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Comparative Law and its Role in the Development of Russian Constitutionalism

The article examines the influence of foreign constitutional models on the formation of Russian constitutionalism and legal doctrine. The authors demonstrate that Russian legal thought devoted great attention to foreign legal practice throughout different historical epochs, although they note that attitudes toward it differed at various stages. They conclude that the contemporary period is characterized by closer interaction with foreign law, while managing to preserve nationally unique developmental trends.

Key words: constitutionalism, comparative law, contrasting comparison, constitutional reform

The course of Russian constitutionalism's development path is a complex one. It comprises several periods, which correspond with the development of the Russian state: the formative period up to the turn of the century (from the 19th to the 20th century); the Soviet period, which took up most of the 20th century; and the modern period.

Each period fundamentally differed from the one preceding it. The first period was characterised by the aspiration to legally limit the autocratic monarchy. During this period, the idea of constitutionalism was being formulated and actively developed, albeit it did not lead to the adoption of a constitution. Various the acts were adopted that reflected the halfway policy of the reforms (the formation of the State Duma, judicial reforms, and the introduction of jury trials).

Despite the fact that the Soviet period began with the adoption of a constitution, and oversaw active adoptions of further constitutions, for the most part, it was characterised by the contradictions between formal and real constitutions.

The third — modern — period is generally characterised by the return to constitutional values. This process began taking shaping at the beginning of perestroika; however, further experiences indicated that such a transition would require a longer timeline and could not be executed instantly.

Despite the inherent contradictions between the periods of constitutional development, they are unified by their dedication to comparative research. Traditionally, comparative law has played an important role in the Russian legal sciences. Russian academic research dedicated significant attention to the investigation of foreign experiences. However, during different periods, emphasis was placed either on the contrast between foreign and Russian development, which accordingly resulted in a contrasting comparison, or on the search for general patterns and the aspiration to apply foreign experiences within the Russian setting. Such transitions can be traced in Russian constitutionalism.

The Formation of Russian Constitutionalism: The Influence of Foreign Practice

Russian constitutional law emerged after its counterparts in the countries of Western Europe.[1] Russian legal and political thought gave a lot of attention to the processes taking place in the West, whose legal culture was used as a source of constitutional theory and practice in Russia.[2] There were numerous suggestions to transfer various components of foreign constitutional experiences to Russian practice. But these developments did not immediately lead to the adoption of a legal constitution.

Prince Andrei Kurbski (1528–1583), a politician and essayist, was one of Russia's early constitutionalists. His knowledge of the theory of natural law and observations of the actions undertaken by the absolute monarchy, as well as the comparison of state institutions of medieval Russia with European countries (Poland, Sweden, England), had led him to found Russia's first constitutional project. Kurbski proposed that the Assembly of the Land, which met irregularly, become a permanent legislative body — "The Council of National Citizens" — whose decisions would have binding authority. The project envisioned the termination of the extrajudicial use of capital punishment, which was widely used during Ivan the Terrible's rule, and the encouragement of freedom of opinions.

The project revealed the natural orientation of a section of the Russian elite towards the replacement of the autocracy with a system of checks and balances.[3] At the beginning of the 17th century, new practical attempts were made to transform the monarchy into an

[1] However, individual constitutional ideas, sometimes even taking the form of projects of constitutional reform, have been coming into being in Russia since the 16th century. One of the components of constitutionalism had in fact been formulated in Russia before it took shape in the countries of Western Europe. In 1232, the first Assembly of the Land (Zemsky Sobor) — a consultative body based on class representation — was convened. "Zemsky Sobor" means "state assembly", which resembles the French term "Estates-General" (first created seventy years following the creation of the Assembly of the Land). The members of the assembly petitioned the monarch, criticising the actions of executive power. The Assembly comprised the Boyar Duma (analogous to England's Privy Council); the "Holy Assembly" (clergy); and "the third estate" (merchants, citizens, and the peasantry). Organisationally and functionally, the Assembly resembled the English Parliament and the French Estates-General. As a consequence, elements of constitutionalism were being formulated in Russian medieval society. Later, Assemblies of the Land would share the fate of the Estates-General: monarchs terminated their gatherings.

