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British and Russian Constitutional Law

Legal Thought: History and Modernity

Book Reviews

To the Readers

In the intricacies of the British constitution and of the Constitution of the Russian Federation, there are common strands that reflect the common needs of political communities for responsible government. Failures of constitutionalism in each country –reflected in the essays in this collection — tend to reflect particular British failings or particular Russian failings to meet those common needs. We share the need for an executive branch of government that is accountable and constrained, for effective law making and effective supervision of the executive by a representative legislature, and for an independent and vigilant and responsible judiciary and legal profession.

The British constitution is ancient; the Constitution of the Russian Federation is not yet twenty years old; but both are developing. Both will need to develop further in the years to come, if their communities are to be well served. The changes under way in Russia are the result of the political restructuring of the past twenty-five years. But teachers of constitutional law in the United Kingdom feel the irony that in Britain, too, this subject –involving ancient laws, and a long history of surprisingly stable political practice– is constantly changing.

For these reasons, I think that the project of combining essays on constitutional theory by academics from Oxford and from Moscow is excellent, and I congratulate Professor Irina Bogdanovskaya, who proposed the idea and brought it to fruition.

The reader will notice striking differences and striking similarities in the approaches of the authors from the two systems. Most striking, in my opinion, is the way in which the study of the two constitutions is converging. The convergence partly results from the constitutional importance in both countries of the European Convention on Human Rights, and partly from a wider convergence in judicial practice and in legal scholarship, which is not restricted to Europe. In the future, we can expect that the work of academics, of practising lawyers, and of judges –and even the work of politicians– will be informed by a better understanding of the constitutional practice of other states around the world.

Diverse countries need diverse constitutions, and there is no automatic reason to think that convergence is a good thing. But because of the common need for responsible government, the potential is worth exploring. And there is undoubtedly one way in which we can benefit: we have the opportunity to learn from each other's mistakes.

Timothy Endicott
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August 2012

To the Readers

The present issue of the journal — published by the National Research University "Higher School of Economics", a young, but quickly growing, institution — is the product of cooperation between Russian and British legal scholars.

Traditionally, Russian academics have devoted much attention to the study of English law, being aware of the important position that English law has occupied historically and continues to occupy in the modern world. The works of English academics have been translated into Russian for centuries, allowing Russian legal scholars to obtain a deep understanding of English law. And Paul Vinogradoff serves as a bridge between scholars of the two countries. However, eventually, there develops a need to exchange the most current information on law and legal sciences.

On the one hand, constitutional law is based on fundamental values, while, on the other, it demonstrates evolutionary development in the context of the changing world. Constitutional development in Russia and Great Britain has differed substantially: if the British path can be overall considered progressive, the Russian path has turned out to be more difficult, with serious digressions during the Soviet period. Currently, Russia is in the midst of a difficult reversion to the values of a constitutional and rule of law state, a topic covered in detail by the Russian contributors to this volume. English law is also demonstrating tendencies that seek to update traditional principles with new content. This issue unpacks both the generalities and the specificities of modern constitutional law.

We would like to thank Professor Timothy Endicott, Dean of the Law Faculty at the University of Oxford, Evgeniy Salygin, the Dean of the Faculty of Law at the National Research University "Higher School of Economics", and all the Russian and British authors who had taken part in this project. We would also like to thank Alisa Voznaya for her outstanding translations of the Russian articles.

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The Future of Human Rights Law

Justiciable charters of rights give courts a dynamic and controversial role in governance, which is in tension with the roles of the executive and the legislature. In this essay I comment, from the British point of view, on the way in which these tensions work out in the law of the European Convention on Human Rights. I argue that politicians need to accept that the tension between the role of the courts and the roles of the executive and the legislature will be permanent, and is not a reason for withdrawing from the Convention, or for ignoring the decisions of the European Court of Human Rights.

Key words: Human rights, human rights adjudication, proportionality, European Convention on Human Rights, United Kingdom Human Rights Act 1998

Justiciable charters of rights have become deeply rooted in the law of most common-law countries. They take various forms in various jurisdictions, from Canada and the United States, to South Africa and India, from Britain to New Zealand. These diverse schemes have one thing in common: in each country, courts have responsibility for elaborating and for enforcing abstract rights. That gives the courts a dynamic and controversial role in governance, which is in tension with the roles of the executive and the legislature. These tensions have special, complex features in the United Kingdom, because of the international structure of the European Convention on Human Rights.

In this essay, I will comment on those tensions from the British point of view. I will discuss the ways in which the European Convention on Human Rights leads to judicial decision making that is politically controversial in the United Kingdom. My conclusion is that politicians need to accept that the tension between the role of the courts and the roles of the executive and the legislature will be permanent, and is not a reason for withdrawing from the Convention, or for ignoring the decisions of the European Court of Human Rights. This conclusion, of course, has implications for law and politics in Russia, as well as in Britain.

In Britain today, some very important aspects of the life of the community are governed by judges. Consider the right under the European Convention on Human Rights, to respect for private and family life[1]. The judges have interpreted the Convention to prohibit deportation of an illegal immigrant who has committed a crime in the United Kingdom, if a judge decides that the impact on the offender's family life- or on the family life of his partner or his child- outweighs the public purpose in deportation. Similarly, a local council

[1] European Convention of Human Rights, Article 8; see R (Huang) v Home Secretary [2007] UKHL 11.

cannot evict a council tenant from housing for misconduct, if doing so would affect their family life in a way that is disproportionate to the council's purpose[2].

Consider the duty under the European Convention to hold free elections. The European Court of Human rights (the Strasbourg Court) has decided that it prohibits a blanket ban on voting by prisoners[3].

In July 2011, the Strasbourg Court decided that the scope of the Convention extends to protect the rights of Iraqis allegedly abused or murdered by British troops on operations during the Iraq war[4].

British lawyers and politicians did not foresee these developments, when they took a leading role in the development of the European Convention on Human Rights in the 1950s. The Convention is the creature of the Council of Europe, an international organisation that was inspired by Winston Churchill, and was set up in 1949 as a shared European project to take a stand against tyranny. The project was designed not only to prevent recurrence of the atrocities of the Nazis, but also to guard against new threats from communism, and against nationalistic and authoritarian abuses that the continent had generated over centuries, and in particular throughout the nineteenth and twentieth centuries.

The British thought that the Convention would have little impact on their law and practice, because Britain had been respecting those rights, in its own ways, for centuries. They thought they would be largely unaffected even though the Convention system included a Court –the European Court of Human Rights in Strasbourg– with jurisdiction to decide what the very abstract rights require. And indeed, Britain was largely unaffected for some decades. At first the Court only heard complaints brought by states that had signed the Convention, and even after the Convention was amended in 1966 to allow individuals to bring complaints, it took a long time for the Court to develop the sort of judicial creativity that has become really interesting in this century. The development in creativity has matched the development in the volume of complaints to Strasbourg: the Court delivered only about 800 judgments in nearly forty years from its beginning in 1959 until structural reforms in 1998; since 1999, the number of decisions has risen from 177 to 1500, and the number of applications from 8,400 to 61,000[5].

Something else happened in 1998: the British Parliament passed a Human Rights Act, requiring British judges to interpret statutes compatibly with the European Convention so far as possible, and making government action unlawful if it violates Convention rights, unless legislation requires it. And although judges cannot strike down legislation, the Human Rights Act authorised them to declare that a statute is incompatible with the Convention. A declaration of incompatibility triggers a fast-track process by which the government can amend the legislation if Parliament approves. Now English judges, too, are training their creativity on the interests protected by the Convention.

The very abstract rights in the European Convention, like the abstract rights in the United States Bill of Rights or the Canadian Charter of Rights and Freedoms, encourage litigants to ask the judges to find new and controversial applications of the Convention.

[2] Manchester City Council v Pinnock [2010] UKSC 45.

[3] Hirst v United Kingdom (No 2) (Application N 74025/01), Grand Chamber [2005] ECHR 681.

[4] Al Skeaini v United Kingdom (Application N 55721/07), 7 July 2011.

[5] European Court of Human Rights, Annual Report 2010, pp. 13–14: http://www.echr.coe.int/NR/rdonlyres/F2735259-F638-4E83-82DF-AAC7E934A1D6/0/AnnualReport2010.pdf

The judges do not only stand up against atrocities that anyone would recognise as a violation of a human right. They also pass judgment on issues that used to be issues for ordinary politics, issues on which the people of the community disagree radically. And judges do so in a forum that privileges the techniques of the advocate, and the advocacy of particular interests, putting the advocate for the complainant on a par with the advocate for a public authority. And that public authority itself may or may not represent the various public interests (and the other private interests) that are at stake. And this forum then leaves the decision to judges who are impartial. Their commitment is to apply the abstract rights, after giving a fair hearing to the arguments for each side in the litigation.

Let's focus on one case, concerning the first of the controversial issues I mentioned — whether respect for private and family life should prevent deportation of an offender who is living illegally in the United Kingdom.

The Convention does not provide any right to immigrate. But the right to respect for family life has become a very common recourse for would-be immigrants. Whether seeking asylum or applying for ordinary immigration, or entering the country illegally, or illegally staying after the expiry of a visa, candidates spend long enough in the country that they tend to develop family ties. And then, refusal of leave to remain in the country is bound to be detrimental to their family life. The courts have held that respect for family life requires the state not to do something detrimental to your family life, if the detriment is disproportionate to the value of the public goal that is being pursued. The House of Lords decided in 2007 that the question is:

> 'whether the refusal of leave to enter or remain [in the United Kingdom]..., taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8'[6].

It is up to judges to decide whether the impact on a claimant's family life is *too serious*, in light of legitimate public purposes. The question is not just whether the burden on the complainant is necessary to achieve a legitimate purpose; even if it is, the government may not pursue that purpose, if the detriment to an interest protected by the Convention is, in the view of the judges, too much to be justified.

If a claimant shows that refusal would cause some detriment to her family life, what state purpose could make the refusal legitimate in spite of the detriment? The Convention recognizes that an interference with family life may be justifiable 'in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'[7]. We can imagine ways in which immigration controls may possibly protect or promote the economic well-being of the country, or protect the freedoms of others. But the British state has never actually said whether its purpose in prohibiting free entry to the United Kingdom is to pursue any of these good purposes. The Courts have no techniques for deciding whether deporting offenders does actually achieve any of them. The immigration rules are the product of controversial politics in which populism vies with political correctness, and both populism and political correctness are adverse to

[6] R (Huang) v Home Secretary [2007] UKHL 11 [20].

[7] Article 8(2).

reasoned deliberation about the goods at stake. The British government's principles for limiting immigration have never been expressed. Limiting immigration is not necessarily unprincipled. But the British law and practice will not tell you what the principles are.

The result is that the judges really are in charge of the immigration decision, for any person with family in the United Kingdom. By an interpretation of the abstract right to respect for family life, they have taken the role of weighing the immeasurable (that is, the gravity of the impact of deportation on an offender's family life –or his child's family life) against something that has always been merely unspecified (that is, whatever legitimate state purposes there may be in having immigration rules).

