



CONSTITUTIONAL CRISIS IN RUSSIA AND HOW TO RESOLVE IT

Elena Lukyanova
Ilya Shablinsky
Vladimir Pastukhov

IMR INSTITUTE OF MODERN RUSSIA



CONSTITUTIONAL CRISIS IN RUSSIA
AND HOW TO RESOLVE IT

Report by the Institute of Modern Russia (Open Russia)

Key provisions of this report were developed by a group of distinguished authors under the general supervision of Professor Elena Lukyanova, S.J.D., Professor Ilya Shablinsky, S.J.D., and Vladimir Pastukhov, Ph.D.

Photos: Vladimir Astapkovich / TASS (cover);
Igor Zotin / TASS

Introduction	4
I. THE COLLAPSE OF IMPLEMENTATION OF THE RUSSIAN CONSTITUTION	5
1.1. Historical background.....	6
II. CHRONIC CONSTITUTIONAL FAILURE: DIAGNOSIS AND TREATMENT	7
III. THE ROOTS OF THE CONSTITUTIONAL CRISIS	9
3.1. Adoption of the current Constitution	9
3.2. Specifics of the constitutional model	9
3.3. Constitutional counter-reforms in 1994-1999.....	10
3.4. Constitutional counter-reforms in 2000-2015.....	11
IV. HOW THE PARAMETERS OF THE CONSTITUTIONAL ORDER WERE CHANGED AS A RESULT OF THE COUNTER-REFORMS	14
4.1. System of separation of powers.....	14
4.2. Elections System.....	15
4.3. Parliamentarism.....	15
4.4. Federalism.....	16
4.5. Human rights	17
4.6. Constitutional control	18
V. HOW CONSTITUTIONAL CRISIS MANIFESTS ITSELF.....	19
5.1. Form of government	19
5.2. Political regime.....	19
5.3. State structure.....	19
5.4. Degradation of government institutions.....	19
VI. THE CONSTITUTION DURING A TRANSITION PERIOD.....	21
6.1. Turnover of political power.....	21
6.2. Right to a jury trial.....	22
6.3. Restoration of constitutional justice	22
VII. LONG-TERM STRATEGY OF CONSTITUTIONAL REFORM IN RUSSIA	23
7.1. Local Governance	23
7.2. Strong government	23
7.3. New Federalism	24
7.4. Constitutional Assembly.....	24

INTRODUCTION

Russia is at a constitutional turning point. The outcome of this moment—an anti-constitutional coup or the beginning of a long effort aimed at the restoration of constitutional freedoms and principles that have been gradually usurped for 15 years by reactionary reforms, which have one by one eroded the democratic essence of the Russian Constitution—depends upon the people. Today, everything points to the willingness of the authorities to use foreign and domestic challenges—some of them real, others of their own making—to eradicate any remaining sense from the Constitution.

There is every indication that an anti-constitutional coup is already in process. In Russia, power is being concentrated in the hands of unconstitutional authorities that have taken the place of constitutional institutions. Some of these authorities have been formalized (such as the Presidential Administration or the Security Council), while others exist somewhat “beyond politics”—as a small circle of presidential insiders. Russia does not know by whom it is governed, let alone who controls these people.

Simultaneously, there are signs that the parliament is being transformed into a Congress of the Peoples’ Deputies, designed after the Soviet mod-

el. Its only function is to legitimize the decisions made by the president and his inner circle. Absolutely unconstitutional “joint meetings” of deputies of the State Duma and the Federation Council have become more frequent, indicating that the political system is accelerating toward a so-called “re-Sovietization” period. All of these signs are evidence of a gathering constitutional crisis, one of the deepest to strike Russia in its history.

The constitutional crisis that faces us today must and can be overcome by restoring the democratic essence of the Russian Constitution through a radical but balanced and gradual reform aiming at the restoration of constitutional order in Russia. The Russian public will need to make the decision to embrace such reform in the near future; and it has to be ready to do so.

We dream of a strong and prosperous Russia, and we understand that in the modern world, Russia can be strong and prosperous only if it becomes a constitutional state, governed by the rule of law. It took over one hundred tragic years during which the Russian people suffered enormous losses, for this truth to be realized. The current generation needs to make sure that these losses were not in vain.

I. THE COLLAPSE OF IMPLEMENTATION OF THE RUSSIAN CONSTITUTION

The 25th anniversary of the Russian Constitution sees the country's post-Communist constitutionalism in a state of crisis. This crisis is of a specific nature: it is a crisis of the implementation of the Constitution, and it is manifested in the three following ways:

- Discrepancy between established practice in applying the law, and fundamental constitutional principles;
- Limitations in implementing basic constitutional rights and freedoms;
- Obstructions in the work of the key mechanisms that protect constitutional rights and freedoms.

The most fundamental constitutional principles—regular rotation of political power, separation of powers, and political and economic pluralism—were corrupted first. The conditions for permanent unconstitutional seizure and maintenance of political power, including the ability to bypass electoral mechanisms, were created. The executive power acquired limitless control over the legislature and the judiciary, and came to monopolize the political and economic life of the public. Inside the executive power, the influence of unconstitutional “supplementary” structures that appropriated the powers of the constitutional authorities began to grow.

Property rights, a crucial area of constitutional rights, have been significantly limited. The government often applies repressive criminal justice to expropriate property. No one—from the ordinary Russian to a major shareholder of a nationally strategic company—can be guaranteed that his

or her property will not be raided, as raiding has become a legalized form of redistribution of property, with the participation and help of the state bureaucracy.

The limitation of property rights has inevitably led to limitations on other rights and freedoms. Electoral rights and freedom of speech have been limited through political control and monopolization of mass media, while freedom of assembly has been limited as a result of unjustified administrative restrictions and disproportionate sanctions.

The right to personal security and the right to a fair trial have been substantially limited as well. The law enforcement system has expanded its authority far beyond its constitutional limits, and the government has not undertaken any measures to deter it. Today, as the economic crisis develops, the Russian people's social rights (including the right to fair retirement pay and the right to free healthcare and education) are also becoming more and more limited. Consistent and purposeful elimination of judicial independence, and reduction of the court system into an administrative appendage of the government machine, have caused obstructions in the channels through which people can get efficient protection of their infringed constitutional rights and freedoms. This applies to the operation of the court system at large, including the general and arbitration courts.