[2] With the exception of Slavophiles, who believed that Russia was self-sufficient in every regard.

[3] The project's influence can be seen in "Shuiski's charter" (1606, see below) and in the conditions set out for Poland's Prince Vladislav when he was elected tsar of Russia (1611). Vladislav was prohibited from taking governmental action that circumvented the Boyar Duma and the Assembly of the Land. Such conditions signified the creation of counterbalances to the sole power of the monarchy and objectively signalled a transition to a dualistic monarchy. Interestingly, the prince's election was based on "test referendums" — in certain places, votes were taken whether to determine whether to swear an oath to the new monarch.

elected institution and to introduce basic human rights guarantees. Tsars Boris Godunov, Vasilii IV Shuiski, Mikhail Romanov and Aleksei Romanov gained their crowns by being elected by the Assembly of the Land. The election of four monarchs signified strong tendencies to adopt constitutional practices prevalent in Eastern and Central Europe (the German Empire, Poland and Sweden) in Russia.

Boris Godunov made a noteworthy move by swearing not to use capital punishment for the first five years of his rule.[4] In retrospect, such an innovation can be perceived as a move toward the acknowledgement of the fundamental human right — the right to life. Shuiski promised not to commit anyone to death without an investigation and the application of a judicial procedure and not to subject to repression the family of the convicted. Significantly, these guarantees, unlike Kurbski's project, were extended across the spectrum of the population, including business owners and free peasants. In "Shuiski's charter", one can see various signs of readiness to adopt some of the norms of the English Magna Carta in the Russian setting.

However, these innovations were not fully grasped. The legal guarantees of Russian subjects and the counterbalances to monarchic power remained notably absent. The lack of legal support for the limitations of monarchic power indisputably indicated the deep mental factors that considerably delayed Russia's progress toward constitutionalism, and, at times, actually served as barriers to such progress.

The effect of these factors was apparent in the fate of the constitutional project, founded by the administrator and theorist, Mikhail Speranski (1770-1839). Speranski's ideas borrowed from Kurbski: Russia required a two-chamber legislative body, comprising an elected chamber — the State Duma — and an appointed State Council. Having closely examined French doctrine and practice, which largely relied on Montesquieu's theories, Speranski developed a constitutional project that was more detailed than Kurbski's. He insisted on the introduction of a written constitution (Code of State Laws) and proposed the creation of elected representative bodies at all levels of power — local, regional and national. He also proposed that deputies to the State Duma be elected by subordinate bodies. Speranski cast the boundaries of the electorate, and of eligibility for office, widely: the right to elect and to be elected at all levels of power was to be legally granted to all free owners of private property.

Term limits in the Duma were to amount to three years, designed this way to make the deputies more dependent on their electorates. It was proposed that the Duma would share legislative power with the monarch, including the right to legislative initiative. Executive power was to be shared between the monarch, the State Council and the ministers. In Speranski's project, the ministers were to be appointed by the monarch but were to be accountable to the Duma, which would carry the exclusive right to take them to court. On the other hand, according to the project, the monarch was to retain the right to dissolve the Duma and postpone its next convocation.

The orderly system of checks and balances, as outlined by Speranski, signalled the transplantation to Russian soil of the principles of two of the most popular constitutions at the start of the 19th century — the American Constitution and the 1791 French Constitution.

[4] The following monarchs also did not use capital punishment: Elizabeth (1741–1761), Pavel (1796–1801), Aleksander I (1801–1825).

Speranski planned a transition to constitutionalism that would preserve absolute monarchy and serfdom. Meanwhile, the political emancipation of the country's peasantry, craftsmen and merchants caused disturbances among the serfs, who were deprived of political rights and of pay for their labour. Speranski's goals contradicted the inherent interests of landowners, who were already set against the adoption of these revolutionary ideas. The division of power would lead to a dualistic, and later a constitutional, monarchy. Emperor Aleksander I did not approve the project and exiled Speranski.