This new judicial role is revolutionary, because it requires judges to assess for themselves the value of pursuing public purposes in the way that the legislature or the government has done or proposes to do. There is no legal test for the complainant's right under the European Convention, except that the effect of deportation on a person's family life must not be too serious in light of the public interest –whatever that may be– in deportation.

The result has been a series of controversial and difficult decisions in which the Court of Appeal and the Supreme Court of the United Kingdom have had to decide whether family ties in the United Kingdom make it unlawful to deport illegal immigrants,[8] or to extradite a person suspected of a crime.[9] The court simply asks the open-ended question whether, in light of the public interests at stake, the impact of the proposed action would have *too serious an impact* on the claimant's family life. In these cases, judges have interpreted the European Convention as handing to them the job of deciding state action. A governmental decision to deport is only provisional; the conclusive decision is for courts.

One drawback of judicialization is a substantial increase in litigation, at public expense, to support the right to a judicial hearing on the question of proportionality. No one is extradited from the United Kingdom these days without first getting a hearing in court on their claim that extradition would show disrespect for their family life; they generally lose, but they get a lengthy delay in the extradition.[10] The deportation claimants do not always lose. In fact, they generally win, if they have a domestic partnership, or if they have children in the United Kingdom. And then another drawback is the potential for the state's decision-making process to be deformed by a sort of pretence- that judges can weigh the unmeasurable personal interests against the unspecified public interests.

Should the United Kingdom adhere to the Convention?

Many decisions of the Strasbourg Court have been controversial. But in the sixty years since the Convention was inaugurated, there has never been any serious political opposition to Britain's membership of the Council of Europe until the past year. A new political controversy has arisen, not from the cases on immigration, but from the case on voting rights for prisoners. The Strasbourg Court decided in 2005 that the blanket ban on voting by prisoners violates the guarantee of free elections in Article 3 of the First Protocol[11].

[8] See e.g. ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4.

[9] Norris v USA [2010] UKSC 9.

[10] See: e.g. Susz v Poland [2011] EWHC 1862.

[11] Article 3: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

The British government did not make any changes in time for the 2010 general election. The new government (a coalition of the Conservative Party and the Liberal Democrat Party) started planning legislation that might meet the Court's requirements (although those requirements are very unclear). But anger was growing against the idea that the judges of the Strasbourg Court were overriding the view of Parliament that prisoners should not have the vote. A backbench debate in February 2011 supported the existing ban by a vote of 234 to 22, with Members of Parliament from all parties taking turns expressing their anger at the idea that the human rights of prisoners entitled them to vote, and also at the idea that this question should be decided by the Strasbourg Court, rather than by the British Parliament.

There is, for the first time, serious political discussion about doing something, and the Prime Minister set up a 'Commission on a United Kingdom Bill of Rights'; its purpose was meant to be to find ways of redressing the balance between the British Parliament and the Strasbourg Court.[12] But its terms of reference merely say that 'The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights'.

The dilemma for the government is that there is not much to be done. Some politicians have talked about ignoring the Court's decision, or even of withdrawing from the European Convention on Human Rights altogether. But withdrawing from the Convention would be a violent and destructive act in European and international politics, and it is clear that the main British political parties are not going to do that. If there was any doubt, the doubt was removed by a remarkable speech in October 2011, by Mr Dominic Grieve, the Conservative Attorney General (the government's chief legal officer, who is a member of Cabinet). Mr Grieve said,

> 'There is no question of the United Kingdom withdrawing from the Convention. The United Kingdom signed the Convention on the first day it was open for signature on 4 November 1950. The United Kingdom was the first country to ratify the Convention the following year. The United Kingdom will not be the first country to leave the Convention....The benefits of remaining within the Convention and retaining our position as a leader of the international community are seen by the government to be fundamental to our national interest.' [13]

That is an unequivocal commitment, and the political furor over the role of the Strasbourg Court leaves the British government looking for something to do, without withdrawing. And in November 2011, the United Kingdom took over the rotating Chairmanship of the Committee of Ministers, the governing body of the Council of Europe. In his speech, the Attorney General called the Chairmanship 'a once in a generation opportunity to drive forward reform of the European Court of Human Rights.' He proposed to strengthen the principle of subsidiarity, which is the doctrine that the primary responsibility for respecting the Convention belongs to the institutions of each member state, that the role of the Strasbourg Court is a supporting role, and that the Strasbourg Court should apply a 'margin of appreciation' — that is, some flexibility for member states to act on their own views as to the requirements of the rights in the Convention. But even in chairing the Committee of

[12] See: *Elliott M.* 'The UK Bill of Rights Commission': ukconstitutionallaw.org/2011/04/18/the-uk-bill-of-rights-commission.

[13] http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventiononHumanRights%E2%80%93currentchallenges.aspx

Ministers, the British government has no tools available for strengthening that principle, because the requirements of the principle itself are decided by the Strasbourg Court. For example, in the prisoners' voting rights case, the Court held that the ban on voting by prisoners 'must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be'[14].

Can the British government redress the balance between Parliament and Strasbourg through reforms of domestic law? The Attorney General aims to do so in the field of deportation of illegal immigrants, through changes to the immigration rules:

> 'We take the view that Parliament, before whom these changes to the Immigration Rules will be laid, is best placed to decide on difficult policy questions such as where the balance should be struck in relation to the deportation of foreign criminals. But it is important to note that in changing the rules we will respect the jurisprudence of the Strasbourg court and reflect the margin of appreciation that the Court has afforded to Member States in coming to such decisions.'

This statement by the Attorney General simply points out the government's dilemma: if the United Kingdom is going to respect the jurisprudence of the Strasbourg Court, and the Strasbourg Court holds that illegal immigrants cannot be deported if judges consider that the deportation would disproportionately affect their family life (or the family life of their partners or children), then there is nothing that the government can do. Reform of the immigration rules will not redress the balance between the Strasbourg Court and the British Parliament, because the Strasbourg Court decides what the balance will be. If we accept that the United Kingdom is not going to withdraw from the Convention, then even if British politicians do not like the decisions of the Strasbourg Court, they will have to put up with them. The tension between law and politics will be a permanent tension.

So should the British be considering withdrawing from the Convention, after all? I do not think so. The drawbacks are, in my view, genuine: the controls imposed on the deportation of an offender who is an illegal immigrant are an example, and the excessive and pointless litigation over extradition cases is another example. And yet, it is possible to imagine circumstances in which it might be abusive to expel from Britain an offender who does not have British citizenship. Imagine a populist government that uses a heavy majority to rush legislation through Parliament making a parking ticket into grounds for deportation of a non-citizen who has lived for decades in the country, since infancy. And here is the potential in the judicial role: it gives the judges the opportunity to stand against a genuine abuse, which we can imagine being facilitated by a Parliament that wants to act willy-nilly against immigrants, and which we can imagine being carried out by immigration authorities that are under political pressure, whipped up by irresponsible media corporations, to be mindlessly anti-immigrant. That is the potential, and there is actually no way to secure legal protection against such abuses, without giving judges a responsibility that is bound to lead to creative and controversial decisions, such as the decisions on deportation of illegal immigrants, or the case on voting by prisoners.

And the judicial process has actually secured justice in some cases. Here is a real-life instance, in my view. A murderer in England receives a life sentence, and Parliament gave the Home Secretary — a politician — the power to decide how long he would actually be

[14] *Hirst,* above, note 3, para. 82.

imprisoned before he could be considered for parole (the 'tariff' of imprisonment). Under the right to a trial by an independent and impartial tribunal in Article 6 of the Convention, it was held that these offenders had a right to have a tariff fixed by a judge, rather than by the Home Secretary.[15] There are some in Britain who think that sentencing clearly, definitely, ought to reflect the view of the public, in a way that makes it perfectly appropriate to commit the decision in a particular case to a politician. But that seems to me to be a mistake, because of the Home Secretary's political agenda, and because of the media pressures under which the Home Secretary operates. Those pressures had led the Home Secretary to impose harsh terms of imprisonment precisely on the ground that a particular defendant's case had become notorious in the media.[16] Detaching a community's decision making from politicians can improve the justice of a country's government.

The extension of legal protections to human rights ought to depend on whether the potential benefits (the possibility of judicial interference with distorted legislative and executive judgments as to the interests at stake) are worth pursuing, at the cost of the distorted judgments that judicial decision making may yield. The case of the sentencing of murderers shows –in my view–what can be done in the interests of justice. The case of the deportation of offenders shows –in my view– what can go wrong. It is impossible to come up with an exact balance sheet; the advantages of the European Convention system are, themselves, incommensurable with the drawbacks of the arrangement.

But in the opinion of many of the British politicians who are angry about the decision no voting by prisoners, there is one special and very serious drawback: the international nature of the Strasbourg Court. And it really is an extraordinary court. There is a judge for each of the 47 countries. Monaco and San Marino each have one judge. The United Kingdom has 2,000 times as many people as Monaco and San Marino, and Russia has 4,000 times as many people, and the UK and Russia have one judge each, just like the tiny countries of Europe. Each country's judge is elected by the parliamentary assembly of the Council of Europe, from a list of three people nominated by the country. The diverse processes by which judges are nominated by their home countries are not transparent, and the process for choosing among the nominees is under review. The system needs reform.

If the appointment of judges is reformed, though, the basic problem will remain: the judges who are trying to balance the unmeasurable against the unspecified –the interests of the litigant against the purposes of the public– will do so without even sharing whatever consensus there may be in Britain, as to the legitimacy of the public interests at stake. A human rights court removes the state's decision-making process from political influences within the state; an international human rights court removes the state's decision-making process from the state itself.

The people of other common law countries, such as Canada and the United States, are used to the judicial role in applying fundamental rights, but I am sure that they would not agree to a general international human rights court. It has particularly angered some British politicians, that the international court is interfering with British policy on issues that particularly affect the national interest: such as immigration, and the question of who can vote in national elections.

[15] R (Anderson) v Home Secretary [2002] UKHL 46.

[16] See: *Endicott T.A.O.* Administrative Law, 2nd ed. (Oxford University Press, 2011), chapter 3.

In my view, the international nature of the court is extraordinary, and it needs an extraordinary justification. And I think that there is such a justification, in the nature of Europe and its history. The European Convention gives Britain and Russia a unique opportunity: a way in which they can cooperate in the project of establishing certain protections against abuses, across a continent that needs such protections.[17] It is good for Britain and for Russia, and for the whole world, if the British and the Russians can participate in the project.

The interesting thing about justiciable bills of rights is the range of radically controversial decisions that they take out of ordinary politics, and assign to judges. There will never be any consensus as to the benefits of doing so, and the benefits cannot be secured without also incurring the drawbacks of judicialization (although it is even controversial whether there are, as I have argued, drawbacks). Reasonable and intelligent people are going to go on disagreeing deeply about the difference between standing up for human rights, and extending them irresponsibly. So the tension between the courts and the politicians will continue. This tension is not in itself a reason to abolish the judicial role.

[17] And the project now extends beyond Europe, to Turkey.