But it is criminal procedure that has suffered the most, having lost almost all characteristics of justice. The damage to constitutional justice

is just as serious: its competence and independence, too, have been substantially reduced.

1.1 Historical background

The crisis in implementation of the Constitution did not emerge out of nowhere. This crisis has both common and special causes. Among the common causes are historical, cultural, social, economic and strictly political circumstances. Some of the special causes include the specific genesis of the current Constitution, and what one can call “birth traumas” associated with its development.

The weakness of the institution of private property in Russia, as well as its lack of a middle class—two major embodiments of constitutional values in the West—impeded the development of Russian constitutionalism. Even a hundred years ago, the Russian bourgeoisie was socially and politically weak, while the intelligentsia shared mostly populist views (*narodnichestvo*) rather than constitutionalist ones. Seventy years of the Soviet regime did nothing to encourage constitutionalism. Legalization of the private market fol-

lowing an almost century-long break could not automatically create an environment in which a new Russian bourgeoisie could emerge, or the former Soviet intelligentsia could be transformed into a middle class. The social and political effects of a market economy could not appear before the economy itself started functioning. Initial expectations in the 1990s for Russian constitutionalism to mature were not misplaced; they were just too early. The time for such maturation has only come today.

Russia’s constitutional system was installed under the most unfavorable conditions, which were determined by two main factors: the acceleration of political and economic reforms (which were partially enforced and, in some cases, based on unfounded hopes for the fast transformation of the country), and an inconsistent and incomplete rejection of the policies of “de-Sovietization” of the political sphere, and “de-Communization” of national ideology. As a result, post-Communist Russian constitutionalism turned out to be declarative rather than substantive.

II. CHRONIC CONSTITUTIONAL FAILURE: DIAGNOSIS AND TREATMENT

The crisis in implementation of the Constitution results from a number of reasons, including those drawing on the Fundamental Law of Russia. While acknowledging the historical significance of the 1993 Constitution, we should note that this draft was not perfect. A ticking time bomb had been placed into the body of the Constitution—and two decades later, it caused the transformation of the constitutional system into the Soviet authoritarian one.

The Constitution proved incapable of resisting the restoration of the regime of personal rule, unconstrained by any legal checks and balances. Elimination of judicial independence and the imposition of state control over mass media have become hallmarks of this regime. In part, this transformation can be explained by the fact that the current Constitution was not the result of a national consensus.

The Constitution was developed behind closed doors, and pursued one single goal—to legitimize the victory of one of the then political forces in a sharp confrontation, and thereby guarantee stable rule by the winning party. Certainly, these are not the goals on which a constitution should be built, a weakness that inevitably affected the document's destiny. Many of today's issues have their roots in the tragic events of the fall of 1993, when a polarized Russian society failed to find a compromise, and resorted to a state coup—though one can hardly call this event “unconstitutional.”

This “birth trauma” left a deep mark on the current Russian Constitution. One cannot help but notice its dual nature and evident internal

contradictions. The vagueness of its principles, the ambiguity of controlling mechanisms, and the dysfunctionality of the system of constitutional justice became the key factors that preconditioned the Russian post-Communist constitutionalism's chronic failure and its inability to retain power within the limits outlined in the text of the Constitution.

Constitutional principles are the key elements of any constitutional system, but many of the principles found in the current Russian Constitution (in contrast to the fundamental rights and freedoms) were formulated in a sloppy and insufficient manner. It is hard to say whether this was the result of carelessness or deliberate action, but these weaknesses have undermined the liberal, constitutional meaning of the country's Basic Law.

The issue of control over political power should be central to any constitutional system, but in the 1993 Russian Constitution, it plays a supporting role. The document pays much less attention to the mechanisms of public control than it does to outlining fundamental rights and freedoms. But without these mechanisms, these rights and freedoms are non-enforceable—a reality that has been proved by the evolution of post-Communist constitutionalism. Restrictions deterring the accumulation of excessive power within the hands of one individual should be precise and concrete, not as vague as they are now. Furthermore, adherence to these restrictions has to be supported by a system of checks and balances, a matter that was almost entirely ignored by the creators of the current Constitution.

The establishment of a rigorous constitutional justice could have compensated for these downsides of the Constitution. Defects of the constitutional draft could have been counterbalanced by efficient operation of the system of constitutional justice. One has to give credit to the document's authors, who envisaged the Constitutional Court specifically for the purposes of administration of constitutional justice. Initially, the system of constitutional justice was efficient, but little by little, its competence and independence were curtailed through constitutional counter-reforms. As a result, the system of constitutional justice became dysfunctional and was virtually excluded from the process of implementation of the Constitution. This situation emerged from two developments: first, the Constitutional Court distanced itself from handling acute constitutional issues, justifying its recusal by its unreasonably limited competence; second, even when the Constitu-

tional Court does deliver important rulings, their binding nature turns out to be unsubstantiated by other courts. As a result, the Constitutional Court's key mission—to interpret and implement constitutional norms—has not been accomplished.

Like any chronic disease, post-Communist constitutional failure responds poorly to treatment. To resolve the current crisis of implementation of constitutional norms, both urgent measures and long-term corrective programs are required. Figuratively speaking, we need to resuscitate the Constitution and then launch a rehabilitation program, with the final goal of transforming Russia from a fading pseudo-empire into a modern nation-state that will be capable of adequately meeting foreign and domestic challenges.

III. THE ROOTS OF THE CONSTITUTIONAL CRISIS

3.1. Adoption of the Current Constitution

The current Russian Constitution was developed under the uneasy circumstances of the diarchy that was de facto established in the country in 1993. It emerged out of the tough struggle between various political groups representing different branches of power— the Supreme Soviet, the Congress of People’s Deputies, and the presidential administration. Technically, the key reason for the conflict was disagreement about what new form the government should take. This main reason, however, was supplemented by other, deeper reasons, mostly related to the economic crisis, the collapse of the Soviet Union, and Russia’s new role in international politics. The conflict resulted in the worst possible form of resolution— an armed confrontation that ended up with one group suppressing the other.