The eagerness to transplant and adapt western constitutional models was confirmed by the radical section of the officer youth of the 1820s — the Decembrists. Some of them called for the adaptation of Great Britain's parliamentary monarchy with a qualified elective franchise in Russia. Others preferred France's republican model, which was based on universal franchise. Both groups planned the establishment of freedom of speech, press, religion and enterprise. These radical projects lacked practical implementation due to the government's crushing of the movement.

The constitutional projects proposed at the end of the 19th century by politicians and administrators Mikhail Loris-Melikov and Nikolai Ignatiev were much more moderate. They proposed to re-establish (with specific modifications) the Assembly of the Land. This time, there was no talk of the transplantation of foreign experiences. The authors of both projects emphasised Russia's unique character. But these projects were dismissed as too risky, and their authors were forced to resign.

The shift in considering monarchy within the scope of western constitutional models happened only after the revolutionary events at the beginning of the 20th century. The Emperor's Manifesto from 17 October 1905 signified the transplantation of concepts of "the security of person, freedom of consciousness, speech, assembly and alliances" and of parliament (the State Duma). The 1906 "Act to Establish the Duma" transplanted the two-chamber parliamentary organisation, the majoritarian electoral system, and the secret ballot. However, the institutions of equality and direct representation were not transplanted. The election to the Duma, deriving from the traditions applied to the Assembly of the Land, became a multiphase and curial event, while the right to take part in elections was limited by 13 qualifications.

As a consequence of the reform, the emperor's status became dualistic. According to law, revised in 1906, the emperor had the "supreme absolute power", but the limits of the "supreme power" were not defined. The 17 October manifesto, which had not clearly defined legal regulation, could not be considered a complete legal constitution. By the time of the First World War, Russia was transformed into a de facto dualistic monarchy, resembling the monarchies of Germany and Austria-Hungary. Still, none of the empire's legal acts contained the term "constitution". The belated transplantation and adaptation of western constitutional models by the imperial elite became a factor that seriously hindered their future adequate acculturation.

The Soviet Period: The Supremacy of the Contrasting Comparison

Despite the fact that the Soviet period oversaw an active adoption of a number of constitutions,[5] it was characterised by the rejection of the fundamental principles of western

[5] The first Russian Constitution was adopted in 1918. Following the founding of the USSR in 1922 and the adoption of its Constitution in 1924, the 1918 Russian Constitution was replaced by the 1925 Russian

constitutionalism (the separation of powers, parliamentarism, and the supremacy of the law). This rejection was justified on the ground that these theories concealed the class essence of government and law and, in reality, only protected the rights of the dominant classes.

In their place, the following principles were put into place: socialist legal order; the unity of governmental power (and, in particular, unity of legislative and executive powers); and the principle of democratic centralism. Soviet constitutions were, above all else, political and ideological documents. They had no direct effect and courts frequently did not base their decisions on these constitutions, except in exceptional circumstances.

The conceptualisation of a rule of law state, acknowledged by the Russian academics at the start of the 20th century,[6] was completely rejected during Soviet times. The idea that the government is above the law,[7]is not accountable to society and determines the scope of rights and freedoms of the individual corresponded much better with the idea of the dictatorship of the proletariat, which was reflected in constitutional resolutions. The first few Soviet constitutions emphasised the role of the working class, its dominance and its interests. Only toward the end of the Soviet period did the 1977 Constitution acknowledge that all Soviet peoples comprise the source of governmental power. Such transformation demonstrated, on the one hand, the failure of the existing resolutions and, on the other, gradual progress toward processes that would later be defined as perestroika.

Soviet constitutional law rejected also the principle of the separation of powers. This rejection was justified by the idea that all power belonged to the Soviets. An attempt to create a new form of "rule by the people" had, in reality, led to the creation of a highly centralised system of governmental power. Such a system did not offer a possibility of checks and balances.