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The Constitutional Conceptual Landscape and Its Values

Constitutional law conceptual space is part of conceptual space. The ontological structure of constitutional law consists of three layers — legal principles, positive constitutional law, traditions and practice. The third layer contains inter alia constitutional law ethics. Constitutional law conceptualism is a kind of legal positivism. Constitutional law conceptualism presupposes some limited influence in law and non exaggeration of significance of conceptual reality represented in signs and symbols as the text of the RF Constitution.

Key words: legal space, constitutional law ontology, axiology of constitutional principles, traditions and constitutional law ethics, internalist and externalist approaches

1. Does constitutional law have its own values and, if the answer is yes, what are these values? How do constitutional values correspond with moral values? These seem to be simple enough questions. Article 2 of the RF Constitution contains a provision that states that the individual — alongside his rights and freedoms — comprises the highest of values. But the individual and his rights and freedoms constitute only the highest of all constitutional values, suggesting that there are other constitutional values, which exist within an objective and hierarchical system of constitutional values. For example, section 3 of article 55 of the RF Constitution sets out that individual rights and freedoms (which comprise the highest of values) may be curtailed in order to protect the following: the foundation of the constitutional system; the morality, health, rights and legal interests of other individuals; the security of the country; or the security of the government. All abovementioned objectives comprise constitutional values. Constitutional principles that comprise the foundational order of the constitution (chapter 1 of the RF Constitution) are particularly important values. The system of moral values is characterised by constitutional values when viewed through the prism of article 55 of the Constitution.

But only two aspects from a variety of constitutional values can be considered to be objective value systems. Fundamental human and civil rights and constitutional principles differ from aesthetic, moral and religious values in the fact that, collectively, they are enshrined into law and comprise the most important part of the intellectual landscape — the constitutional legal conceptual space.

2. In order to capture the substance and meaning of this concept, it is necessary to ontologically analyse what comprises the legal reality as a domain of legal science and in what ways legal reality corresponds with the material world or existence. Existence, as is

well known, is one of the fundamental philosophical categories. It is something that exists in reality; it is something that is. Past, present and future existence, as the sum of its parts, comprises reality[1].

Peter Berger and Thomas Luckmann noted that reality is the quality that allows phenomena to exist, independent of our will. Allowing for a multiplicity of realities, the authors specifically single out everyday reality, regarding it as the most superior type of reality. In comparison to everyday reality, other realities become the finalities of meaning, the enclaves within the framework of the superior reality, marked by characteristic meanings and perceptions[2]. B. Kistyakovskii, the famous Russian philosopher, discussed the same ontological ideas when he wrote that surrounding life is not just a uniform reality, but rather one that represents **several different realities**. The reality of physical objects (the material world) is one reality, while the spiritual reality of literary and artistic work is another. These different realities are closely tied together and depend on each other.

Returning to the purely empirical understanding of reality and the meaning of legal reality as a whole, B. Kistyakovskii posits that legal reality is psychological, on the one hand, and spiritual, on the other. It is not in any way physical. Legal reality is related to socio-governmental organisation, comprising both legal relationships and the institutions that administer them. Law, like any other cultural value, is a human creation — one, which in the process of objectification of the human spirit, resulted in a material manifestation. B. Kistyakovskii's concluding thoughts on the topic of legal reality are as follows: "If, after everything that has been said, we compare legal reality with the realities of various cultural goods, we will foremost have to acknowledge the **singularity of legal reality**. It should be considered as occupying a space halfway between the reality of art and sculpture, on the one hand, and literary and musical creations, on the other. Still, legal reality should be considered more closely to resemble the reality of the former than the latter."[3]

B. Kistyakovskii remarked that the question of legal reality was extraordinarily complex and difficult. In essence, it is a methodological question of scientific cognition of law. In contrast to material reality, which we experience directly and intensely with the aid of emotions, legal reality, according to Kistyakovskii, is a different type of reality. Nikolai N. Alekseev, a member of the Moscow school of legal philosophy (founded in the early 20th century), considered whether positive law could be part of reality (in the Hegelian ontological sense). Without explicitly stating the idea, Alekseev came close to defining legal reality by suggesting that, on the one hand, it exists in opposition to empirical reality, but, on the other, remains a "fact", a reality, albeit not a "transcendent", ideal or symbolic reality. This anticipates the understanding of legal reality as a type of virtual reality.

Mathematical formulae are "factual" in the same sense, in that they represent the conceptual space of mathematics. Notes and music form a similar special concept.

According to Alekseev, all of this comprises a "particular type of reality", a "special world".

Legal reality transforms the external world. As a result of juridical perception of reality, a certain type of thinking arises — juridical thinking reflects the outside world as if through

[1] *Ikonnikova T.I., Lyashenko V.P.* Legal Philosophy. Moscow, 2007. P. 119.

[2] *Berger P., Luckmann T.* The Social Construction of Reality. A Treatise of the Sociology of Knowledge. Moscow, 1995.

[3] *Kistyakovskii B.* Social Sciences and Law: An Essay on Methodology of Social Sciences and the Universal Theory of Law. In: Philosophy and Sociology of Law. St. Petersburg, 1998. P. 184.

a distorted mirror. Law is an extremely distorted mirror image of reality, as it inevitably employs a different type of fiction. This reasoning highlights the author's passion for phenomenology and, specifically, the influence of its founder, Edmund Husserl. According to Alekseev, law and order, just like moral order, "is a fiction in its own right". In other words, fundamental moral and legal concepts are varieties of practical fictions[4].

So, what is the idea behind our understanding of legal conceptual space? We consider it to be one of the categories of juridical ontology.

Factual reality is material, tangible, and visible. Hedge walls serve as an example of the material world, signifying that at least some part of the material world demonstrates to everyone that another part of that world is owned by legal subjects. It is possible to hypothesise a situation where, for a moment, all laws are repealed. But even in a situation where legal space has ceased to exist, aspects of material reality — as conveyed by walls and hedges — remain. Property rights, acts of registering one's property, are real, but only within the conceptual space of legal reality. Imagine a modern summer home somewhere in the vicinity of St. Petersburg. To the average observer, it appears as a fairly expensive building, which could be valued at approximately one million dollars. A lawyer would see this building from a completely different perspective, if s/he possesses information that the house was built without permission or if there are existing problems with registration. The price of the building, or its liquidity, sharply plummets. Lawyers, unlike the average man or woman, perceive two different realities — the normal world and the world of legal realties. Law students grasp legal reality with the aid of legal spectacles, so to speak, which enable them to perceive the real world in a different way.

Hernando de Soto writes that the understanding of the right to property comprises part of the legal conceptual space. It is the recorded entitlement to property that comprises its value, its capital. Such value exists as a result of the property's existence in property records, the deposit that was set out in the agreement and other similar legal documents, which economically fixate the most important characteristics of the assets, contrasting them to the visible quality of the actual object.[5] When a person turns his attention to the property rights of a house, including the availability of the respective governmental registration, from the actual house itself, he transports himself to a different conceptual space, which is "inhabited" by legal subjects and objects. This comprises the legal conceptual space (LCS). The fact that property rights are part of legal reality is confirmed each time a property (a house) transfers hands. It is impossible to establish ownership simply by looking at a house. In the material world, nothing changes when the owner of the property changes. The house remains the same, whether it is rented out or used as a security. The property right to a house does not comprise the house itself, but part of its legal conceptualisation. Most properties that are simultaneously "reflected" in the legal conceptual space enjoy an increase in their valuation. The myth of King Midas, who turned everything he touched to gold, serves as an excellent example of a perfect legal system, where registration mechanisms function properly. A house may be used for living in, or for provision of security to obtain credit, or as a means to procure investment resources. All of these improve its value. Aristotle offered an ingenious idea when he said that our abilities to utilise objects grow exponentially when we allow our thinking to concentrate on their hidden potentials!

[4] *Alekseev N.N.* The Foundations of Philosophy of Law. St. Petersburg, 1999. P. 21.

[5] *De Soto H.* The Mystery of Capital. Moscow, 2001. P. 56.

Images of real objects and subjects exist in the legal conceptual space. By all appearances, it is a type of virtual reality. In such a reality, images do not differ from the "originals", or images of objects in the external world. The concept of "virtual reality" first appeared as a specialised philosophical term in the 1980s, when the post-classical understanding of the object of inquiry was supplemented with the understanding of the reality of existence of objects, which assumes that a variety of heterogeneous objects can belong to the same reality. For example, in physics, the material substance and the energy field belong to the same physical reality.

Legal conceptual space has developed over a lengthy period of time. Nineteenth century legal science, which reflected the philosophy of Savigny, has probably had the greatest influence on the development of the legal conceptual space in modern times. Within this school of legal thought, there was an aspiration for utmost autonomy of the legal conceptual space, its enclosure form other academic disciplines. This represented a typically conceptual jurisprudence, in the words of R. Ihering, or "jurisprudence of concepts". Jurists created an autonomous, enclosed world of legal concepts and believed that law could be free from subjective interpretations of legal practitioners, because the legal conceptual space allowed the opportunity to achieve a solution to a legal problem in all possible cases by means of employing objective methods (such as analogies in law) within the confines of the enclosed logical systems of legal norms.

Legal conceptual space has historically originated from the efforts of legal academics, who, to a certain extent, had mythologised real life. The appearance of the concept of "persona" as a legal subject in Roman law symbolised the beginning of legal mythology. Savigny wrote that law could be perceived as human life itself, as perceived from a **particular point of view**! He also frequently repeated that law is a world of human interactions, **transformed** into legal form.[6]

Thus, legal conceptual space is a legalised reality, the reality of legal thinking. Law is the legal representation of the world, which establishes the proper, ideal behaviour of a person.

G. Radbruch believed that law could be defined as the totality of prescriptions, which regulate the interactions of individuals in society. Being a follower of Kant, he did not arrive at this definition inductively, or from the generalisation of individual legal phenomena. He created this definition deductively from the idea of law. According to Radbruch, the concept of law contains a variety of individual legal concepts, which, just like law itself, are a prori in their nature. They are firstly academic tools — not results — that aggregate legal phenomena and are considered to be necessary categories of legal thinking. We are talking about legal concepts that comprise the foundation of the legal conceptual space, such as the concept of legal norms (and its constituent parts), subject of regulation, set of facts, legal origins, lawful and unlawful behaviour.

Thus, legal thinking has specific characteristics: 1) it mythologises reality, 2) it operates based on a priori conceptualisation, 3) it is evaluative, as the streamlining of human interactions occurs by means of separating legal substance from legal indifference.[7]

Describing legal conceptual space is as difficult as trying to describe the space occupied by the universe. Its formation begins with the appearance of autonomous, purely legal con-

[6] See: *von Savigny F.* History of Roman Law during the Middle Ages. In: The German Historical School of Law. Chelyabinsk, 2010.

[7] *Rabdruch G.* P. 47.

cepts. A law subject — persona in the Roman conceptualisation — is not a real person with specific biological characteristics, but is rather a legal being.