During the crisis, all representative bodies were forced to dissolve, the work of the Constitutional Court was suspended, the headquarters of the Supreme Soviet were fired at and seized, and blood was shed. Under the state of emergency in Moscow, Boris Yeltsin, Russia’s president at the time, issued a decree setting a constitutional referendum. The referendum was then held in accordance with a set of rules developed specifically for this situation—rules that were different from those envisaged in the legislation.

As a result, in the fall of 1993, the president carried out a constitutional coup, or a constitutional revolution (although these events are often referred to as “constitutional crises,” such crises are rarely resolved with the help of tanks). This event transformed the whole paradigm of the

Russian Constitution and resulted in the demolition of the existing constitutional tradition.

Following these events, revisions to the draft constitution were carried out behind closed doors to accommodate the corporate and political interests of the winning political group. Although, in June and July 1993, various public groups had been involved in discussions of the draft within the Constitutional Assembly, after the crisis, in October and November 1993, that key role was taken by officials in the presidential administration.

Indeed, a number of the country’s prominent constitutional law experts contributed to the development of the Constitution’s basic provisions. However, the crucial part of the text (that which envisaged the delineation of powers between the branches of state power) was crafted inside the presidential administration. The officials who developed it were concerned solely with the political landscape of the moment and the interests of their patron—the president.

As a result, the country became trapped by this precedent—the adoption of a liberal-democratic Constitution by fiat from above. It is a specifically Russian way, one that we have inherited, from history, which duly caused a familiar constitutional crisis, but under different historical circumstances.

3.2 Specifics of the Constitutional Model

The Constitution’s “birth trauma” left a deep imprint on its contents. On the one hand, it is a liberal constitution drawn upon the models of the best European democratic constitutions of the

second half of the twentieth century. On the other hand, in jurisprudence it is considered one of the weakest of the constitutions adopted in the late 1980s and early 1990s, as part of the wave of democratic revolutions that swept the world at the time.

The main reason for the document's weakness is that it consists of two essentially incompatible parts: the liberal, modern, European-minded Chapters One and Two, and the archaic, authoritarian Chapters Three to Eight. The urgent conditions under which the draft constitution was developed took a toll on the quality of the document, creating numerous legal problems including gaps, defects, conflicting and contradictory provisions, dispositivity, lack of legal clarity, and the framework nature of certain norms.

3.3 Constitutional Counterreforms, 1994–1999

The new Constitution did not take hold easily. Legal scholars and practitioners gave a very low evaluation of its performance in the first five years of its existence. In 1998–1999 alone, the Ministry of Justice registered around 50,000 laws passed by the constituent entities (subjects) of the Russian Federation, of which one-third contradicted the federal Fundamental Law. Over the same period, the Prosecutor's Office lodged protests against 1,400 laws of the subjects of the federation on the ground that they were unconstitutional.¹ Nevertheless, assimilation of the new Constitution and harmonization of the old and new legal systems gradually took place.

Still, the key provisions that made up the foundations of the constitutional order were transformed at only a minimal level. The changes

pursued only one goal—the extra-constitutional expansion of presidential powers (through presidential decrees, federal laws, acts of the Constitutional Court).

In this period, these powers mostly dealt with the federal authorities and hardly touched upon the regions. Different models of the relationships between the president, the parliament, and the government were being tested—but the president almost always gained the upper hand. The conflict that emerged over the appointment of the prime minister in the spring of 1998 serves as a telling example. In the standoff between the president and the State Duma over the candidacy of Sergei Kiriyenko, the Constitutional Court decidedly took the president's side. Later, in a dissenting opinion, one of the justices noted that this decision would have been impossible “without certain violations of the semantics of the Russian language.”

President Yeltsin played a particularly controversial role in the history of Russian constitutionalism. No doubt, he thought himself the creator and defender of the country's democratic institutions. Indeed, institutions such as the independent media and political parties were given a chance to develop under his presidency, and gubernatorial elections were formalized by law. But some of Yeltsin's personal characteristics—his impulsiveness, authoritarian tendencies, and overconfidence—stood in the way of necessary reforms, and ultimately allowed those reforms to be thwarted.

The crucial change in Russian politics was marked by the introduction of the term “successor to the president” and the consequent assumption of this position by Vladimir Putin, whose investi-

¹ Luchin, Victor, “Constitutional Delicts,” *State and Law*, 1 (2000): 12.

ture concluded this stage of the “constitutional involution.” By issuing his Decree No. 2, Putin formalized unprecedented rules according to which a Russian president, having resigned, shall not be responsible for actions (with the exception of grave crimes) undertaken during his or her term, and is granted material and other guarantees upon resignation.

3.4 Constitutional Counter-reforms, 2000–2015

Shortly after coming to power, Vladimir Putin launched a full-fledged attack on the foundations of Russia’s constitutional order. First, he targeted two key areas: federalism and the political regime. Constitutional meanings, which determined the goals and methods of domestic politics, were successfully modified during Putin’s first presidential term.

By 2002, a large number of revisions had undermined the shared competence of the federation and its subjects, thus discrediting the idea of federalism. Amendments to the 2003 law “On the general principles of organization of the legislative (representative) and executive bodies of the government of subjects of the Russian Federation” did not specify certain areas of the shared competence as defined by Article 72 of the Constitution. Later, some areas of the shared competence were directly attributed to the federation.²

Massive attacks were launched against the country’s democratic institutions—referenda, elections, and, indirectly, the parliamentary system. The law on referenda was amended in such a way as to exclude the actual possibility of holding a referendum. The Constitutional Court ruled these amendments unconstitutional, but the par-

liament replaced the repealed norms with even more abhorrent ones.

From the spring of 2002 on, the government began testing its new electoral technology based on application of the administrative resource. It eliminated political competition in the regional elections through a total “cleansing” of the election groups, by pressuring public sector employees, threatening pensioners, stuffing ballot boxes, rigging election results, permitting secret offsite voting, organizing 100 percent voter turnout in psychiatric facilities, and so on. Meanwhile, a coup took place inside the parliament when, in April 2002, Unity, a pro-Kremlin faction (which later became the United Russia Party), seized power by violating the so-called “package agreement” with the Communist Party. (The agreement held that leadership positions in Duma committees had to be distributed between the two Unity and Communist factions). Unity managed to remove members of other factions from those positions.

