism shows itself in ambiguity of important constitutional norms, contradictions between formal equality and real inequality of Federation subjects in the system of asymmetric federalism. Another side of the problem – the absence of a clarity in separation of spheres of competences and prerogatives between different levels of administration – central, regional and local (*Administrativno-territorialnoe ustroistvo Rossii, 2003*).

In accordance to this approach were represented different concepts of the power and legitimacy criteria as a basis for political institutes of Post-Soviet period. The search for a new concept of national identity (in form of civil nation as opposed to “ethnic nation”) actualized the rejection of the Soviet concept of federalism and forms of its legal implementation. That means the elaboration of a federalism concept which is principally opposed to the Soviet one. Firstly, subjects of federation should not be automatically connected with nations or even more – with ethnos; secondly the right of secession (which is not

characteristic feature of federal state) should be excluded; thirdly, priority should be given to the protection of civil individual rights and not to national groups or majorities. Contemporary debates on Russian federalism includes just this kind of problems: definition of constitutional model of federalism; outcome from asymmetric character of the existing model; the change in the relationships of national and socio-economic borders of subjects of the federation and legal possibilities to change them, budget federalism, federal intervention, the election of governors and the creation of effective institutes of administrative and judicial control over them (*Staatsburgerschaft in Europa*, 2001).

There is a gap between the legal norm and real life in this area of the constitutional regulation and a dichotomy between formal and informal regulation. Legal dualism encompasses all aspects of social life, including those which in Russia are called federative relations. Three crucial questions have remained unanswered: first, does Russia need federalism; second, is Russia's federalism a real one; third, which type of federalism can be definitely realized in Russia. The Russian Constitution pronounces federalism to be one of the fundamental principles of the state system. According to the Constitution all unities of Federation have equal rights as subjects of the Russian Federation. The characteristic features of Russian federalism which are established in the Constitution are the integrity of the state, a unitary system of state power, delimitation of the subject of activities and of jurisdiction between federal and regional governmental structures, the equality of all of the Federation subjects in relation to the federal government. From the other hand, the political, economic, and legal asymmetry of the Russian Federation is one of the most noticeable. The actual debate on the prospects of the Russian federalism includes three main position: first, in favor of the existing system (according this point of view this system is a real and full-blooded federalism); second, the opposite view – against federalism in Russia (because Russia historically did not know any federalism and was unitary state); and the third view is a compromise: federal system in Russia is important as a constructive element of the separation of powers and democracy in general, but it must be rationalized and modified according to the principle of economic sustainability and political integrity of the state.

The difference of approaches to federalism determines the variety of strategies for the solution of another important problem – the formation of appropriate structure of judicial power: should the parliament consists of one or two chambers; should the Upper Chamber be interpreted as administrative institute (as it was the case of the State Council of the Russian Empire); as representation of a national subjects of federation (in order to protect their rights) or to represent territorial communities in spite of national structure of the population. The proposed concepts of bicameralism according this guidelines covered three main options – should bicameralism be strong (than two chambers are equal in their role in legislative process), weak (than this symmetry does not exist) or represent any intermediate variant (of formally weak bicameralism with reserved right of Upper chamber to block a part of legal proposals on federalism matters). From this angle different

opinions are represented on the order of formation of Federation Council – its real role in solution of constitutional and political questions (a huge legal prerogatives of the Upper Chamber on the basis of art. 102 of the Constitution have not being required by the Chamber). The threefold change of Federation Council formation procedure close (and parallel creation of the State Council) is a search of a new bicameralism model in Post-Soviet Russia. It reflects the uneven character of the Russian federalism, very different views on its further development and possibilities for political organization in a framework of the Upper Chamber – from the trend to real federalism till its transformation to nominal one (*Sovet Federatsii*, 2003).

The search on negotiated principles of solidarity and power in a framework of a new identity took a concentrate reflection in current debates on sovereignty doctrine. In these debates such interpretations become actual as “national sovereignty”, “peoples sovereignty”, “state sovereignty” with different conclusions on international or national law, federalism and centralization of political power – the necessity to build its “vertical” or, oppositely, the development of the social control over it (*Ideia suvereniteta*, 2009).