Thus, in the course of protracted historical development, a universe of legal concepts was created. These concepts are the same "final conceptual domains" described by sociologists P. Berger and T. Luckmann. Roman lawyers, mediaeval analysts of Roman law (glossators) and German pandectists have also contributed greatly to the foundation of legal concepts. From our perspective, the zenith of this intellectual paradigm is Hans Kelsen's "pure theory of law", which considered the assertion that it is fundamentally important to emphasise the difference between "real" and "proper", between reality and norms, between facts and values.[8] H. Kelsen discovered two new characteristics of legal conceptual space — norm hierarchy and their reality. Norm hierarchy is described by Kelsen as *norm interaction* and their effects on each other. The legal *system* is a dynamic system and, as such, each norm has a role in influencing norms which occupy lower levels of the hierarchy. The hierarchy of norms, comprising several levels — with the most abstract ideas at the top and the most concrete ones at the bottom — can be uncovered when analysing legal structures. The hierarchy of norms is based on the understanding of reality of legal norms, which, in turn, determines the *unity* of the legal system. From the perspective of pure theory of law, the only purpose in utilising the hierarchy of norms is to understand the interdependency of interactions between legal norms. According to Kelsen, the reality of a norm should be determined within a concrete legal system using structural considerations, whereby higher level norms predetermine the realities of lower level norms and, consequently, guarantee the application of norms within the system. In essence, the understanding of norm reality in pure theory of law differs from a general understanding of norm reality when we contemplate legal outcomes. Pure theory of law assumes the presence of a *fundamental* norm (Grundnorm), which represents a hypothetical norm, whose existence is the logical precondition for all others. This norm allows all other norms to obtain their role in reality. The main presumption of any legal system — "legal norms must be observed" — is a fairly close attempt at the fundamental norm. As such, the point of the fundamental norm doesn't come from its contents, but rather from the fact that it determines the structure of the legal system and the criteria that sets out the realities of legal norms.[9]

These characteristics of legal reality comprised the foundations of Kelsen's theory of judicial constitutional review. It is not a coincidence that Hans Kelsen is considered the father of European constitutional courts.

3. In essence, Kelsen substantiated the specific character and necessity of acknowledging the *constitutional-legal conceptual space*, although he himself did not use this concept.

At the basis of this ontological conceptualisation there exists a specific world of basic constitutional legal concepts. Concepts of constitutional law are frequently employed within other branches of law. For example, the word "dwelling" is used in criminal proceedings, and in family and property law. But only within constitutional law does this juridical concept have the widest application, which separates it from similar juridical definitions in other branches of law. "People", "will of the people", "state power", "division of power", "democracy", "republicanism", "freedom", and "justice", among others, comprise some of the most important constitutional legal concepts. Freedom of expression implies not

[8] *Lukashevich V., Shalat O.* "In Search of Purity in Juridical Science (A Short Essay on Hans Kelsen's Philosophy of Law). In: Comparative Constitutional Review. 2008. N 3. P. 178.

[9] *Lukashevich V., Shalat O.* Ibid. P. 180–181.

only the use of words, but also actions and deeds, within the conceptualisation of constitutional law.

Historically, the constitutional aspect of legal conceptual space emerged in the period shortly preceding and during the French Revolution, when philosophers-Encyclopaedists discussed the meaning of freedom, equality, and brotherhood. These ideas became commonly accepted after they had been integrated into colonial American constitutionalism. American society, free from many social prejudices, gave birth to a new, multiclass political elite, which promoted the idea of shared constitutional values. The idea of the constitutional aspect of the legal conceptual space as a unifying concept among civilised nations emerged after the Second World War. It came into existence alongside the greatest consensus on basic human rights and freedoms.

Constitutional values, which we employ to inform our analysis of the constitutional aspect of legal conceptual space, form the foundation of the constitutional aspect of the legal conceptual space. We are convinced that our proposed concept of the "constitutional legal conceptual space" will serve as the basis for developing new research directions within constitutional ontology. The methodological value of the proposed concept derives from the fact that it will facilitate the use of *spatiotemporal thinking*, a method not used in jurisprudence, which could lead to new and unexpected results.

As already noted, reality comprises past, present and future existence. Constitutional legal reality must also be perceived as a trinity of past-present-future. As such, legal conceptual space cannot be bounded by limits of any one government. In essence, this is the specification developed by Georg Jellinek, who proposed that jurisprudence would abase itself if it allowed itself to be bounded by governmental frameworks, which would render it national law[10].

Constitutional values — first of all, constitutional principles and the objective system of basic rights and freedoms — are the property of all mankind, in a sense that they provide shared content of the constitutional legal conceptual space for all civilised beings. It is this underlying concept that motivates the preamble in the Russian Constitution that declares that the Russian people acknowledge themselves to be part of the world community.

At the same time, objective reality constitutes the *notion* that constitutional principles and basic rights are reflected in historical and cultural progress. In employing these exact specificities of a nation's historical fate, we can argue that each state's constitution codifies not only the most important juridical norms, but also socio-cultural traditions and, in that sense, our relationship with the past[11].

On occasion, the relationship with the past begets unexpected perceptions of Russian constitutional values within the context of European constitutionalism. The ironic phrase of Kluchevsky, a Russian historian, regarding the wise Russian reformers springs to mind. As the reformers admire how their reforms have transformed Russian antiquity, they fail to notice how the antiquity imperceptibly transformed the reforms.

Various juridical interpretations of the value of such constitutional principles as economic freedom and social government represent only the tip of the iceberg. Below the surface, there exist different philosophical traditions — two different intellectual paradigms that had formed on the European continent and in England and the United States.

[10] *Jellinek G.* The General Theory of the State. St. Petersburg, 1908. P. 47.

[11] Recall the words from the preamble of the Russian Constitution — "...honouring the memory of our ancestors...”!

It can be posited that these two paradigms differ because they are founded on different philosophical and legal principles. European students of law perceived Immanuel Kant as the indisputable authority on legal philosophy. Kant was less popular in England and the United States, where Jeremy Bentham's utilitarianism enjoyed wider popularity. The value of economic freedom — which constitutes a juridical constitutional concept — forms one of the pillars of utilitarianism. But the best way to achieve economic effectiveness is through economic freedom. Speaking figuratively, economic freedom — as perceived by American lawyers and legal philosophers — comprises the juridical garments of effectiveness. In Europe, legal ethics were always held in high esteem.

This is related to Emile Durkheim's idea that division of labour leads to social solidarity.[12]

In essence, division of labour is not important only in the economic sense. It is also important in a moral, ethical sense since solidarity fits within the ethical category.

Solidarity assumes that all members of society unconditionally accept a set minimum of common values, which, according to Durkheim, make up a "collective consciousness". These values do not need to be devised, as they are not Kant's a priori values. They must only be collectively selected from the *values* that already function within the social consciousness and socio-cultural traditions.

This is precisely the approach that humanity undertook when it created the Universal Declaration of Human Rights.

As a result, collective values were born — constitutional values that exist alongside individual, and nationally individual, values. Conflict between these sets of values is one of the main dialectical contradictions that puts the Russian legal system in motion.

The concept of a welfare state, the idea of government regulation of economic relations, and the consolidation of trust in economic institutions are all concepts that function on the basis of their ethical foundation, formulating what could tentatively be called constitutional legal ethics. The American Constitution sets out provisions regarding contractual freedom and protection of private property, but it says nothing regarding a welfare state or solidarity.

The question of "regulation/deregulation" in economic relations provides further ground for disagreement between European (dirigisme) and American (free markets) views. From our perspective, this difference has an effect in the constitutional sphere in the sense that the issue of relating different constitutional principles with each other is resolved in different ways. As is well known, the most important constitutional norms are those that comprise constitutional principles (in the Russian Constitution, these are contained in the norms in the first chapter).[13] These norms include provisions that set out the terms for a legal and welfare state, that describe the separation of powers, economic freedom, republicanism, and justice, etc. At first glance, it appears as if the constitutional principles are immutable and are, in some sense, metaphysical. In reality, however, they possess a necessary juridical flexibility, as they are subject to dialectical alteration when the conceptualisation of these principles changes.

[12] *Durkheim E.* Sociology and Its Scientific Domain. Moscow. 1995. P. 326.

[13] *Zagrebelskii G.* (see: *Zagrebelskii G.* Interpretation of Laws: Stability or Transformation? In Comparative Constitutional Review. 2004. N 3. P. 80–82) demonstrated the distinction between constitutional norms that underlie principles and constitutional norms that contain regular governmental laws. It is the norms that underlie constitutional principles that "actually perform a constitutional function by formulating the universal conditions for public life."

The Constitutional Court frequently encounters conflicts in interpretations of various constitutional principles. In fact, some of the constitutional principles are frequently internally contradictory (suffice it to mention the constitutional principle of justice, which is mentioned in the sixth paragraph of the Constitutional preamble).

The contradictory nature of constitutional principles reflects not only the contradictory nature of human aspirations, but also the multiple contradictions comprising modern public life.

The search for balance in harmonising constitutional principles is the task of the Constitutional Court, which produces the rules to counterpoise constitutional principles, taking into account the fact that they are all equally valuable and that no hierarchy exists between them.

The concept of equilibration, including the balancing of constitutional principles, is founded in rationalism, which means that a) all constitutional principles must co-exist with each other; b) the best system of co-existence allows the interpretation of any constitutional principle to increase its regulatory effect in relation to other constitutional principle(s) when a new conceptualisation becomes available; c) there exists the possibility of not only balancing out two constitutional principles, but also the opportunity to strengthen the meaning of one of them during a given period of time.

The equilibration of constitutional principles is a search for rational proportionality. The principle of proportionality, one of the constitutional values, becomes the universal method for solving juridical issues in constitutional law.

From our perspective, the idea of equipotency of constitutional principles is based on the philosophical legal interpretations of American scholars, who believe that each constitutional principle represents a particular interest of a large social group. At the same time, from the perspective of constitutional law, these interests and their representative constitutional principles comprise equivalent entities, as one of the features of the constitutional law axiology is the fact that no hierarchy can exist between different constitutional principles.

From the point of view of constitutional law ontology, an interesting phenomenon arises, with equally valuable constitutional principles "accommodating" a multiplicity of the most important social interests. This is one of the most enigmatic spheres of constitutional law! The specific juridical form of constitutional principles — the foundation of constitutional law — contains information regarding the most important social interests, which exist in social reality. Within the conceptual space of constitutional law, constitutional principles are unique symbols that represent the most important juridical information, which, in essence, sets out their legal value.

The purpose of constitutional principles becomes clearer in the legal conceptual space. They are needed to establish basic consensuses in society, where contradictory social interests always exist.