The unconstitutional practice of prosecuting citizens for lucrative and political purposes was introduced at about the same time. In some cases, law enforcement and judicial authorities started to ignore the fundamental, non-derogable human rights provided by Articles 46, 47, 49, and 50 of the Constitution. This practice has rapidly acquired the characteristics of criminal repression. The term “Basmany justice” (describing the infamously unjust rulings of the Basmany District Court in Moscow) soon entered the vocabulary of Russian and foreign media. Corruption in law enforcement agencies and the courts became endemic.

² Collection of Legislative Acts of the Russian Federation, 2004, Vol. 35, Article 3607.

To retain control over the courts, the president's powers were purposefully expanded further. The provisions of section "f" of Article 83 of the Constitution, which give the president the right to suggest nominees for the upper courts (the Supreme Court, the Higher Arbitration Court, the Constitutional Court) and to appoint federal judges, were distorted. But in December 2001, the law "On the status of judges" was amended to allow the Federation Council to appoint the chairman and deputy chairmen of both the Supreme and the Higher Arbitration Courts, in accordance with the president's recommendation, which did not admit of any alternatives. The president was also granted the right to appoint the chairpersons of all Russian courts, including the district courts.³

The final blow fell after the Beslan school siege in 2004. Using national security concerns as a pretext, the government pushed for the abolition of gubernatorial elections. The mixed electoral system was changed to one of proportional representation; the creation of electoral blocs was prohibited, as was participation in elections by any element of the political system that was not a registered political party. Thus, the constitutional principle of equality of all the non-governmental organizations before the law was violated. These developments laid the groundwork for the deformation of the political system.

The government also changed the regulations governing the founding and registering of political parties, which dramatically narrowed citizens' right to assembly. Parties were burdened with mandatory participation in elections as a legal condition of their existence. Another rule was

introduced that linked political actors to the government, and stripped them of their independence: the parties that win deputy's seats in the parliament are required to receive state budget funding.

Putin's second and third terms as Russia's president (with a break in between for Dmitry Medvedev's presidency) were marked by a consistent, unconstitutional extension of presidential powers at the expense of other government bodies and local self-government organs. The powers that Yeltsin had as a president, were supplemented by the right to dissolve regional parliaments, and increased subordination of executive authorities to the president.⁴

Parliament's authority was gradually reduced, and the Audit Chamber was stripped of its independence. Another round of attacks on the Constitution coincided with the beginning of Putin's third term. In the summer of 2012, responding to increased civil society activity, the government stiffened penalties for participation in unsanctioned public events, and restricted citizens' rights to peaceful, unarmed assemblies. Direct criminal reprisals against dissidents were initiated. Introduction of the term "foreign agent," with regard to NGOs, highlighted the beginning of the building of a new Iron Curtain.

In parallel, freedom of speech in the media and on the Internet was restricted, and interpretations of what constitutes banned political activity were broadened. The Russian Orthodox Church became an active player in public life, after receiving additional benefits and preferential treatment from the state.

³ Krasnov, M., and Mishina E. *Open eyes of the Russian Themis*, ed. T.Morshchakova. (Liberal Mission Publishing, 2007).

⁴ Luchin V., *Constitution of the Russian Federation. Problems of implementation* (Moscow, 2002), p. 482

The Ukraine crisis and the annexation of Crimea and Sevastopol caused an acute reaction from the international community, pushing Russia to the verge of international boycott. The Kremlin's actions have heightened tensions and aggravated manifold the crisis of the national constitutional order.

The accession of the new territories was implemented amid flagrant violations of the federal constitutional laws "On the Constitutional Court" and "On the procedure of acceptance into the Russian Federation and formation of the composition of a new subject of the Russian Federation." Paragraph 4 of Article 15 of the Constitution was also violated when the priority of international law over the country's legal system was put into question.

The construction of this new Iron Curtain continued. Notwithstanding the constitutional principle of equality before the law, the rights of deputies and state officials were limited—they were banned from owning property abroad, and access-

ing foreign financial instruments; their freedom of movement was also limited, as travelling to most foreign countries for them was prohibited. The term "undesirable organizations" was introduced in parliament, and the list of organizations falling into that category was created. According to another bill introduced in the Duma, "anti-Russia propaganda" was considered a criminal offense; under this bill, any criticism of the current authorities can be recognized as such.

The chronology of the development of Russia's Constitution and current legal system is not fully illustrative of the constitutional involution that has taken place. To diagnose the problem more accurately, it is necessary to conduct additional analysis of certain constitutional institutions.

In this report we intentionally do not review the state of the constitutional foundations of the justice system and deformation of the courts system, since the acuteness of these issues requires separate research.

IV. HOW THE PARAMETERS OF THE CONSTITUTIONAL ORDER WERE CHANGED AS A RESULT OF THE COUNTER-REFORMS

4.1. The System of Separation of Powers

The loophole in Russia's constitutional model that allowed for the extension of the president's powers beyond that permitted under a system of the separation of powers created an environment in which the institution of the presidency could transform rapidly into a power branch of its own. Initially granted broad constitutional powers, this new branch has expanded and amplified them manifold at the expense of other branches of power, whipping the latter into submission and establishing itself as the only important institution in the political field and the state overall.

Today, legal experts estimate that the president enjoys 300 to 700 types of unconstitutional powers, both direct and indirect, including those that he can exercise through his subordinates or affiliated persons.

The overarching aim of the system of separation of powers is mutual control and prevention of one of the branches from interfering into other branches' exclusive authority and seizing their power, which is achieved through the mechanism of checks and balances. Thus, the main goal of the Russian presidential power was to fully liquidate these mechanisms, and eliminate the very possibility of their being applied.

The easiest way to achieve this goal was

to change the constitutional rules for forming the government, thereby establishing full control over the government, and so making it dependent on the president. This aim was at the core of the accretion of presidential powers from the representative, executive, and judiciary spheres at all levels. The mechanism of checks and balances—such as those allowing other branches to override the president's veto; remove the president from office; appoint the prime minister, the prosecutor general, the justices of the higher courts, and the officials of the Audit Chamber; and lodge judicial appeals against the president's actions and decisions—were initially formulated quite vaguely in the Constitution. Today, these mechanisms have completely lost their value.