The system operating at that time rejected parliamentarism — the idea that a professional parliament functioned as an active institution. The organisation of parliament works to harmonise political interests and make decisions using a majority vote, while the Soviet system of power was openly designed on the idea of the dictatorship of the proletariat, which presupposed the dominance of one social group above all others. Instead of a permanent parliament, a system of Soviet conventions was initially in place, which soon showed itself to be quite ineffective.[8]

The Soviet model was characterised by specific interactions between the legislative and executive powers. Executive power was founded on the principle of dual submission — subordinate bodies were under the command of higher institutions and were simultaneously subordinate to Soviets at a corresponding level. Because representative bodies convened only for a few days once a year, executive power began to accumulate more and more au-

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Constitution. Later, the 1937 and 1978 Russian Constitutions were adopted following the adoption of USSR Constitutions (in 1936 and 1977 respectively).

[6] *Kotliarevskii S.A.* Power and Law. The Problem of the Rule of Law State. Moscow. 2004 (reprint of the 1915 edition).

[7] *Vyshynskii A.Ya.* Questions on the Theory of Government and Law. Moscow. 1949. A. Ya. Vyshynsky (a one-time Procurator General of the USSR) was one of the few qualified jurists under Stalin who was awarded the highest scientific rank of academician.

[8] The system of Soviets underwent various changes. It went from a system of Soviet conventions, which were elected every six months, to the Supreme Soviet, which was elected every five years and which closely reflected the organisation of a traditional type of parliament (two-chamber organisation and specialised committees). However, the Supreme Soviet was not a permanent body and it was continuously dominated by a single legal party.

thority, becoming a key institution in the process. Despite the fact that some elements of a parliamentary republic were evident in the Soviet model, executive power was not held to account.

The role of judicial power and its autonomy was an even more complicated issue. Courts were viewed as political institutions, with judges expected to protect the interests of the ruling party and its ideology. Judicial functions were frequently (until the mid-1950s) carried out by ad hoc agencies, for which no provisions were made in the constitution.

To a certain extent, the idea of constitutionalism was upheld in legal doctrine. After the revolution, despite its destructive nature, the doctrinal influence of pre-revolutionary legal thought could not be instantly destroyed and rebuilt. Not all pre-revolutionary jurists-constitutionalists had left the country. A number of pre-revolutionary academics continued to work in universities, research centres and states institutions of the USSR in the 1920s and 1930s. They took part in writing the 1918, 1924 and 1936 constitutions (M.A. Reisner, S.A. Kotliarevski).

Legal theory affirmed the position that during the first stage of development, Soviet law would maintain "narrow horizons of bourgeois power". This position was later used as a basis for comparison between Soviet and bourgeois law. Obviously, as the level of repressiveness of the totalitarian regime increased, the contrasting comparison, which was part of the government's ideology, increased also. The contrasting comparison reached its zenith in the 1930s — 1950s. During this time, it was transformed into an almost nihilistic rejection of the achievements of western constitutionalism.

However, the political thaw from the mid-1950s to the 1960s, which was accompanied by the government's official rejection of dictatorial methods of rule, had a constructive effect on the development of comparative constitutional law. Access to foreign publications was greatly expanded for analysts, with a number of such publications being translated into Russian. Research retained a contrasting approach; nonetheless, such research contained a deeper analysis of processes that originated from foreign countries, such as Great Britain, France, Germany, the USA, Italy, Japan and developing countries like India and Latin American countries.[9]

I.D. Levin's monograph "Modern bourgeois scholarship of public law. A critique of fundamental trends"[10] and French comparativist R. David's monograph "Principal contemporary legal systems",[11] translated by V.A. Tumanov, were published in the 1960s and had a significant influence on the subsequent development of Russian constitutional thought. Academic research gradually began to take on an unprejudiced and balanced character.