4. The law and force: the form of government and the type of political regime

An important issue in the debate on justice is the divorce between law and force. In Post-Soviet context the dominant trend is embodied in transformation of political system from uneven democracy to guided democracy, constitutional parallelism and important changes in symbolic attributes of power and the style of government. Contemporary Russian controversies on law-based state are similar to those which existed in pre-revolutionary classic jurisprudence (*Obschestvennaia mysl Rossii*, 2005; *Rossiiskii liberalism*, 2010). As it was at the beginning of the XX century (in the time of the First Russian Revolution) at the end of the century realized the model of constitutional revolution (not reform). The result was the creation of constitutional establishment which introduced a weak parliament and a powerful figure of the head of the state. In Post-Soviet period Constitution of 1993 introduced the mixed political regime of French type (in the interpretation of the period of establishment of the V-th French republic created by De Gaulle). In Russia this regime obtained a great specificity which realized in presidential or even super-presidential regime. Political system created as a result of the constitutional revolution of 1993 was in many aspects similar to the system, appeared in Russia after the revolution of 1905–1907 and Constitution of 1993 had similarity with “Fundamental laws of the Russian empire” in redaction of 1906 in terms of status of Parliament and prerogatives of the Head of the state (*Konstitucionnye proekty*, 2010; *Reformen in Russia*, 1996; *Russia*, 2009).

Transitional society does not know any stable legal regulation. For every transitional political system the real core of political decisions must be posed more or less outside the traditional legal restrains (in order to transform them). And the complex machinery of relationships

between law and reality in formation must be taken into consideration. The author introduced in his publications threefold distinction of different historical types of constitutionalism according to the criteria of its political function – real constitutionalism (for the stable democracies); nominal constitutionalism (for totalitarian regimes) and transitional pseudo-constitutionalism (for the modernizing political regimes with the unstable democracy and many reserved domains for the administrative power). According to this line of argumentation the real logic of transformation in Eastern Europe and Russia contained a transition from the nominal constitution to real one but included also possible phase of sham constitutionalism (which theoretically can be used for the movement toward liberal democracy as well as for the regressive movement toward authoritarianism and even totalitarianism) (Medushevsky, 1998; *Stalinism kak model*, 2010, № 6).

The Russian constitutional evolution since 2000 included the reshaping of political process under the following lines: limitation of political participation (new electoral law, regulation of political parties and NGO, law on parties limits participation to national parties and eliminates regional, special interest parties in national elections); the transition from contractual theory of federalism to the constitutional and subsequent reinterpretation of federalism as more centralized one (the creation of a parallel system of administrative regions under the intermediate control of President's representatives in federal districts and presidential appointment of governors in lieu of popular election and a new process for the selection of governors – presidential nomination, confirmation by regional legislature); growing corrections of the mechanism of separation of powers (by the creation of powerful governmental party majority in central and local Parliaments and uphold of pro-governmental conservative movements); systematic changes in the formation of Upper Chamber of Parliament – The Council of Federation according to centralized model of federalism; creation of new extra-constitutional bodies like State Council and the Public Chamber as para-legislative collective ombudsman which could be used for the selection of social initiatives; the transformation of judicial system and the process of nomination of the Chairman of Constitutional Court (*Konstitucionnoe razvitie*, 2007). According to constitutional amendments adopted in 2008 the President's mandate was prolonged from 4 to 6 years. Conservative reforms conducted in the period from 2000 resulted in the creation of the system of limited pluralism with “monarchical” prerogatives of presidential power similar to the historical phenomenon of pretended constitutionalism, existed in Russia at the period of Dumas monarchy 1905–1917 (*Gosudarstvennaia Duma*, 2006). The official concept of “sovereign democracy” which appeared as an answer to this ideological demand, was criticized by right-wind conservatives as insufficient and contradictory. Romantics obviously aimed to create sovereign state without adjectives.

This system defined as “sham constitutionalism” was not at the same time totalitarian one: in both cases it demonstrated an important path toward the adoption of principles of a law-based state and separation of powers (which were definitely rejected by absolutist as well as by

Soviet juridical doctrine and constitutional practice). The current Russian constitution appeared to be internally contradictorily: realize in a fool scope liberal concept of human rights it fixed at the same time rather authoritarian model of presidential power which turned it in a driving force of political process. As a result the new construction of power which formally is interpreted as a mixed form of government in really represents an original variant, direct analogs to which could not be found outside the Post-Soviet area (Medushevsky, 2006).