The search for balance between equally valuable yet simultaneously antinomian constitutional principles is, in a sense, the marking of the end of contradictory points of view. As such, this search aids the harmonisation of public life. It is essential, however, to address the ontological law of nature as the binarity of constitutional principles. The foundation of the constitutional system guarantees the constitutional principle of economic freedom. With the aid of this constitutional principle, the interests of economically energetic members of society, such as entrepreneurs, employers, and property owners, are protected. For those citizens who require social support from the government, there exists the constitutional principle of

the social welfare government. According to V. Nersesyants, the juridical principle of economic freedom is the necessary means for the provision of freedom in society.[14]

Another set of constitutional principles that can be used to demonstrate binarity include the constitutional principles of freedom of expression and freedom of choice. Equally contradictory are the constitutional principles, which, on the one hand, guarantee the right to privacy and, on the other hand, defend the freedom of the press. A similar pairing arises from the protection of the rights of women and the protection of interests of a child and the issue of abortion. There are many more examples, which include the issues of euthanasia and artificial insemination. Possibly, the binarity of constitutional principles, as the ontology of natural law, comprises the manifestation of formal equality, which, according to V. Nersesyants, is necessary to provide freedom in society.

The tradition of considering constitutional norms in relation to the rights of individuals and the tradition of examining constitutional principles as interdependent, rather than discrete, entities are American, not European, in their nature. In his essay, "The Path of The Law", the great American jurist, Oliver Wendell Holmes, wrote: "the judges themselves have failed adequately to recognise their duty of *weighing* considerations of social advantage".[15]

Thus, constitutionally legal principles exist interdependently, rather than separately, in the legal conceptual space. Even so, "paired" constitutional principles frequently collide with each other and these collisions create the dynamic of the whole space — the constitutional legal reality. This reality can be compared to a child's kaleidoscope, which, at the slightest turn of a hand, creates a different mosaic. The binarity of constitutional principles aids the ability of constitutional law to demonstrate its social value, which comprises the stabilisation of social life, expansion of world space and harmony.

4. Constitutional law cannot determine the direction of social life development. Thus, article 38 (part 1) of the Russian Constitution sets out that the family is protected by the government. But then a question arises: what kind of family? Does a traditional family, and only that type of family, constitute a constitutional value? Or do common law marriages also fall under the notion of an evolving family?[16] For this reason, constitutional principles should not serve as iron ties that restrict the development of social life. The system of constitutional values, which, first of all, comprises constitutional principles, should not set out an a priori entity. Within its principles, the constitution contains only those elements that serve as the glass in the kaleidoscope, allowing for creation of new societal mosaics.

In essence, we have two types of argument — external and internal. Juridical positivism calls for a strict and exclusive adherence to positive law norms and excludes the possibility of applying other arguments, be they sociological, economic, moral, or historical, when addressing the issue of suitability of court decisions, which acknowledge new human rights. This is known as the internal approach, which separates the legal space from others, including economic and moral considerations. From this perspective, the politics of law comprises something external to the idea of law and, hence, it is the domain of politicians.

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[14] *Nersesyants V.* Philosophy of Law. Moscow. 2006. P. 39. As noted by Nersesyants, freedom turns into lawlessness when it is not integrated into a universal norm (a norm that sets out mutual and equal limitations on individual freedoms of all members of society).

[15] *Holmes O.* The Path of the Law. Boston Law School Magazine. 1897. N 1 (4). P. 9.

[16] See *Tolstaya A.* Common Law Marriage: Perspective of Legal Development. Law. 2005. N 10; *Kostrova N.* How to Protect the Rights of Family and Children: Problems in Improving Family Law. Law. 2010. N 8.

The external type of argument lets us avoid the extremes and excessive formalism of legal conceptualisation. This field of juridical scholarship employs open methods of argumentation, using sociological and statistical data, economic considerations, and, of course, moral arguments.

Andras Sajo believes that juridical science and legal practice must develop a theory that would, to a certain extent, integrate new social facts and social values.[17] In line with that thinking, we suggest that constitutionalists adopt the ontological method as the method for assessing historical space. The application of this method will serve as the methodological basis for new relationships between national courts and European supranational courts and, foremost, the European Court of Human rights. Therefore, it is necessary to address existing differences when it comes to evaluating constitutional values at the national and European levels.

The stable socio-cultural model — the codification of connections to the past in the Constitution — is not a phenomenon exclusive to Russia. Germany witnessed the formation of its own "stable national culture"[18], which led to disharmony with European constitutional values.

In September 2011, a new disagreement arose between the German Federal Constitutional Court and the European Court of Human Rights. The European Court of Human Rights ruled in favour of fathers, who had fathered children outside of marriage, to maintain a relationship with their children, overturning the rulings of German courts. German judges take a strong stand when dealing with issues of fatherhood, steadfast in their position of the rights of the family. As such, their laws follow their socio-cultural tradition and protect the family, above all, even if the child has a different biological father. The European Court, however, decided that the German Constitutional Court violated the constitutional rights of the biological father and his right to privacy, which is set out in the European Convention on Human Rights. Previously, these two courts faced off in an uncompromising debate regarding the question of which constitutional value could be considered "more important", that of the inviolability of right to privacy or freedom of the press.[19]

Considering that the constitutional legal conceptual space is a single entity, it is essential to develop relationships between national constitutional courts and the European Court of Human Rights on the basis of mutual compromise. The philosophy, underlying the relationships of national and supranational courts, must be developed with the understanding that no absolute constitutional legal value (or truth) exists. As such, the only possible legal means to establish relationships between these courts is to encourage dialogue.[20] National and European constitutional values that are formed on the basis of the new spatiotemporal thinking must influence and supplement each other in a "peaceful" fashion, for they must exist in a single constitutional legal conceptual space.

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[17] *Sajo A.* Constitutional Values in Theory and Legal Practice: An Introduction. In Constitutional Values in Theory and Legal Practice. Moscow. 2000. P. 8.

[18] *Lubbe-Wolff G.* International Protection of Human Rights and the Principle of Subsidiarity: The case for the "hallway" resolution in the case of legal conflict. Comparative Constitutional Review. 2011. N 2. P. 70.

[19] European Court of Human Rights resolution. Application N59320/00 Von Hannover V. Germany. Judgment of 28 June 2005.

[20] See: *Costa J.P.* Role of National Authorities, Particularly Judicial Authorities, and the Future of the Protection of Human Rights in Europe. Comparative Constitutional Review. 2011. N 1. P. 121.

5. In essence, the ontological category of the constitutional legal conceptual space, which we propose here, can fulfill several functions. In particular, it demonstrates that even in the sphere of constitutional law, juridical positivism, used as a means to solve constitutional problems, has left a noticeable trace. The limitation of conceptualism in constitutional law, in our opinion, is rooted in the fact that it is based on a fallacy, whereby it is assumed that constitutional law has reached such a high stage of development that it has become self-sufficient and, as such, is capable of further evolution on its own. Constitutional law now exists separately from real life, operating under conditional assumptions. Those who rule in reality use the conditional terminology of "nation" and "sovereignty". The real world is being replaced by a fictional world. Constitutionalists dedicate too much attention to the symbolism of conceptual reality, rather than real life. But especially dangerous is the aspiration to create value-neutral constitutional law, using a limited set of legal values.

Why is the individual — and his rights and freedoms — considered the highest value in the Russian Constitution? And do the individual and his rights and freedoms comprise only one value? Or are we talking about an individual's life, whereby an individual comprises one value and his right to life another? And does justice, as the moral foundation, comprise a value in constitutional law? And why is it that a person's mind — or his knowledge — does not comprise an independent value within the constitutional legal conceptual space?

All of these questions signify that the constitutional legal axiology is still being developed. We are in need of further evidence to substantiate the fundamental assumption underlying this axiology that constitutional legal values must be evaluated, especially in applying moral values. The idea of law is founded on the principle of evaluation.

The application of the value approach to constitutional law must not be limited by the assertion that there exists a certain system of constitutional values, or worse — a hierarchy of values — or that there is a rigid and inaccessible legal space for values of constitutional law. Neno Nenovski rightly noted that by systematically applying the value approach to law we are compelled to trespass the rigid delineation of the law itself.[21] A system of constitutional values is influenced by moral and other values. As a result, two contradictory points of view had evolved within legal theory. The first is Hans Kelsen's pure theory of law, which derives its roots from Friedrich von Savigny's school of conceptualism. Kelsen believed that law must be cleansed from the influence of other values, be they political, ideological, moral or religious. Pure law must be constructed exclusively on the basis of jurisprudence. The pure theory of law requires consideration of the law only as structural terminology, maximally avoiding value-laden judgements. This theory was echoed by Herbert Hart in his famous article on positivism and the necessity of separating the law from morality, as the merging of morality and law could have destructive elements for the legal system. The second point of view came from Ronald Dworkin, who believes that it is essential to evaluate constitutional values through the prism of moral values and, foremost, justice.

I believe that the principle of justice exists under joint competence of law and morality. My experience as a justice of the Constitutional Court has allowed me to reach a conclusion that constitutional values are not self-sufficient and, as such, must be evaluated with the help of moral criteria.

[21] *Nenovski N.* Law and Values. Moscow, 1987. P. 25, 29.

Gustav Radbruch wasn't that far off when he argued that veritable values are moral values, as the majority of constitutional values can be related to moral values. The idea of social welfare is related to solidarity. At the very minimum, it implies the solidarity of generations. Even L. Petrazhitskii, in his discussion of various considerations related to public material benefits, addressed the meaning of love to those close to us, to fellow citizens, to our contemporaries. That said, Petrazhitskii conceptualised love as an active force, characterised by a constantly increasing intensity. In his opinion, love can be institutionalised through attitudes, instincts and even institutions. Petrazhitskii believed that a close analysis of the entire "public structure" would lead one to conclude that its entire foundation was nothing but the crystallisation of institutions, which had formed under the long-term influence of love and reason. These two foundational beginnings — love and reason — dissolve into one another. Love and reason exist in constant opposition to egotism, which hinders not only the harmony of human interactions, but also prevents a reasonable construction of social life.

The relationship between constitutional and moral values makes practical sense when addressing subjects familiar to jurists, such as omissions in law and, even, in the Constitution. Can the court ascertain legal oversights, and acknowledge that the law's own underlying principles have been violated in the case of such an oversight?

This question has a negative answer in those countries that, to this day, strongly support Kelsen's positions. In those countries where Kelsen's opinions have been reconsidered, law practitioners recognise that omissions in constitutional law exist, with axiological omissions prevalent in the law when legislation regulates certain relationships in a morally unacceptable manner.

There is a distinct difference between legal axiology and constitutional axiology. Legal axiology is interpreted as a value and an object of evaluation using values, such as justice, equality, freedom.

Constitutional axiology has an applied meaning. The philosophical problems of constitutional law constitute a type of *midrange theory*, rather than the philosophy of law in an authentic sense.

In essence, it is the sum of scholarly knowledge relating philosophy of law to constitutional law.