During Boris Yeltsin's rule, the presidential administration was an executive office staffed with a small number of advisors, aides, managers, and jurists. Today, this office has grown into an enormous bureaucratic machine with powerful regional branches (which act as presidential plenipotentiary envoys to Russia's federal districts), federal inspectors, and other unconstitutional bodies that exercise power on the president's behalf. The presidential administration coordinates and makes all the decisions in the country, even the smallest ones. Over the last 15 years, this style and method of governance has become "business as usual." Thus, no opportunities were left for anyone

to check or balance anything, or aspire to do so.

As a result, all the checks and balances have been consolidated within the hands of one individual—the president. All of the other branches of power have been disabled.

4.2. The Electoral System

One of the hardest tasks the president faced in establishing a monocentric system of government was incorporating all of the representative and other elective bodies under the mantle of the presidency. It would have been impossible to achieve this goal without distorting the constitutional principles of the electoral system. Therefore, starting in 2002, no election in Russia was held according to the same set of rules as had governed the previous one. The federal law “On the basic guarantees of electoral rights and the right of citizens of the Russian Federation to participate in a referendum” was amended 73 times, with the size of the text increasing from about 470,000 to 760,000 characters. Amendments were repeatedly added to the same norms, and certain institutions were randomly excluded from the law and then added back to it based on the current state of the political environment or the most pressing practical considerations of the moment (e.g., the addition of the “none of the above” box to the ballot). As a result, the election laws have ceased to be laws per se and have turned into a set of hard-to-follow instructions that are used to manipulate the election process. The devil is always in the details.

The goal of all of these changes over the last 15 years was not to build a platform upon which consensus could be reached, but to form an obedient parliament, and to legitimize the president’s next term in office. That is why the legislation has been changed so many times.

Active and passive electoral rights have gradually been limited. For example, the Constitution initially stipulated a hard and univocal rule (Article 32, Part 4) that citizens who had been declared incapacitated in court or had been sentenced by the court to serve time in prison were not eligible to vote. This rule has since been substantially revised to include not only persons with non-expunged and outstanding convictions for grave and/or especially grave crimes, but also individuals whose convictions have been expunged from official records. To match these revisions, criminal legislation has also been changed to make it impossible for “undesirable” candidates to participate in elections.

In defiance of the constitutional principle of equality of all before the law, eligibility for public office has been constricted to exclude Russian citizens living abroad and citizens who own property outside of Russia. Numerous ways of limiting the right to appeal electoral decisions have been introduced by judicial practice. All of these manipulations have pursued only one goal—to bar bright, smart people who oppose the current authorities from holding elected positions.

A special system of distributing seats in parliament, where the ruling party was always getting more seats rather than a proportional correlation to the voting results, was instituted. The difference in outcome has ranged from 3.6 percent in the 2011 elections to 30 percent in 2003, when United Russia received 37.56 percent of the vote but gained 307 seats in (67.56 percent of) the parliament. Such legislation places the ruling party at an advantage compared to other political parties.

4.3. Parliamentarism

As a result of these manipulations to the electoral legislation, a parliament was formed whose mis-

sion was quite accurately described by the leader of United Russia's Duma faction, when he said that "Parliament is no place for political discussions." According to Duma deputies themselves, "The Duma has turned into a rubber-stamping machine that approves the bills prepared by the presidential administration or the government."⁵

The mission had been accomplished—but it turned out that there was a flip side to this success. The selection of parliamentary candidates on the basis of their loyalties and not their personal qualities delivered a major blow to parliament's professionalism. The de-professionalization of the legislative process has utterly undermined the authority of parliament and increased public mistrust for the laws passed by it. Only 16 percent of the Russian people have a positive outlook on the State Duma's activities, while 56 percent speak of it in sharply negative terms, even declaring the parliament unnecessary.⁶

To compare: during its first six years (1994–2000), the Duma passed 1,213 bills (about two bills per session). Out of this number, 501 bills were rejected or returned to the Duma by the Federation Council or the president, and 904 bills became federal laws.⁷ The fourth Duma passed 1,062 federal laws in its four-year term, and the fifth Duma 1,581, but the current sixth Duma has set a record: according to official statistics, in 2014 alone, it introduced 1,684 bills, of which 464 were passed and signed by the president. This means that the Duma passed 1.5 bills per day, not taking into account weekends, holidays, or vacations.

What is called the Russian parliament today has been transformed into an expensive smoke screen behind which ochlocracy has been substituted for representative democracy.

4.4. Federalism

Russia has never been a federation in its pure form. Historically, even the Russian Empire was not a federal state, a reality reflected in the emperor's 113-word title consisting of the list of the empire's territorial entities and their various legal statuses.

As part of the Soviet Union, Russia was not a "pure" federation either. Until 1989, the Russian Soviet Federative Socialist Republic did not have a two-chamber parliament, its autonomous entities (republics, autonomous districts, and autonomous regions) were directly represented in the USSR's Supreme Soviet, and all of the kraia (territories) and regions were governed directly by the central government according to a unitary model.

Today, Russia is still not a pure federation, but instead a composite regionalist state structured on a model that can be called "mixed federalism." This model does not require the unification of regions, and clearly defines the division of authority between the federation and its subjects. The procedures to be followed in resolving territorial and national disputes are outlined in the Constitution.

Historically, it has been very dangerous to apply the rules of a monocentric power system to such

⁵ Drapeko E. "The Duma Torpedo." *Sovietskaya Rossiya*. 6 July 2002. P. 1.

⁶ Levada Center poll: "Public opinion on the work of the State Duma and its deputies. 26 November 2013. Last accessed on March 14, 2016 at (in Russian): <http://www.levada.ru/26-11-2013/obshchestvennoe-mnenie-o-deyatelnosti-gosdumy-i-deputatakh>

⁷ These numbers date back to February 2001. See: Averyanov A. Memo on the issue of improvement of law-making in the Russian Federation. Moscow, Federal Assembly, 2001. P.1.

a model. In a composite regionalist state, any decision imposed by the center is always perceived negatively by the regions. Any absolute dictate leads to regional degradation and boosts nationalism.