There are three main positions about Russian form of government. According the first of them, Russian form of government is similar to the French one and is a mixed form with dual executive power. Another position presented the Russian form as the new edition or even transplant from American presidential system of government. And the third position interpreted the Russian political regime in terms of super-presidential or hyper-presidential form. But in reality the Russian system combines the elements of each of these pure forms without being one of them. It cannot be reduced to the first (dual) form because the constitutional requirement of the State Duma agreement for the nomination of a government by the president can be easily bypassed by presidential power (after three-fold motion of non-confidence to the prime minister a new elections to Duma can be initiated by the president). The Russian system also is not similar to the classical presidential system of American type because lack of a strict separation of powers in Russia (Russian president can dissolve the State Duma) (*Konstitutsionnyi sud kak garant razdelenia vlastei*, 2004).

The third interpretation of the Russian political regime as super-presidential form of government has more grounds for existence. The main arguments of its supporters are prerogatives of the Russian president and his possibility to rule by decrees in emergency situation as well as without it (this decree law was used very broadly in transitional period for the implementation of important legal norms such as private ownership on land). But this interpretation of the Russian system of government again confronts with the existence of the strict separation of powers in Latin American systems and importance for presidents to have a stable majority in Congress to enforce presidential decrees. In Russia president could realize all his political initiatives without parliamentary majority. The nearest analogy with the Russian system is the Latin American «presidencialismo» or super-presidential system with its power to govern by presidential decrees in a state of necessity. In such type of political systems constitutional and sometimes political prerogatives of the president are almost unlimited. This approach emphasizes first of all the role of meta-constitutional powers of the Russian president and the role of the Russian monarchical tradition in the formation of the system.

The most important arguments of jurists and political scientists which were formulated during current Russian constitutional discussion reflected very clearly the political mobilization in favor of each position or against it, and have been used by competing political forces for the propaganda of their political preferences as presented in the respectable and attractive form of constitutional amendments (for

example, communists argued in favor of parliamentary system and liberals in favor of presidential one).

The important feature of the Russian legal and political situation is the visible expansion of the executive power in the framework of a new concept of administrative vertical. Constitution does not include the closed list of the administrative prerogatives of presidential powers. It also contains no clear restrictions for the using of «sleeping prerogatives» by the president as a guarantor of the constitution. Many critical arguments have been worked out in actual constitutional debate on the ways of administrative and judicial reforms. Two concepts of such reforms appeared from the very beginning of the political transformation. One of them, if put it very schematically, is inspired from the old-fashioned concept of a law-based state and the other one is intended to conserve the maintenance of bureaucratic control over society by using new political technologies. They manifested their positions in the opposite views on the acute questions of transitional period – human rights and the problem of lustration; private ownership and state monopoly; principles of judicial reforms and the role of administrative justice; different approaches to the role of bureaucracy in transitional process (Grajdanskoje obschestvo, 2009).

Political regime of contemporary Russia was labeled by a variety of terms. Among them: a guided democracy; delegated democracy; republican monarchy; elected dictatorship; latent monarchy. The real content of all such definitions is obvious: to show the autonomous role of the executive and administrative power in the process of social transformation and creation of civil society from above.

5. Post-Soviet constitutional cycle: legitimacy and legality of political transformation

The dynamic concept of Post-Soviet transitional period – changes including conflict of legal consciousness and law – is possible on the basis of the cycles theory. Constitutional cycle is a period of time during which in society has come three main stages of constitutional regulation – from the rejection of an old Constitution to the adoption of a new one and than to transformation of the last one in accordance to reality. The predominant role in this transformation is played by psychological component – the establishment in minds some imprints and their consequent change according to the logic of political process. The driving force is the conflict of legal consciousness (the idea of justice) and positive law (as “morality minimum”). The mechanism of cycle is represented in a dynamic of three phases – the rejection of an old Basic law (deconstitutionalization); adoption of a new one (constitutionalization); and a process of transformation of a new constitution under the influence of changing reality (reconstitutionalization) (Medushevsky, 2005a,b).