Among these studies, research focussing on British government and law occupied an important place. During the Soviet period, Russian academicians continued the traditions of their pre-revolutionary academic counterparts, who had translated into Russian the work of English classical jurists — Dicey, Locke, and Bentham. The works of Jenks,

[9] Two sectors for the study of constitutional law of foreign countries were created at the USSR Russian Academy of Sciences Institute of State and Law. Soviet law was using the term "state law". The term "constitutional law" appeared in Russian legal literature only at the end of the 1980s.

[10] *Levin I.D.* Modern Bourgeois Scholarship of Public Law. A Critique of Fundamental Trends. Moscow, 1960.

[11] *David R.* Principal Contemporary Legal Systems. Moscow, 1967. Subsequently, while V.A. Tumanov was alive, this monograph was published in several new editions. Following the death of R. David, it was published under the editorship of K. Joffre-Spinosi (Moscow, 1997).

Wade and Phillips were published in the USSR even during the post-war economic crisis conditions, where generally the critical treatment of foreign law prevailed.[12] In the 1980s, Russian readers were given the opportunity to become familiar with the monographs of P. Bromhead, D. Garner, R. Cross, and R. Walker.[13] Interest in English law is maintained by modern Russian academicions.[14]

The academic and practical significance of comparative legal research conducted by Soviet academicions is difficult to overestimate. Their research on modern foreign constitutionalism, state apparatus, judicial systems, specifically constitutional justice, served as the basis of constitutional reform in the 1990s. It was in the 1960s that attempts to re-evaluate the fundamental resolutions of constitutional law were made in legal science. For example, I.D. Levin proposed to revise the negative perception of the principle of separation of powers. He argued that, on the one hand, the works of Marx, Engels and Lenin did not actually reject the principle of separation of powers. During that period, the criticism of the principle of the separation of powers was founded on an out-of-context quote by Marx, who stated that the separation of powers was just as much of an absurdity as a quadrature of a circle. Levin, however, brought attention to the fact that Marx was referring to a specific situation in Prussia.[15]

De facto, Soviet-era comparative legal research had substantially prepared the intellectual ground that later served as the foundation for perestroika in the 1980s and 1990s. Among the research prepared by those comparative jurists on the topic of foreign constitutionalism, works on constitutional theory (V.A. Tumanov), constitutional justice (S.V. Bobotov, O.A. Zhidkov), parliament (B.S. Krylov), central bodies of power (A.A. Mishin) stand out in particular. Their evaluations, findings and generalisations were widely adopted throughout the constitutional process at the end of the 20th century.

The Modern Period of Russian Constitutionalism: In Search of a National Model

The 1990s and 2000s post-perestroika period marked a new stage of integration between Russian and western law. The change in social relations demanded a cardinal reformulation of the law, which needed to occur in a very short period of time. In order to deal with such an encompassing problem, it was necessary to look to the constitutional experiences accumulated in the West. The achievements of the western legal civilisation were taken into account during legal reform in Russia.

The first step consisted of re-establishing the principles of constitutionalism in Russian legal thought and practice. They were conclusively accepted by the provisions of the current constitution, which was adopted in 1993.

[12] *Jenks E.* English Law. Moscow, 1947; *Wade and Phillips*. Constitutional Law. Moscow, 1950.

[13] *Bromhead P.* Britain's Developing Constitution. Moscow, 1978; Garner, D. Great Britain: Central and Local Government. Moscow, 1984; Cross, R. Precedent in English Law. Moscow, 1985; Walker, R. The English Legal System. Moscow, 1980.

[14] See *Bogdanovaskaya I.Yu*. Statute in English Law. Moscow, 1993; *Krylova N.S.* The English State. Moscow, 1981.

[15] It must be noted that *I.D. Levin* raised the question of re-evaluating the principles of separation of powers by citing the work of A. *Ya. Vyshinski*, who had previously stated that the literature of the time contained numerous examples of single-sided, simplified points of view that led to the unfounded rejection of the real meaning of the principle of separation of powers.