Constitutional axiology engages with: 1) the definition of what constitutes constitutional values, *deriving their genetic origins*; 2) the establishment of relationships between various constitutional values. As such, economic freedom, as a value, became part of the Constitution due to its role in the economic space, while values like solidarity, social welfare state, and right to a decent life are ethically sourced constitutional values, which comprise the constitutional ethics section in constitutional law. The law of proportionality claims the same origins. It is used as guidance when creating public policy, or systems of reasonable limitations for individual rights and freedoms. Balance comes from finding a happy medium, an ancient ethical category. Carl Schmitt noted correctly that, beginning in the 11th century, various types of balance have come to exist in all spheres of life — trade balance in economics, European balance in foreign policy, cosmic balance of attraction and repulsion, the balance of passions as described by Malebranche and Shaftesbury, and Moser's nutritional balance.[22]

[22] *Schmitt C.* The Intellectual-Historical Condition of Modern Parliamentarism. In: Political Theology. Moscow, 2000. P. 194.

The balance of powers through their separation and the internal balance of a legislative institution are manifestations of the legal principle of proportionality, which formats the constitutional axiology of values.

When considering the idea of spatiotemporal thinking in constitutional law, the constitutional principle of proportionality should be applied to the most difficult issue related to the relationship between traditional and social (category: "past-present") and universal and public (category: "future) in understating constitutional values. And here, we must strive for balance. In search of balance, we must employ not only juridical knowledge, but also sociological and economic knowledge. This knowledge can be applied when corresponding normative regulations, which allow such application, are in existence. The modern model of constitutional court law rests on Kelsen's idea that constitutional courts deal exclusively with questions of law. However, in reality, these courts frequently issue judgements on the basis of moral values — especially justice — and other non-juridical arguments. For us, the most important methodological means to acquire knowledge through the idea of constitutional legal conceptual space are as follows: 1) the Constitution codifies the links and relationships with the past and the future. The Constitution apportions the majority of its weight to universal values, but it includes traditional and social values that have come about as a result of the socio-cultural code; 2) despite the broad application of constitutional universal values, constitutions remain nationally specific, concrete, and reflecting the specificity of its nation.

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Modern Russian Constitutionalism: Philosophical Conceptualisation in Light of Constitutional Justice

In accordance with the methodology of worldview legal pluralism, which derives from the combination of positivism and natural law, this article considers constitutionalism as a legal and philosophical category. One of the fundamental features of modern constitutionalism is constitutional justice. In this capacity, the Constitutional Court of Russia is not only the custodian, but also the reformer, of the Constitution, serving as a key factor in the development of the Russian constitutionalism. Building on this assumption, the article analyses the main developmental directions of judicial ("live") constitutionalism as a qualitatively new political and legal regime of judicial protection of the Russian Constitution and the provision of the rule of law. Furthermore, it explores the normative-doctrinal meaning of decisions of the Constitutional Court.

Key words: the Constitutional Court of the Russian Federation, constitutional justice, constitutionalism, positivism, natural law, judicial constitutionalism

The current epoch is characterised by a systemic crisis of constitutionalism, which has encompassed not only structural and functional features, but also the axiological foundations of classical institutions of constitutional democracy. This is accompanied by deepening contradictions and increased competition between fundamental principles and constitutional values of democracy, such as human rights and state sovereignty, and the need for personal, public and state safety, which face humanity in the 21st century in light of emerging global threats.

Undoubtedly, contemporary geopolitical changes have constitutional significance, albeit not always positive. As a result, these changes objectively predetermine the need to develop a new philosophy of constitutionalism, which includes the development of new approaches to form the basis of certain integral, synthetic, worldly, moral-ethical, socio-economic, and political foundations of contemporary constitutionalism. Simultaneously, this predetermines new claims to the gnosiology of modern constitutionalism, specifically to the process of understanding it by means of elucidating general patterns, as well as through the national-historical specificities of constitutional development of contemporary states, which becomes apparent — particularly within the political and legal spheres — in constitutional justice.

1. Methodological pluralism — "the salutary foundation" of the philosophical conceptualisation of modern constitutionalism.

A dynamism — hitherto unknown to any other historical epoch — which is characterised by the swiftness of regenerating not only political, socio-economic, moral-ethical, clerical-confessional, but also the constitutional foundations of state and public life — a phenomenon facing post-Soviet states, including Russia — objectively sets out the need for active supplementation of dogmatic methods for examining the regulatory, official component of constitutionalism with sociological, historical, moral-ethnical, and philosophical methods of conceptualisation in order to grasp the complex phenomena of constitutional and regulatory reality. Only through the application of such wide and general approaches is it possible to detect and evaluate the internal connections, general patterns, and socio-cultural specificities of modern globalised constitutionalism. And this is not coincidental: the constitution itself represents the outcome of public and state social conflicts, serving as the regulatory instrument and legal basis for their resolution. As such, the principal methodological question, which arises from the analysis of any constitutional system within the context of contemporary global issues, deals with the cultural-historical aspect of the universal juridical mechanism of implementing universally recognised constitutional values.

The culturological approach, which facilitates not only the understanding of essential foundations of regulatory phenomena, but also the generation of new knowledge of social reality, must become one of the primary pillars of the modern conception of constitutional philosophy. No rational formal-legal reasoning can be free of national culture and morality.

In this regard, the current state of constitutional philosophy can be characterised, in the words of I.A. Ilyin, as the loss of faith in the salutary methodological monism and the transition to the fundamental acknowledgement of methodological pluralism[1]. It is assumed that various conceptualisations — legal approaches during transition to real constitutionalism — acquire the significance of effective doctrinal features to the extent that they can be authentically integrated into the constitutional space of regulation, which requires the "communicative-integrative" or — the significant feature for studying legal systems — constitutional legal understanding[2]. This presupposes the acceptance and affirmation of philosophical pluralism not only as a doctrinal research method, but also as the most important (from a constitutional perspective) principle of the normative-legal system of organisation and functioning of the entire system of democratic governance.

This fully captures the universal nature of the concept of "constitutionalism": this category has the capacity to encompass not only legal, as well as non-juridical (pre-juridical or post-juridical), phenomena, but also "metajuridical" phenomena of social, economic, political or cultural nature. And this inclusion does not imply the *socio-cultural premise underlying the basis* of constitutionalism, but rather the *inherent characteristics* (social, culturological, moral-ethical, etc.) of the institutional *legal subsystem* of constitutionalism and simultaneously *the context for its existence and development*, which influence the basic historical nature of the given phenomena.

[1] See: *Ilyin I.A.* Ideas of Law and Power (A methodological analysis). *Ilyin I.A.* Collected Works in 10 volumes. Volume 4. Moscow. 1994. P. 9–10.

[2] Russian legal science offers a number of different approaches, for instance: *Kruss V.I.* The Theory of Applying Constitutional Law. Moscow: Norma. 2007; *Polyakov A.V.* The General Theory of Law. Problems of Interpretation Within the Context of the Communicative Approach. St. Petersburg. 2004; *Maltsev G.V.* Understanding Law. Approaches and Problems. Moscow, 1999.

In this sense, the philosophical conceptualisation of modern Russian constitutionalism has not only the fundamental methodological, but also applied, significance. This incorporates the understanding of corresponding social practices as both a sphere for implementing the philosophy of modern constitutionalism and an institutional instrument for its development, whereby — as a consequence of decisions taken by the Constitutional Court of the Russian Federation (hereinafter CC RF) — they acquire the significance of concrete (normative-doctrinal) manifestations of the philosophy of modern constitutionalism.

When it comes to the actual definition of "constitutionalism", much can be said about its semantic and structural characteristics, its principles, and qualities when trying to establish a universal and acceptable definition. However, irrespective of this, we all know the significance of lacking constitutionalism in state and society. This is not accidental. In understanding this phenomenon, much weight is given to non-juridical knowledge, based on faith, personal views, customs and traditions, and moral and ethical requirements of Justice and Truth. Saint Paul's words are illustrative in this case in that no one can use the excuse of not knowing how to behave, for the moral code is inscribed into the heart of each individual: individuals "without law, act lawfully according to nature" as "the rule of law is inscribed in their hearts".[3]

Ultimately, this understanding is present in addressing ontological, axiological, gnosiological and other problems of constitutional philosophy, as well as in *"doctrinally objectifying"* the category of "constitutionalism" in the theory and practice of constitutional justice.

2. Constitutionalism as a philosophical-legal category: the unity of public-authoritative, socio-cultural, and moral-ethical foundations.

With the existence of a multiplicity of approaches to defining the concept of constitutionalism[4], it is clear that the traditional approach to constitutionalism as a juridical, political-legal problem, prevalent in research literature, is not sufficient. This concept is too complicated to award complete control over to the jurists. As one of the universal philosophical-legal categories, constitutionalism is called upon to reflect the most important (universal) values of modern civilisation. These values are apparent in concentrated form in the patterns of democratic organisation of society and the state on the basis of *the triune balance of authority-property-freedom* within the context of the supremacy of the law, adherence to and protection of rights and freedoms of the individual and the citizen, and compliance with moral-ethical imperatives that had formed within state and society. The specific, structured plan of constitutionalism as a philosophical-legal, socio-cultural and moral-ethical category is described below.

Firstly, *doctrinal constitutionalism* as a special *philosophical-legal theory* includes systems of political-legal ideas and conceptualisations, which simultaneously represent the study of the constitution — the constitutional foundations of organisation of power — and a defined system of moral-ethical conceptions of justice and equality, freedom and accountability,

[3] Quoted from: *Sorokin V.V.* Conscience as an Element of the Russian Orthodox Sense of Justice. State and Law. N 6. P. 23. See also: *Papayan R.A.* Christian Roots of Modern Law. Moscow, Norma. 2002.

[4] See, for instance: *Berman G.D.* The Western Tradition of Law: the Epoch of Formation. Moscow. 1998; *Shaio A.* Self-restraint of Power (a Short Course on Constitutionalism). Moscow. 1999; *Kravets I.A.* Russian Constitutionalism: Problems of Formation, Development and Implementation. St. Petersburg. 2004; *Kutafin O.E.* Russian Constitutionalism. Moscow, 2008; *Russell G.* Constitutionalism: America and Beyond. http://www.infousa.ru/government/dmpaper2.htm (09.03.2009).

good and evil, and, of course, the nature of the relationships between society, the state and the individual within the context of accepting (or rejecting) these values. In a sense, this comprises the gnosiological component of constitutionalism. Despite the presence of multiple research studies linking law to morality[5], the question of specific mechanisms and actual inclusion of spiritual-moral values into the system of existing legislation remains pressing. For now, it must be acknowledged, that only isolated and fairly timid attempts have been made at establishing moral values, and their legal provision as necessary regulators of actual life, through juridical practice.[6]

Secondly, the given *philosophical-legal* category embodies *normative-legal constitutionalism* as a system of *constitutional positivism*, which, by means of state hierarchy, constitutes a normative-legal constitutional space that is based on moral-ethical, socio-cultural values of society and is subject to the Constitution — the supreme formal juridical imperative of state and society. The Constitution itself serves as the normative-legal centre of constitutionalism.