The Post-Soviet constitutional cycle (1989–2000 years) began to develop with the growing understanding of lost of perspective for the model of nominal constitutionalism and one party dictatorship, namely in the period of the so-called “stagnation”, the appearance of alternative political culture – the human rights protection movement. In this cycle three main phases are visible: the crisis of the

legitimacy of the Soviet model of nominal constitutionalism in USSR in 1989–1991 years, and than in Russia (1991–1993) (combined with formation of the opposite centers of constituent power and multiplied projects of social and political reestablishment which became the object of intensive debates in society). The creation of the new constitutional establishment (constitutionalization) – the adoption of a new Constitution of 12 December 1993 as a result of constitutional revolution. And later, especially after the year 2000 appeared traces of the third stage – the reconstitutionalization. On this phase the difficult search for the combination and reconciliation of new constitutional forms (some of them transplanted from outside, some of traditional national origin) and changed social reality has taken place. The question arises: in which size the third phase of the recent constitutional cycle could be ended as it was previously in restoration of authoritarianism in one or another historical modification. And what should be done to prevent such evolution? The debatable question of a current politics concerns the genesis and elaboration of the Russian constitution and some internal contradictions in the transitional constitutionalism. Till now there are a lot of critics of the existing constitution on the ground of the illegitimacy as well as illegality of its adoption. At the core of this approach is the discussion about relationships between legitimacy and legality, different views on the series of Coup d'Etat which catalyzed the destruction of political system and made the breakdown of the Soviet (nominal) constitutional tradition unavoidable (Medushevsky, 2006).

From this brief observation one could see that conflict between legality and legitimacy was really sharp: Russia in last twenty years had a full scale constitutional revolution which started with a gradual reforms and evaporation of constitutional legitimacy, than it confront the period of the rude destruction of the old law and at the end of the whole period – to the elaboration of a new constitution and stabilization of it by the process of the posterior legitimization which is unfinished till now.

6. Reason and society: the idea of the Post-Soviet restoration

Discussions about origins of the constitution and its legitimacy became very sharp on the eve of 20-th anniversary of the Russian Constitution of 1993. They represented a quite opposite strategies of constitutional reforms. Conservative political reform addenda concentrates on such aspects as constitutional changes, structure of power, and legitimacy of political regime. Proposed Constitutional transformation include such principle changes as the elimination of value free character of positive law, secular character of the state and education, the reinterpretation and limitation of human rights and liberal freedoms. The long debate had taken place about constitutional incorporation of norms about state ideology or national doctrine principles. Legal changes were proposed according to this guiding principles in the constitutional, international, civil, criminal, family, administrative law as well as mass-media and Internet-law regulations and procedures. Among important proposed innovations were: the repressive anti-

corruption measures, reinstallation of capital punishment, limitation of the role of international humanitarian law and European Court of human rights in national affairs, enforcement of state security services in terms of their prerogatives and even new tourism legislation to minimize the popularity of tourism abroad. All such initiatives of different conservative think tanks were presented in the proposed projects of state sovereignty, state security and information security doctrines (Iakunin, 2009; Ideia suverenitena, 2009).

The legitimacy of regime under construction according to this approach should be based not on democratic choice but on the idea of loyalty of subjects to the sovereign – the state power. The distaste for parties and the disrepute of politicians in the mass consciousness inevitably reflect on the institutions in which they are housed. And if representative institutions themselves are generally perceived as inadequate instruments of democracy, than saving the situation becomes quite a task. Invectives against politicians abound in the so-called anti-parliamentary literature of the late nineteenth century, and have recurred ever since (Sartori, 2002, pp. 145–147). In Russia the idea of paternalism, loyal behavior and humility (or even servility) to supreme power is the mainstream of right-wind ideological doctrines such as “Manifesto of enlightened conservatism”; “The Project of Russia”, “Russian doctrine” – eclectic mixture of ancient conservatism, socialism, nationalism, Slavophil and Eurasian concepts of a new Empire. Occasionalism as “the magic hand of chance” and believe in providential political leader is another side of anti-parliamentary and anti-party romantic feelings. The language of such documents is similar to the lexica of conservative romantics from the epoch of Otto von Bismarck or Napoleon III, and reproduce many ideological cliché from Weimar Germany, Italy, Spain or France under Mussolini, Franco, Salazar and Petain but not from manuals of contemporary historians or political scientists (Schmitt, 1998, 2004).