Unfortunately, over the last 15 years, contrary to these history-proven principles, Russian federalism has been rolled back using various pretexts. Some of the key transformations include:

- Changing the nature of federal legislation from a framework to a comprehensive model and unifying legislative regulation;
- Changing the ratio of the powers shared between the federation and its subjects in favor of the federation;
- Limiting the remaining powers of the subjects and scope of their control;
- Creating a whole new list of unconstitutional mechanisms that allow the federation to interfere with regional affairs, and creating unconstitutional bodies to implement these mechanisms.

The paradox of Russia's "manual control" (reliance on power networks for governance) is that regional elites who on the surface may exhibit full loyalty to Moscow are granted independence more rapidly than is safe for the country's territorial integrity. In reality, the regions are controlled by local clans and groups with influence, which have no official (constitutional) legal status.

In Russia, centrifugal forces usually strengthen in two situations that may seem mutually exclusive: when the center is weak and unpredictable or, conversely, when the center exceeds the limits of

its power by interfering with regional affairs. Today, these limits have been exceeded multifold. Russia's special version of federalism has been struck hard. Thus, it comes as no surprise that after the monocentric "power vertical" was established in Russia, the authorities made calls for actions against the country's territorial integrity a criminal offense.⁸

Over the last 25 years, Russia has come full circle from broad decentralization and the "Parade of Sovereignities" back to absolute centralization. Today, it once again faces the threat of a new wave of decentralization that may result in territorial disintegration.

4.5. Human Rights

Initially, Russia's framework of relationships between the state, civil society, and the public was constructed following the examples of democratic countries. The Russian Constitution provides guarantees against state interference in the work of civic institutions, and establishes tough limits on any attempts to restrict citizens' rights. Moreover, human rights and freedoms described in this document are declared the supreme values, which define both the goals and the essence of the government's work. These norms are formalized in the chapters of the Constitution that cannot be amended by the parliament, and have a special legal force, which vests them with decisive authority.

However, the current monocentric power system is incompatible with the concept of external oversight. Having subordinated all other branches of power, and distorted their constitutional meaning, the presidency launched an offensive against civil society and human rights. First, it attacked com-

⁸ Article 280.1 of the Criminal Code of the Russian Federation, "On public calls to actions aimed at violating the territorial integrity of the Russian Federation." Last accessed on March 17, 2016 at (in Russian): https://www.consultant.ru/document/cons_doc_LAW_10699/8b38952a3e743c7996551cbfe4b32d4d336a35ad/

peting political parties that posed a threat to the “power vertical” in elections. These parties were removed from the political field, and an artificial, pseudo-party political system with a limited number of parties approved and funded by the state (the so-called “systemic opposition”) was created instead.

Then came the moves against independent non-government organizations. First to suffer were those NGOs that had certain public oversight functions (such as fighting corruption, overseeing the quality of public services or the election process, and defending human rights). Their activities were substantially limited. Even the Public Chamber, which used to serve as a mediator between the state and the public, was modified so that it lost all authority and became merely a powerless mouthpiece of the state.

At the same time, the constitutional rights and freedoms of the people were limited as well. Today, in Chapter 2 of the Constitution it is impossible to find any right or any freedom that has not been substantially limited or fully neutralized by amendments made to certain pieces of legislation, by extra-constitutional judicial or other law enforcement practice.

One can say with full confidence that in its relationship with civil society and the public, the government has developed the gravest form of legal nihilism—constitutional nihilism. This attitude is

manifested either in direct disregard of the law or in selective adherence to its provisions. The laws are complied with when it is beneficial for the state, and they are ignored if they go against the government’s interests.⁹ Moreover, constitutional nihilism has bred widespread constitutional cynicism, which appears in its most audacious form as conscious violation of the Constitution and disdain for its values.¹⁰

4.6. Constitutional Control

Human rights and freedoms, and constitutional principles and values can be guaranteed and protected only by the judicial system. Therefore, courts must be able to directly apply the Constitution, even in disputable cases in which other laws come into conflict with it. But the Constitutional Court has deprived the judicial system of that ability. In 1998, it claimed a monopoly on constitutional truth,¹¹ and later, the monocentric power system undermined all the remaining mechanisms of constitutional control by depriving the Court of its independence. As a result, the Constitutional Court began appealing to “political feasibility”¹² or “political will,”¹³ explaining its rulings on the basis of “political reasons”¹⁴ and “political factors.”¹⁵

Deprived of the protection it needs, the Constitution gradually lost its crucial role as the indisputable core of the Russian legal system. Over the last 20 years, the legal system itself has been transformed into a parallel reality—something very distant from the Basic Law.

⁹ Matuzov N. “Legal nihilism and legal idealism as two sides of a medal.” *Pravovedeniye*. Vol. 2, 1994. P. 12.

¹⁰ Luchin V. Social and psychological factors of implementation of the Constitution. P. 16.

¹¹ Ruling of the Constitutional Court, 16 June, 1998. No. 19-P “On the interpretation of certain provisions of the Articles 125, 126 and 127 of the Constitution of the Russian Federation.”

¹² Ruling of the Constitutional Court, 1 February, 2005. No. 1-P.

¹³ Ruling of the Constitutional Court, 4 April, 2002. No. 8-P.

¹⁴ Determination of the Constitutional Court, 15 December, 2005. No. 270-O.

¹⁵ Ruling of the Constitutional Court, 16 November, 2004. No. 16-P.

V. HOW CONSTITUTIONAL CRISIS MANIFESTS ITSELF

The constitutional crisis is currently manifesting itself in several ways:

- a change from the form of government established by the Constitution;
- a change from the political regime established by the Constitution;
- a change from the state structure established by the Constitution;
- the Constitution's loss of significance as the core of Russia's legal system, and movement into conflict with the said transformed legislation and its unconstitutional implementation.

5.1. Form of government

Russia's current form of government does not adhere to any republican criteria. It is categorically unconstitutional, comparable only to an absolute monarchy supplemented with a system of succession to the throne.