Thirdly, it is *ontological constitutionalism* that constitutes *constitutional-legal practice* in the most expansive sense of societal and governmental development, including, of course, constitutional — legislative, administrative, judicial — practice. Evidently, it is at this level of implementing the Constitution and legislation that the moral crisis of modern constitutionalism becomes most apparent. Specifically, juridical positivism completely dominates the legal professional understanding of legal decision-makers, serving as one of the factors fueling the moral crisis of constitutionalism. The constitutional plan contains foundations for raising issues beyond professional juridical ethics (of investigators, judges, state or local officials) to implement constitutional maxims in the professional and public legal conceptualisation: *an unjust decision cannot be constitutional.* Decision-makers in the legislative, executive and judicial branches are the intended recipients of these essentially moral-ethical, though constitutionally significant, maxims.

Fourthly, and finally, as a moral-ethical and philosophical-legal category, constitutionalism embodies the characteristics of one of the forms of *public conscience*, which reflects the universality of constitutional psychology and constitutional ideology and, in turn, comprises the decisive prerequisite for the formation of a new type of juridical vision of reality — *the constitutional world-view*. In a certain way, constitutionalism incorporates the spontaneous legal experience into a normatively conceptualised model, based on the values of the supremacy of the law, human rights, social justice, and equality before the law, rule of law, division of powers, and political, ideological and economic pluralism, etc. Within the scope of this model, constitutionalism facilitates the implementation of various world-view, value-oriented, normative-regulatory, and educational functions. Specifically, it organises and structures public and individual conceptualisation of the law and of legal philosophy. In this regard, constitutionalism — as a complex axiological, teleological and praxeological system — is one of the universal, non-material values of civilisation and comprises humanity's cultural legacy, on the one hand, and is a national and cultural

[5] See, for instance: *Maltsev G.V.* The Moral Foundations of Law. Moscow. SGU. 2008; *Lukasheva E.A.* Law, Morality, and the Individual. Moscow. 1986.

[6] These attempts include the ratification of special laws concerning the protection of individual and public morality, with a focus on national and historical specificities, across different jurisdictions of the Russian Federation (for example, the Republic of Dagestan, the Republic of Sakha (Yakutia), the Altai Region, the Krasnoyarsk Region).

property of each people, nation, and government, on the other. However, it is necessary to acknowledge that this is one of the spheres of constitutionalism (especially if we take into account corresponding constitutional legal policies) that is least and, at times, not at all likely to "account for" moral reference points, as well as constitutional-legal controls and limits.

The fact that constitutionalism cannot be considered as a product of the state or as a state-controlled phenomenon can ostensibly "justify" this state of affairs, as the state is incapable of "instituting", "decreeing", or "establishing" legislation to formulate a desired variation of constitutionalism, despite the fact that the state is, undoubtedly, obliged to make the necessary efforts to affirm and develop constitutionalism in a manner that is most appropriate to the state. *Constitutionalism is the objectively emerging pattern of real public relationships*, which is based on the publicly accepted moral-legal requirements of justice and degree of achieved freedom, as well as the inadmissibility of lawlessness and violence. This order is formulated on the basis of maintaining these internal relationships, transforming them into mediums of justice and criteria of freedom. As a result, relationships, which comprise constitutionalism, acquire the capacity to embody certain requirements and normative models, which guide the behaviour of citizens, officials, organs of power and the state as a whole to comply with the ideals of justice and freedom.

Without the intent to diminish the significance of other branches of power, it is essential to note the important role played by the judicial branch as a body of authority that shapes constitutional normative control, as well as the development, in particular, of the axiological foundations of modern constitutionalism and the linkage of formal juridical elements with moral-ethical and culturological elements of constitutionalism.

3. Constitutional justice — the generator of judicial ("live") constitutionalism.

Russia's federally implemented model of strong constitutional justice is guaranteed by the active role taken on by the CC RF not only as a judicial and legislative, but also as a quasi-lawmaking, body that develops and implements the system of real Russian constitutionalism. In this sense, CC RF is not only the guardian, but also the interpreter, of the existing constitutional system. The governmental power system of constitutional justice, the material manifestations and normative equivalents of which are the *legal positions of CC RF* that are formulated as normative-doctrinal conclusions on the basis of final conclusions regarding specific cases, penetrates all components of constitutionalism and has an active effect on them.

Through the application of constitutional justice, constitutionalism is brought up to date, taking into account the changing historical conditions of its development. Consequently, reality (the system of real relationships) and legal ideals (juridical constitution) are brought together, transforming into "live" constitutionalism. On this basis, it is possible to formulate a new — in many ways, unique — political-legal formulation of constitutional governance — *judicial constitutionalism*.

The initial authorial conceptions of judicial constitutionalism originate from the essential characteristics of the Constitution, on the one hand, and constitutional prescriptions deriving from the judicial branch, particularly concerning constitutional justice, on the other.[7] The necessity of having the judicial branch take part in solving constitutionally important issues has an objective purpose. It is conditioned by the acceptance of judicial power as one of the pillars of the constitutional system, which is tasked with ensuring the

[7] See: *Bondar N.S.* Judicial Constitutionalism in Russia in Light of Constitutional Justice. Moscow. Norma. 2011.

supremacy and the direct implementation of the Russian Constitution, as corroborated by national and foreign practices.

With regard to Russia, we account for the entirety of the judicial system, including constitutional, juridical, and arbitrational components. As part of the law-enforcing component of constitutionalism, judicial practice has a significant effect on its normative components and, ultimately, on the socio-philosophical foundations of the system of real constitutionalism. It is not only in the common law countries, but also in the Romano-Germanic (continental) legal systems that the judicial branch specifically formulates the precedent-related conceptualisation of constitutional-legal regulation of public relations within the scope of judicial cases and, as such, formulates the system's specificities and development. The judicial branch identifies, establishes, defines, and specifies relevant constitutional pillars (principles) of sectoral legislation. It eliminates normative acts that do not correspond with the law and are ultimately deemed unconstitutional from the legal system through the use of courts of all jurisdictions. The interpretations of the Supreme Court of the Russian Federation and the Supreme Court of Arbitration of the Russian Federation (articles 126 and 127 of the RF Constitution) play a significant role because these courts were designed to provide a universal judicial interpretation and application of legislative norms and, by implementing this task, they frequently affect law-making. Nonetheless, in the instance that, in the course of the judicial process, a general jurisdiction court or an arbitration court establishes the presence of ambiguity in relation to adhering to the RF Constitution, the courts are obliged to direct the case to the Constitutional Court of the Russian Federation.[8]

The need to involve courts from various jurisdictions in solving constitutionally important issues has an objective purpose. In the most general view, this need is conditioned by the acceptance of judicial power as one of the pillars of the constitutional system (statue 10 of the RF Constitution), which was designed to ensure the supremacy and direct implementation of the Constitution (articles 15). At the same time, it is clear that constitutional justice, as a specialised instrument of legal protection of the Russian Constitution, plays a key role in this process.

This conceptualisation of constitutional justice is universally accepted in countries applying the Kelsen (continental) constitutional normative model. This makes sense: "a constitution — as described in the general report of the XIV Congress of the European Constitutional Courts' Conference (Vilnius, 3–6 June, 2008) — without a constitutional control body, which possesses the authority to certify contradictions of regular normative acts with the constitution, is *lex imperfecta*. A constitution becomes *lex perfecta* only when the constitutional court can recognise regular laws that violate the constitution... Only the active position of the constitutional court can provide a real, rather than an assumed, implementation of the principle of constitutional supremacy... The role of the constitutional court to ensure the application of constitutional supremacy is fundamental. Through constitutional control, the constitution, as a legal act, transforms into "live" law"[9] and — let's add — constitutionalism transforms into "live" Constitutionalism.

[8] See: Constitutional Court of the Russian Federation resolution, dated 16 June 1998, N 19-P, in the case of interpreting separate provisions of articles 125, 126 and 127 of the Constitution of the Russian Federation. SZ RF. 1998. N 25. St. 3004.

[9] See: General report of the XIV Congress of the European Constitutional Courts' Conference (Vilnius, 3–6 June, 2008). Constitutional Justice. Bulletin from the Conference of Bodies of Constitutional Control of Young Democratic Countries. Yerevan. 2008. Edition: 2–3. P. 110–111.

The practice of constitutional justice objectifies both the formal-juridical and the social nature of the Constitution as a legal act of supreme juridical authority and direct influence, which serves as the product, reflection and universal resolution instrument of social conflicts. It is from this perspective that it becomes possible to consider the formulation of the RF Constitutional Court as one of the most important prerequisites for ensuring that Russia practices real, "live" constitutionalism, rather than declarative constitutionalism. *The CC RF serves as the guarantor of the indissolubility of the factual and juridical constitution*, which also secures the unity of the real and the ideal constitutional space.

Taking into account the nature of constitutional justice, which simultaneously embodies a specialised constitutional-authoritative institution and an institution of judicial power, it can be argued that the formulation of the CC RF as a sort of material-organisational, purpose-designed manifestation of constitutionalism is the key step to the formation of a new type of constitutionalism — judicial constitutionalism. Using this understanding of judicial constitutionalism, combined with the role played by constitutional justice in its formation and development, we must consider several key moments.

Firstly, CC RF's decisions, in their capacity to represent specialised normative legal acts, are the normative legal foundation underlying the formation of judicial constitutionalism and, as such, the formulation of the entire Russian system of constitutionalism. The court's decisions are the manifestations of its nature and purpose as a normative legal component of judicial constitutionalism.

Secondly, constitutional justice and corresponding resolutions comprise one of the most important sources underlying the development of the modern constitutional doctrine — the modernisation of Russian governance (the doctrinal component of judicial constitutionalism) — which is sourced from the normative-declarative components of CC RF's decisions.

Thirdly, CC RF is the generator of constitutional ideology, as well as the creator of new constitutional culture, which shapes the public's and the individual's constitutional worldview (the ideological component of judicial constitutionalism).

Fourthly, judicial constitutionalism is the manifestation of the constitutional-judicial practice, whereby constitutional supremacy is applied to real life, having a direct effect on constitutional values in society and state (the material component of judicial constitutionalism).

Judicial constitutionalism facilitates the consolidation and maintenance of the constitutional order as the supreme juridical expression of legal democratic governance. This is ensured by conferring factual (practical and applied) values to the constitution, which penetrate both the public-authoritative life and the processes of consolidating the rights and freedoms of the individual and the citizen.

Accordingly, constitutional justice, as the embodiment of a specialised constitutional-authoritative institution and an institution of judicial power, as well as the cumulative manifestation of state-legal control, serves as one of the primary channels and, simultaneously, as an attributed indicator of constitutionalism. Judicial constitutionalism defines the structure of constitutionalism and supplies it with the necessary degree of stability and dynamism. From this perspective, *judicial constitutionalism can be perceived as a political-legal regime of judicial provision of the supremacy of the law and the direct influence of the Constitution*. It can be said to provide absolute judicial-legal guarantees of constitutional values, on the basis of the balance between power and freedom, public and private interests,

unity of socio-cultural and normative legal factors, which help to constitutionally develop Russia into a democratic government by economic, social and political means.

Constitutional control, principally reflected through constitutional justice, functions as a fundamental characteristic of judicial constitutionalism, penetrating all of its comprising parts. The establishment and the functioning of the institution of constitutional-judicial control transforms constitutionalism and takes it to a new level of practical reality.