The replacement of the principles of socialist legislative order with the concept of a state governed by the rule of law led to a substantial reconsideration of the nature of the constitution. The 1993 Constitution declared government subordinate to law. In contrast to the Soviet constitutions, the 1993 Constitution has direct influence and its supremacy is accepted. Other sources of law cannot contradict it (article15 of the RF Constitution). The supremacy of the Constitution is upheld by the institution of constitutional oversight, implemented by the Constitutional Court of the Russian Federation. In addition to the concept of a rule of law state, the principle of separation of powers was also acknowledged in the Constitution.

The conceptualisation of the rights and freedoms of the individual was reconsidered at the constitutional level. Rights and freedoms were considered inalienable and inherent to every individual from birth. In contrast to the Soviet constitutions, rights and freedoms were accepted and acknowledged as an independent value. The rights and freedoms of citizens are accepted as directly effective. They determine the meaning, content and application of laws, the work of legislative and executive powers and local government, and are to be secured by the judiciary (article 18 of the Constitution). Such an approach meant that there was a cardinal re-evaluation of the Soviet conceptualisation. In contrast to the latter, the current Russian Constitution establishes that the acknowledgement, observance and protection of rights and freedoms of individuals and citizens are the responsibility of the government (article 12 of the Constitution).

During perestroika, the political-ideological parameters defining the contrasting features of Russian and foreign law were removed. Such conditions influenced views on the relationship between Russian and foreign law, as a result of which academic research rejected the contrasting comparison. The current dominant position supports adherence to European values in a sense that "during a complicated time of global chances, Russia cannot and has not the right to leave the European legal field",[16] while "the degree of the protection of rights and freedoms of the individual in any country is determined not only by the degree and effectiveness of the national justice system, but also by its government's integration in the international system of the protection of rights and freedoms of the individual".[17] Undoubtedly, Russia's membership in the Council of Europe and the European Court of Human Rights has an influence on Russian law. At the same time, there is a tendency to emphasise national specificities and sovereign development. Such approaches can also be found in foreign constitutional practice.[18]

However, the new conditions mostly played a role in the description of foreign models of constitutionalism. Analysts have not yet developed the scientific foundation for the

[16] *Zor'kin V.D.* The Limit of Compliance. Rossiiskaia Gazeta, No 5325, dated 29 October 2010.

[17] *Tumanov V.A.* The European Court of Human Rights. Moscow, 2001. 214.

[18] For instance, to justify Russia's sovereign position, the Chairman of the RF Constitutional Court, V.D. Zor'kin, refers to the practices of the Federal Constitutional Court of Germany in relation to the evaluation of juridical power and execution of the resolutions of the European Court of Human Rights. According to its legal position, "One of the goals of the German basic law is its integration into the legal community of the world's free states; however, the law does not provide the terms for rejecting the country's sovereignty, the terms of which are outlined the German Constitution. Consequently, it does not contradict the goal of adhering to international law if a legislator, as an exception, does not observe the law of international agreements in a situation where it is the only possible means to avoid violating fundamental constitutional principles." *Zor'kin V.D.* The Limit of Compliance. Rossiiskaia Gazeta, No 5325, dated 29 October 2010.

perception of positive aspects of any specific foreign experience. Despite the significant academic research in the sphere of comparative constitutional law, the process of acculturation is being implemented empirically. Time and practice determined what "took root" from the concepts adopted from abroad. Legal doctrine did not have a significant impact on this process. It is reasonable to assume that if doctrine was more connected to practice, then the reform of law could have been more effective.

Russian law has a complicated relationship with foreign law. Having gone through a period when socialist law was pitted against bourgeois law, Russia's national legal system has entered a period of tighter than ever interactions and influences with foreign national legal systems. This, in a sense, sets out the general picture of legal development in the country.

On the one hand, there is a tendency to harmonise with the constitutionalism of the western model. On the other hand, however, tendencies that highlight the uniqueness of the Russian model are also prevalent.