In fact, the only branch of power left in Russia is the presidential one. All other branches of power—executive, legislative, and judicial—are merely simulacra, or imitations of government bodies, the activities of which have nothing to do with their intended purpose established by the Constitution. These are essentially pseudo-republican bodies that serve to camouflage reality by creating a republican myth to cover the monarchical nature of the state.

5.2. Political regime

The actual condition of a political regime can be determined by a single criterion: the existence or absence of mechanisms that allow the public to participate in decision-making processes.

Among such mechanisms are institutions of direct and representative democracy; a system of public approval of government decisions; and means of interaction between the government and non-governmental elements of the political system.

Over the last 15 years in Russia, all democratic instruments provided by the Constitution have been rendered ineffective imitations, characteristic of an entirely different political regime from the one established by the constitution—a regime categorically irreconcilable with the very spirit and essence of the Basic Law. An analysis of Russia's current political regime yields only one possible conclusion: that it is authoritarian and totalitarian in nature, and its subsistence requires constant propaganda and artificial support of the ochlocracy.

5.3 State structure

Russia's current state structure can hardly be called a federation. The symbolic statehood of Russian regions does not compensate for the actual restriction of their constitutional powers. Nor is Russia an asymmetric federation gravitating toward unitarianism. Today, Russia represents a unique example of a unitary regionalist state de facto gravitating toward a confederation.

5.4 Degradation of government institutions

A gradual and unequivocal usurpation of power by Russia's highest official has resulted in the establishment of an unconstitutional personal rule regime that manifests itself in terms of an unbalanced concentration of powers (direct and

latent) in the hands of the political monopolist. Naturally, this has led to monopolization of the political market, which supports and preserves this regime (thus forming a never-ending cycle). Among the most telling indicators of personal rule are not even the extent of the presidential powers, but rather the impossibility of any government institution to oppose or limit the actions of the president, by using legal methods as part of a system of checks and balances; and an almost entire lack of correlation between parliamentary election results and actual policies. All of this vehemently contradicts the spirit, the meaning and the provisions of the Constitution.

The significance of this conclusion must be grasped, because a state that is incapable of implementing its constitutional goals and objectives is a failed state. Such a state cannot function and develop properly, as we have witnessed over the last several years. The deliberate or uncon-

scious inconsistency of Russia's current Basic Law has pushed the government and society toward opposite legal poles. If an official breaches the Constitution, he or she eventually stops paying attention to its law. Conversely, a citizen protesting against the abuse of power, gets deeper to the root of the problem and understands its meaning better.

Despite an almost complete erosion of Russia's constitutional and legal environment, which occurred within the last several years, we are faced with the challenge of developing measures directed at overcoming the constitutional crisis, and restoring the state to an accord with the model provided by the Constitution. This comprehensive set of measures covers everything from the complete revision of the legislation, and negative law enforcement practices, to the adoption of a new version of the Basic Law based on all significant constitutional values and meanings.

VI. THE CONSTITUTION DURING A TRANSITION PERIOD

The stability of a constitutional regime is guaranteed by the existence of a public consensus on basic constitutional values. Constitutionalism cannot be forced onto a society that is neither historically nor culturally ready for it. But even if a society demonstrates constitutional potential, it does not mean that this potential can be automatically reached. In order for a constitutional state to emerge, action and political will are needed to turn constitutional potential into constitutional reality.

When it comes to the future of constitutionalism, the pace of change is less important than taking the right political course. The engine of constitutional reform will not work without certain “necessary and sufficient” conditions. A set of constitutional measures forming a constitutional action to steer society onto the constitutional path can serve as the initial push. After that, it is only essential to keep moving, correcting the path, and finally transition to a higher one.

Today, Russia’s constitutional action should, at minimum, address three simple tasks:

- 1: restoration of the rotation of political power;
- 2: adoption of a constitutional provision that would guarantee the right to a jury trial;
- 3: restoration of the jurisdiction and independence of the Constitutional Court to its fullest force.

Three fundamental problems facing Russia’s constitutionalism

In order to guarantee the irreversibility of democratic and constitutional processes, it is imper-

ative to restore political and legal restraints on the executive branch (Russia’s “bureaucratic machine”), as well as the effectiveness of mechanisms to safeguard the Constitution itself. Political restraints can be restored through the implementation of a mechanism for the rotation of political power, while the establishment of an independent judiciary—something Russia has in fact never had—would provide legal restrictions. A reformed Constitutional Court should be responsible for the protection of the constitutional order.

6.1. Rotation of political power

The older the post-Communist regime in Russia gets, the more its supporters talk about the benefits of the “eternal power” or the dangers of the “stupid democracy.” Without officially rejecting the Constitution’s democratic norms, the current Russian regime has rendered them powerless, thus creating a system directed at perpetuating its own power, bypassing elections.

The first priority of Russia’s constitutional reform should focus on restoring the rotation of political power as a basic principle and a norm. This is the key condition that must always be complied with unquestionably. Political rotation should be clearly and unequivocally identified as the fundamental constitutional norm that is applied to all key political and public office positions—not only the president.

As a next step, it is necessary to clearly define the norms regulating terms of office. The rule that one person cannot hold the same official position more than twice, with or without a break, should

be indisputable. The possibility of a “successor to the president” should be eliminated once and for all.

6.2. Right to a jury trial

Technically, jury trials exist in Russia, but in reality, the institution does not work properly. In Russia today, only a minuscule number of cases are tried before a jury. There is a clear trend toward forcing jury trials completely out of the Russian justice system. The reasons are obvious: even in their humblest and most abridged version, jury trials prevent the courts from being turned into an appendage of the government machine. The statistics of not-guilty verdicts by jury trials proves this irrefutably.

Just like political reform, judicial reform in Russia is a fundamental problem that cannot be solved in a single step. It will take years, if not decades, to develop the principles and mechanisms of judicial reform, not to mention the procedures for their implementation. The questions concerning Russian judicial reform go beyond the subject of this constitutional reform document, and demand a separate discussion that should lead to the adoption of new constitutional laws directed at changing the fundamental principles of court organization and proceedings in Russia.