In order to restore “symphony” of society–state relations it is recommended to make reinstallation of historical institutes, more appropriate to mass consciousness in the form of “Land Assembly” (“Zemsky Sobor”) or system of Soviets as surrogated forms of social representation. Some authors go so far as to put arguments in favor of the restoration of estate system, aristocracy or even monarchy. The idea to convoke the Constitutional Assembly in order to adopt a new constitution recently became popular in these circles. The Russian Church played an important role in this debate arguing the prevalence of collective spirit of fairness over individual human rights and necessity to incorporate individual into traditional religion-based system of values. Authoritarianism is represented as a unique possibility to stop the destruction of “national identity”. Constitution-alism as such is blamed by many conservative romantics as an artificial product of uncritical westernization. They applauded recent governmental decisions to regulate and restrict the non-governmental organizations, supported measures against “aggressive installation of Western liberal political culture” in other parts of the world and proclaimed that the authentic Russian civilization is based on predominance of the national state and charismatic

leadership of any kind (religious or secular ideology). The rise of nationalism in Post-Soviet period originated mainly from the conflict between Russian and Soviet identity in the late Soviet Union (Hosking, 2006). The natural form of future conservative statehood thus should be the new Empire – the supra-national form of ruling class and government (also in artificially recreated archaic forms). The predominant role of the Russian nation as a “state-building nation” must be ensured in this Empire by fixed legal norms incorporated to the Constitution, or constitutional laws. The highest principles of the Russian statehood should be formulated and officially declared as a National doctrine. The possible result of this program of constitutional transformation seems to be the rebirth of the social utopianism – the idea of restructuring of global political addenda in terms of conservative values, national interests and authoritarianism, export of conservative messianic culture to other countries of the world in order to stop “humanitarian imperialism of the West” and subversive activity of a hidden “global government” (Buduschie ugrozy, 2009).

The romantic idealization of Russian specificity in such aspects as religious beliefs of traditional population (which is not exist today), statehood (legitimacy and the special system of power), universal beliefs and ethics is not only a form of nostalgia. New political theology under construction absorbed archaic ideas as a form of quasi-scientific explanation. The idea to close Russian society and state from destructive components of globalization has practical implications: the rejection of constructive dialog, legal forms of conflict solution, the exploitation of ancient stereotypes, the apology of autarkic (closed) state and the using of filtration of information or different concepts of censorship. The same kind of ideas symbolized a cultural conflict of modernity everywhere. This bulk of ideas is of course not typical specially for Russia, was taken by romantics from western conservative heritage and can be found in all modernized states of Europe, Latin America or Asia which experimented with guided democracy or authoritarian modernization.

7. Conclusion: the effectiveness of law

The conflict of law and justice, formed in the period of constitutional crisis of Perestroika and later in 1991–1993, became the basis of the cycling dynamic of Post-Soviet constitutionalism. Marked the disruption between legitimacy and legality this conflict formed the ground for debates on all key problems – relationships between constitutional and constituent power (the necessity of convocation of Constituent assembly or the search of solution via amendments to the existing constitution); possibilities of constitutional revolution or counterrevolution (in the form of “conservative revolutions” as opposed to “colored revolutions”) and reform (the last idea is interpreted in favor of conservative turn to “reality”); the calculation of traps and mistakes on this path (constitutional coups, parallelism and sham constitutionalism) and constructivism: the elaboration of administrative and judicial reforms in society of transitional type; transplantation of foreign models and the problem of their

effective functioning; strategy and tactic of constitutional reform making. At the core of political debates appeared problems of free elections; the position of intellectuals in front of political power (collaboration and loyal behavior or rejection of it); the search for legitimacy of the existing power on the basis of traditionalism or modernization (Pravo i obschestvo, 2008).

The reaction of society on closing phase of the Post-Soviet constitutional cycle became the appearance of the concept of Post-Soviet Restoration which put under question simultaneously justice and legality of contemporary political order and develop a rather dangerous alternative to the model of liberal democracy. That opens possibilities for the diametrically opposed interpretations of the Constitution in action – on the basis of force and of law. The first approach realized in alternative projects of political reforms (of extreme right or left orientations) which is represented by the idea of radical revision of Basic Law in “accordance with reality” till the rejection of the of law-based state as artificial product of Europeanization in 1990-s. Oppositely the idea of priority of law over force which was dominant in the period of the adoption of the Constitution in spite the revolutionary character of this introduction, makes it necessary the restoration of parliamentary-presidential regime. This idea is in accordance with the whole logic of Russian historical liberal projects with their slogans about representative government. From this position the acute problem is the place of dualistic system in history: causes of their instability, coup d’etats in them, and other peculiarities of Russian transitional regimes – prerogatives of the Head of state, the reciprocal relations between decree (ukaz) and law, the institute of marshal law, the decree law prerogatives of President and control over its enforcement, meta-constitutional prerogatives of the Head of the state and limits of delegated prerogatives of administration. The central part of the program and constitutional amendments aimed at reconsideration of political structure of the state regarding such principles as constitutionalism, federalism, parliamentary democracy and separation of powers as represented in the Russian Constitution of 1993.

Three main strategies of political modernization were proposed in transitional period: liberal idea to transform this system into the “normal” law-based state of Western-type democracy (in the form of parliamentary, or mixed parliamentary-presidential regime); the pragmatic opinion to keep the system of limited pluralism for transitional period with subsequent liberalization of it, and conservative idea to restore the fool-scale authoritarian system congenial to historical form of unlimited power in monarchical or dictatorial form (Modely obschestvennogo pereustroistva, 2004). This debate is important in the context of separation of ways between different countries of Post-Soviet areal: for one group of them the search for political alternatives to the Russian model was found in “colored revolutions”; for another – in legal modernization of existing systems, for the third – in total rejection of constitutional and political reforms in order to conserve stability and “vertical of power” even by conservation of the most archaic elements of political regimes in power (15 let Rossiiskoi konstitutsii, 2008, N. 6). Restoration ideas are in

complete agreement with the vector of a real transformation of constitutional order. As it was in old pre-revolutionary literature the recent authors emphasizes the phenomenon of constitutional parallelism – changes and transformations in Constitution by it’s legal or judicial interpretation. The discussion about the reality of constitutional limitations of monarchical power and sham constitutionalism at the beginning of the XX century reappeared in a new form in process of interpretation of the existing constitutionalism. It was interpreted as guided democracy, para-constitutionalism, authoritarianism and even latent monarchy. Amendments which were adopted to the Constitution in 2008 created grounds for the so-cold imperial presidential power in Russia.

In the context of political ideal of the law-based state the following issues of the Russian modernization process should be put under debate: the critic of mutes of conservative political romantic on the basis of reliable knowledge and demonstration of potential of constitutional norms for the development of democratic modernization; making broader guarantees of the social pluralism (multi-party system, the role of NGO and mass-media); the solution of federalism problems in accordance with international experience and on the basis of more strict separation of competence between federation and subjects, the broadening of legislative and administrative authorities on the local level, budget federalism and bicameralism (the logic of the formation of the Upper chamber in a federative state); the movement toward functioning mixed president-parliamentary system of government; the extension of control functions of parliament and making clearance in the distribution of prerogatives between President and government (representative government); the strengthening of the independent role of judicial power and legitimacy of guiding precedents of judicial decisions; legal enforcement of acts on local government and self-government in their relations with local authorities; creation of administrative justice and finally overcoming the traditional social stereotypes, based on legal nihilism in order to enforce the demand for law.

On this way as we think, it is possible to make bridge between law and justice in Post-Soviet society; to find compromise between reason and tradition, ideal and reality, solidarity and power, juridical norm and force, legitimacy and legality, public ethic, juridical doctrine and effective law; in whole – the achievement of targets of democratic modernization.

References

- 100-letie “Vekh”: Intelligentsia i vlast v Rossii. 1909–2009: “Krugly stol”// Rossiiskaia istoria, 2009, N. 6.
- 15 let Rossiiskoi Konstitucii// Otechestvennaia Istoria, 2008, N. 6.
- Administrativno-territorial'noe ustroistvo Rossii. (2003). *istoria I sovremenost*. Moscow: Olma-press.
- Billington, J. H. (2004). *Russia in search of itself*. Baltimore and London: The J. Hopkins University Press.
- Buduschie ugrozy chelovechestvu i Rossii. Materialy nauchnogo seminar2009*. Moscow: Nauchnyi expert, Vypusk N.5.
- Dam, K. W. (2006). *The law-growth nexus. The rule of law and economic development*. Washington: Brookings Institution Press.
- Diskurse der Personalität.Die Begriffsgeschichte der “Person” aus Deutscher und Russischer Perspektive. Hrsg von A.Haardt und N. Plotnikov. München: Wilhelm Fink, 2008. S. 207–223.