The Constitution should not just establish jury trials, but should guarantee the right to a jury trial for all persons accused of committing all types of crimes—moderate, dangerous, severe. More-

over, plaintiffs and defendants in most civil, and especially economic disputes, in which the “value of the matter” in controversy is often higher than in criminal cases, should, too, have the right to a jury trial. Indeed, this is a very expensive and organizationally complicated transformation, demanding a fundamental change in attitude in the minds of judges, prosecutors, and defense attorneys, as well as the transformation of the entire legal education system. However, this is the single revolutionary measure without which it will be absolutely impossible to eliminate corruption from the justice system, and make it independent.

6.3. Restoration of constitutional justice

Any constitution, no matter how good, will be rendered useless if it is ignored by the government and courts. In theory, the Constitutional Court is supposed to deal with outrageous unconstitutional practices. In Russia, however, it stays aloof from active participation in managing conflicts between the Constitution and actuality. In order to restore the effectiveness of constitutional justice, it is important to considerably expand and enshrine the authority of the Constitutional Court and its status as a self-governing judicial body (one that elects its own chairman) in the text of the Constitution itself.

Moreover, the Constitution should directly and unequivocally stipulate that decisions of the Constitutional Court are binding on all other courts, as well as establishing liability for failing to comply with these decisions.

VII. LONG-TERM STRATEGY OF CONSTITUTIONAL REFORM IN RUSSIA

It is important to acknowledge the difference between overcoming the consequences of a series of constitutional counter-reforms that have been carried out by the Russian government in the last 15 years, and long-term measures directed at creating a nation state in Russia.

The transition from an empire to a nation state is a process that can take several decades. Russia cannot remain in an amorphous and unstable state existing somewhere between an empire and a nation, for an extended period of time. For this reason, once implementation of the fundamental principles of the Constitution becomes inevitable, the next steps must follow quickly.

Russian supporters of constitutionalism face three major problems:

- 1: how to organize local governance;
- 2: how to build real federalism;
- 3: how to constitutionally support a strong government.

7.1 Local Governance

Development of local governance is Russia's key strategic objective. Constitutionalism should be growing—not diminishing as it has been since the time of the Decembrists uprising. Where civil society should exist in Russia, there is instead a barren desert. There is no tradition of self-government in Russian culture—how could there be, when for centuries, any sprouts of initiative have been consistently uprooted through state abuse and repressions?

The task essentially consists of creating an “incubator” for local governments—that is, specific conditions in which local initiative can develop safely. In order for this undertaking to succeed, powerful political and legal safeguards are needed. To start with, local governments should be granted financial (budget) independence on the constitutional level. In this, the experiences of other countries, and of the Russian district councils (*zemstvo*) might prove instructive.

7.2 New Federalism

Russia is and has always been a unitary state; however, for almost a century Russia has declared itself a federation and has exhibited the external secondary characteristics of a federation, such as a bicameral parliament and regional legislatures. This duality leads many to believe that Russia doesn't need federalism at all, and that it would be more honest and pragmatic to openly declare that Russia is not a federation.

Yet economic and political decentralization is essential for Russia, since without decentralization, such a large country as Russia cannot hope to follow any other political paradigm, save for an imperial one. This is why the federalization of Russia—not a formal, but a real one, involving the creation of a few dozen new economic and political centers that together would form a new federation to replace today's powerless subjects—represents a constitutional priority. In establishing such a federalization, however, one should first prepare the proper economic and political foundation.

7.3 Strong government

Russia is often and not without reason called an autocratic state. Many believe that autocracy is synonymous with strong government, and that the objective of Russian constitutional reform is to weaken the government. The truth is quite the opposite. Autocracy weakens government, and the goal of constitutional reform is, in fact, to make government stronger, because a weak government poses a great and unacceptable risk for a country like Russia.

Today, real power is concentrated beyond government bodies—either in unconstitutional agencies that duplicate government functions, such as the presidential administration and the Security Council, or in numerous informal lobby groups (“friends of the president”). Thus, constitutional reform should be directed at giving power back to the government and restoring its effectiveness.

7.4 Constitutional Assembly

While urgent problems related to the restoration of a constitutional regime can and should be solved by introducing immediate amendments to the current Constitution, long-term objectives can only be reached by drafting a new version of

the Russian Constitution. To do this, a Constitutional Assembly should be convened. At the moment, however, it would be impossible: despite the fact that the current Constitution contains a relevant provision for the drafting of a new Constitution, a corresponding constitutional law has never been adopted. A Constitutional Assembly should draft and approve the text of the new Constitution and suggest a mechanism for its adoption.

This is a difficult and time-consuming process. But the first step is always the most important one. A year ago, the Open Russia movement launched a discussion about the Russian Constitution. We are now faced with the necessity of taking the next step, and organizing the work in two directions simultaneously—drafting urgent amendments to the current Constitution, and developing a viable project for a future Constitution, for a free and democratic Russia.

Success comes with tenacity. Instead of looking around in horror, we should learn to look far ahead, and work for the sake of future generations. This is the only way to bring the future closer.

Authors

Elena Lukyanova is a Doctor of Juridical Sciences, a professor at the Higher School of Economics (Moscow), and the director of the Institute for Monitoring of the Efficiency of Law Implementation (affiliated with the Civic Chamber of the Russian Federation, in which she also served as a member in 2009 and 2011). She is one of Russia's leading experts in election law and public disputes and is the author of over 90 scholarly papers.

Ilya Shablinsky is a Doctor of Juridical Sciences, the chair of Constitutional and Municipal Law at the Higher School of Economics (Moscow), and a member of the Presidential Council for Civil Society and Human Rights. He is a contributor to numerous media outlets and the author of many scholarly articles and books on election law and constitutional law.

Vladimir Pastukhov is a Doctor of Political Science and a visiting fellow at St. Antony's College, University of Oxford. In the 1990s, he worked as a fellow at the Institute for Comparative Political Sciences and the Institute of Latin America (both under the Russian Academy of Sciences). He served as counsel to the Constitutional Court of the Russian Federation, as well as to the State Duma and the Moscow City Mayor's Office. He is the author of several books and over 200 scholarly articles on constitutional law and political science.



Tanks on the streets of Moscow during the 1993 constitutional crisis.