- Edinoe pravovoe prostranstvo Evropy i praktika konstitutsionnogo pravosudia* 2007. Moscow: Institut Prava i Publichnoi Politiki (Institute of Law and Public Policy).
- Gosudarstvennaia Duma Rossiiskoi imperii. 1906–1917* 2006. Moscow: Rosspen, Encyclopedia.
- Gosudarstvo i nacia v Rossii i Centralno-Vostochnoi Evrope. Materialy mejdunarodnoi nauchnoi konferencii* 2008. Budapest: Russica Pannonicana.
- Grajdanskoe obschestvo i pravovoe gosudarstvo kak factory modernizatsii rossiiskoi pravovoi sistemy* 2009. Sankt-Petersburg: Asterion.
- Hare, R. M. (1998). *Essays on Political Morality*. New York: Oxford University Press.
- Hosking, G. (2006). *Rulers and victims*. Cambridge, Mass.: The Russians in the Soviet Union.
- Iakunin, V. I. (2009). *Novie tehnologii borby s Rossiiskoi gosudarstvennostiu*. Moscow: Nauchnyi expert.
- Ideia suvereniteta v rossiiskom, sovetском i postsovetском kontexte. Materialy nauchnogo seminara* 2009. Moscow: Nauchnyi expert, Vypusk N.4.
- Ideologia "osobogo puti" v Rossii i Germanii: istoki, sodержanie, posledstvia. Pod red. E. A. Paina. Moscow: Tri kvadrata, 2010.
- Implementatsia reshenii Evropeiskogo suda po pravam cheloveka v praktike Konstitutsionnykh sudov stran Evropy* 2006. Moscow: Institut Prava i Publichnoi Politiki (Institute of Law and Public Policy).
- Istoria Rossiiskogo Konstitucionalizma // *Rossiiskaia istoria*, 2010, N. 1.
- K 90-letiju Fevral'skoi Revolucii // *Otechestvennaja istoria*, 2007, N.6.
- K 90-letiju pervoi Rossiiskoi Konstituanty // *Otechestvennaja istoria*, 2008, N. 2.
- Konstitucionnoe razvitie. (2007). Zadachi institucionalnogo proektirovaniia. In *Sbornik statei*. Moscow: Higher School of Economics.
- Konstitucionnye prava v Rossii: dela i reshenia* 2002. Moscow: Institut Prava i Publichnoi Politiki (Institute of Law and Public Policy).
- Konstitucionnye proekty v Rossii XVIII-XX veka. Pod red. A.N. Medushevskogo. Moscow: Rosspen, 2010.
- Konstitutsia Rossiiskoi Federatsii v resheniach Konstitutsionnogo suda RF* 2005. Moscow: Institut Prava i Publichnoi Politiki (Institute of Law and Public Policy).
- Konstitutsionnyi sud kak garant razdelenia vlastei* 2004. Moscow: Institut Prava i Publichnoi Politiki (Institute of Law and Public Policy).
- MacIntyre, A. (1984). *After virtue*. London: Univ. of Notre Dame Press.
- Medushevsky, A. (2002). Power and property in Russia: the adoption of the land code. In *East European constitutional review*, Vol. II, Number 3 (summer).
- Medushevsky, A. N. (1998). *Demokratia i avtoritarizm: Rossiiskiy konstitutsionalizm v sravnitelnoi perspective*. Moscow: Rosspen.
- Medushevsky, A. N. (2005a). *Proekty agrarnykh reform v Rossii, XVIII-nachalo XXI veka*. Moscow: Nauka.
- Medushevsky, A. N. (2005b). *Teoria konstitutsionnykh ciklov*. Moscow: Vishaia shkola ekonomiki.
- Medushevsky, A. N. (2006). *Russian constitutionalism. Historical and contemporary development*. London: Routledge.
- Mesto Rossii v Evrope i Asii. Pod red. D.Svaka. Budapest– Moscow: Russica Pannonicana, 2010.
- Modely obschestvennogo pereustroistva Rossii. XX vek. Pod red. V.V. Shelohaeva. Moscow: Rosspen, 2004.
- Mommsen, M., & Nussberger, A. (2007). *Das System Putin. Gelenkte Demokratie und politische Justiz in Russland*. München: Beck.
- Nacionalnaia ideia i jyznesposobnost gosudarstva. Materialy nauchnogo seminara* 2009. Moscow: Nauchnyi expert, Vypusk N.2.
- Nacionalizm v mirovoi istorii. Pod red. V.N.Tishkova i V.A.Shnirelmana. Moscow: Nauka, 2008.
- Nozick, R. (1974). *Anarchy, state and utopia*. New-York: Blackwell Publishing.
- Obraz Rossii s centralno-evropeiskim akcentom. Materialy mejdunarodnoi konferencii* 2010. Budapest, Univ. Press.
- Obschestvennaia mysl Rossii XVIII-nachala XX veka* 2005. Moscow: Rosspen, Encyclopedia.
- Oktiabr'skaia revoliutsia i razgon Uchreditelnogo sobrania: "Kruglyi stol" // *Otechestvennaia istoria*, 2008, N.6.
- Pravo i obschestvo v epochu peremen* 2008. Moscow: Institut gosudarstva i prava RAN.
- Rawls, J. A. (1971). *Theory of justice*. Harvard, Univ. Press.
- Reformen im Russland des 19. und 20. Jahrhunderts. Westliche Modelle und russische Erfahrungen* 1996. Frankfurt am Main, V.Klostermann.
- Rossia i Zapad: Chto razdeliaet? Materialy nauchnogo seminara* 2009. Moscow: Nauchnyi expert, Vypusk N. 7.
- Rossiiskaia imperia ot istokov do nachala XIX veka. Ocherki socialno-politicheskoi i ekonomicheskoi istorii* 2011. Moscow: Russkaia panorama.
- Rossiiskii konservatism* 2010. Moscow: Rosspen, Encyclopedia.
- Rossiiskii liberalizm serediny XVIII-nachala XX veka* 2010. Moscow: Rosspen, Encyclopedia.
- Freeze, G. (Ed.). (2009). *Russia. A history*. Oxford, Univ. Press, P.503.
- Sandel, M. J. (2010). *Justice: What's the right thing to do?* London: Penguin Books.
- Sartori, G. (2002). *Comparative constitutional engineering. An inquiry into structures, incentives and outcomes*. London: Palgrave. 145–147.
- Schmitt, C. (1998). *Politische Romantik*. Berlin: Duncker und Humblot.
- Schmitt, C. (2004). *Politische Theologie*. Berlin: Duncker und Humblot.
- Sobstvennost na zemlu v Rossii: istoria i sovremennost* 2002. Moscow: Rosspen.
- Sovet Federatsii. (2003). *Evolucia statusa i funktsii*. Moscow: Совет Федерации. Лволюция статуса и функций. М., Institut Prava i Publichnoi Politiki (Institute of Law and Public Policy).
- Conrad, Ch., & Kocka, J. (Eds.). (2001). *Staatsbürgerschaft in Europa. Historische Erfahrungen und aktuelle Debatten*. Hamburg: Korber-Stiftung.
- Stalinizm kak model socialnogo konstuirovania // *Rossiiskaia istoria*, 2010, N.6.
- Teoria i metodologia kognitivnoi istorii: "Kruglyi Stol" // *Rossiiskaia Istoria*, 2010, N. 1.
- Medushevsky, A. N., & Skyner, L. (Eds.). (2004). *Transformation and consolidation of market legislation in the context of constitutional and judicial reform in Russia*. Moscow: Institut Prava i Publichnoi Politiki (Institute of Law and Public Policy), Analytical Report 2003.
- Velikaja reforma i modernizatsia Rossii // *Rossiiskaia istoria*, 2011, N.1.
- Walzer, M. (2007). *Thinking politically. Essays in political theory*. Yale University Press.
- Zapad-Rossia-Vostok v istoricheskoi nauke XXI veka. Materialy mejdunarodnoi konferencii* 2011. Saratov: Nauka.