The creative-transformational function of constitutional justice comes about with the assistance of various methods of judicial normative control within the scope of constitutionally set authorities granted to CC RF. Foremost, this includes the *interpretation of the norms set out in the RF Constitution,* which allows for a transformation of the Constitution without the need for its alteration. The official interpretation of the Constitution allows for a governmental-legal (constitutional) evaluation of corresponding social spheres, as well as for a defined development of the content of constitutional norms. This facilitates the timely amendment of the constitutional basis for sectoral legislation, which specifies given constitutional norms and institutions. Clearly, CC RF's decisions must originate not from the current state of political affairs, but rather from the requirements of the Constitution itself, perceived as a "meta-legal" document. In interpreting the Constitution, the Court takes on a normative-doctrinal, quasi-lawmaking function when it formulate its decisions, as they become part of the Constitution and are comparable with it in terms of juridical power.

The transformation of constitutional relationships also occurs as a result of *resolving constitutional-legal conflicts*. Their resolution — the formulation of a conclusive decision on the constitutionality or the non-constitutionality of a given law — requires the identification of the meaning and essence of the constitutional-legal approach to a given question, including the existing system of legal regulation. An appropriate outcome to this particular type of constitutional-legal activity is the elucidation and interpretation of direct and reverse links between the provisions of the Constitution and current legislation — their synchronisation within the scope of the hierarchical legal system, on the one hand, and the enrichment and development of the normative potential of constitutional principles and norms, on the other.

Constitutional interpretation of legal norms of sectoral legislation comprises an important mechanism of constitutional transformation by means of constitutional regulation and delineation of constitutional relationships. The work of CC RF, linked to the implementation of constitutional interpretation of legislative provisions, is also a form of quasi-lawmaking activity, which implies the building up of normative energy of sectoral legislation through constitutional principles and values that facilitate the evaluation of norms within existing legislation.

The CC RF's recommendations, outlining the improvement of legal regulations, to the legislator, deriving from the Court's resolutions on specific cases, serve as the next step to developing constitutional institutions of Russian governance through constitutional justice. This emerges from the very nature and specificities of the juridical authority of these recommendations. The recommendations to the legislator, as developed by the CC RF on the basis of specific cases, do not directly oblige lawmaking institutions, but rather orient them for future systematic implementation of constitutional principles within legislative projects. Consequently, the legislator's failure to acknowledge or, worse, actively disregard, the recommendations can lead to contradictions and disagreements in legislation vis-a-vis the RF Constitution. This can increase the threat of violating the constitutional rights and freedoms of the individual and citizen, as well as public interests and values.

As such, judicial constitutionalism provides a consistent harmonisation of the letter and the spirit of the Constitution. It links the Constitution's formal-juridical content with "social norms", which embody the real relationships between political powers and economic and social organisation of state and society.

4. Philosophical-worldview pluralism in constitutional justice: concord of positivism and natural justice.

Among the various conceptual approaches, the quintessence of the philosophical-worldview approach to modern constitutionalism rests in the realisation of two modern state-legal systems of legal interpretation — positivism and natural justice. The external — formal-juridical — expression of these philosophical-worldview concepts of modern constitutionalism is found in the relationship of the Constitution with the law, on the one hand, and legislation, on the other.

These two legal directions — positivism and natural justice — are important within the scope of the philosophical-worldview system of interpreting legal activity. For the constitutional-legal science, these two categories have a similar influence to Plato's and Aristotle's teachings for philosophers.[10] Here, we are talking about the use of these two philosophical-legal directions to implement various gnosiological guidelines, which carry an important methodological sense, embodying the entire system of modern constitutionalism.

It can be posited that the 1993 RF Constitution is characterised by philosophical-worldview pluralism. This pluralism is based on the combination of natural justice and positivist approaches. At the same time, when considering the formal philosophical dogma, it can be posited that the Russian constitutional space lacks philosophical-worldview monism and instead pioneers a certain worldview eclecticism, which suggests that the natural justice approach competes with the positivist approach. Such evaluations have a place in research literature, like the assertions that in the Russian Federation "the constitutional conceptualisation of human rights (and the conceptualisation of corresponding legislation) *eclectically* (author's emphasis — N.B.) links non-positivist views regarding legal freedoms with positivist views on legally sanctioned rights".[11]

This approach clearly juxtaposes natural justice and positivism and eliminates the possibility of their co-existence. It acknowledges their independence of each other and their comparable juridical value without damaging the essence of the law as a manifestation of freedom, equality and justice. At the same time, ancient philosophical teachings open the possibility of bringing together opposing philosophical theories, when the tensions between the two approaches beget the creation of a new positive quality that can lead to a positive outcome. From this perspective, the attentive and unprejudiced analysis of the RF Constitution provides evidence that the Constitution, though it identifies the independence of the natural justice and positivist doctrines, does not contrapose them and does not suggest an antagonistic relationship between the two. On the contrary, the Constitution strives to develop a synthesised, coordinated understanding with the purpose of developing effective legal interpretation.

[10] See: *Vorotilin E.A.* Natural Justice and the Formation of Juridical Positivism. State and Law. N 9; *Rudovskii V.A.* Positivism and Natural Justice (Legal Philosophy) in the Context of Modern Legal Interpretation. Philosophy of Law. 2008. N 5.

[11] See: *Chetvernin V.A.* Russian Constitutional Conceptualisation of Legal Interpretation. Constitutional Law: Eastern European Review. 2003. N 4. P. 32.

Indeed, to a large degree, the RF Constitution realises the concepts of the natural justice approach. As such, according to the Constitution, the individual, and his rights and freedoms, comprises the supreme value (article 2). This value, acknowledged and guaranteed in the Russian Federation in accordance with universally recognised principles of international law, is inalienable and is granted to everyone from birth (article 17). At the same time, the RF Constitution sets out the inadmissibility of opposing natural justice guidelines (set out directly in the Constitution) in consequent legislative regulation of individual rights and freedoms. On the contrary, the authority of state-legal regulation regarding individual rights lies with the federal legislator (article 71). Article 18 of the RF Constitution sets out that *rights and freedoms determine the essence, content and application of legislation*; in other words, the natural justice components of rights and freedoms must be objectified in positivist (passed by the government) legislation in order to be implemented in lawmaking activities.

Within the philosophical-worldview foundation of modern Russian constitutionalism, natural justice and positivist approaches are integrated within the concept of *legal legislation*. The CC RF serves as the main organisational-legal mechanism for coordinating the two philosophical-worldview approaches, ensuring their harmonisation within the scope of Russian constitutionalism.

From the perspective of constitutional justice, this issue goes beyond the practical, utilitarian sense, if we take into account the possibilities and the objective necessity of utilising corresponding philosophical doctrines in order to formulate the juridical logic of constitutional-judicial normative control and the development of necessary constitutional-legal approaches (motivational and foundational) in solving specific cases. The philosophy of constitutionalism — when considered within the sphere of constitutional control — has a wider application. It serves as a sort of foundational system, which determines the essence of the institution of constitutional control. It influences its functional characteristics and, in many ways, sets the guidelines for the practical work of the institution charged with constitutional control. It is the conceptual differentiation between law and legislation, including their relationship with the Constitution, and the desire to formulate legal legislation on this basis, that serves as the decisive prerequisite for formulating the legal content of legislative acts, and their link to the Constitution, and, in a sense, institutionalises the given control-judicial function.

The conceptual delineation of law from legislation — the conferring of an inherent legal foundation to legislation tied exclusively to the will of the legislator (which is characteristic of juridical positivism) — in principle, excludes the possibility of constitutional control, as the key maxim of this doctrine is "the legislator is always right" and, as a consequence, the evaluation of the legitimacy of the legislator's actions is pointless.

In utilising the constitutional-legal doctrine of legal legislation, the CC RF strives to bring a balanced combination of positivist and natural justice principles into the national constitutional-legal system. Considering that the law, in its content and origin, has an "external lawmaking" and "pre-lawmaking" nature, the CC RF strives to express as fully as possible the law in legislation (in the widest sense of this word). In other words, legislation is designed to provide a formal form for the law, representing the universal understanding and application of equality of rights among citizens.

Accordingly, the CC RF acknowledges the existence of the so-called *informal sources of the law* and, specifically, actively participates in implementing institutional control us-

ing *general principles of the law and legal principles*, using them as evaluation criteria for determining the constitutionality of legislative norms. According to the CC RF, these principles contain the greatest degree of normative generalisability and determine the content of constitutional individual rights — and other corresponding citizen rights. They also have a universal nature and, as a result, have regulatory influence on all spheres of public relationships. The authority of these principles is constituted in their supremacy vis-a-vis other legal provisions, as well as their influence over all legal subjects. As such, the actions of the legislator, the lawmaker or other legal subject must not contradict not only *the letter*, but also the *spirit* of the RF Constitution and its principles, including the principles of the rule of law, justice, balance between public and private interests, etc.[12]

At the same time, the CC RF does not set the law and legislation against each other and utilises all possible constitutional-legal means to ensure the constitutionality of the content of existing legislation. This emphasises the CC RF's sensitive approach to legislation. This is linked to the *presumption of legislative constitutionality* and the method of constitutional-judicial control, which employs a constitutional-legal interpretation and allows the identification of the legal (constitutional) meaning of the legislation and the elimination of all other — unlawful — interpretations from existing practice. If the CC RF establishes that, as a result of an inadequate interpretation of the RF Constitution by a legislator, a norm is interpreted unconstitutionally, the court, without having to eliminate the norm from the legal system — as that can have a significant impact on the functioning of the legal system as a whole and create difficulties for lawmaking, specifically, as a result of the emerging gap in the regulatory legislation — has the right to restore its constitutional-legal interpretation by acknowledging that the norm does not contradict the RF Constitution in a constitutional-legal sense. The CC RF"s decision — which confirms the constitutionality of the norm within a narrow interpretation and thus, excludes any other interpretation (in other words, an unconstitutional interpretation or the application of an unconstitutional interpretation) — has the same effect as if the norm was considered unconstitutional vis-a-vis the RF Constitution.[13]

The main instruments for harmonising natural justice with positivism within the scope of constitutional control are constitutional values and, consequently, the search for balance between authority and freedom, between the rights of the individual and public safety, between democracy and centralism, between freedom of enterprise and social security, as well as other rival values inherent in the normative make-up of existing legislation and in lawmaking practice.

5. Universal constitutional values — the objective-gnosiological mechanism of constitutional justice.

The question of constitutional values can be considered from various aspects: from a general theoretical perspective of constitutional philosophy, which is related to the identification of the meaning, content and system of constitutional values and the nature of their influence on the constitutional world view; or from a pragmatic applied perspective, as not only an element of axiology, but also as a component of constitutional praxeology, which implies the need to develop a mechanism for applying constitutional values to lawmak-

[12] See: CC RF Resolution, dated 27 January 1993, N 1-P, SZ RF. 1993. N 14. Statute 508; CC RF Resolution, dated 21 December, 2005, N 13-P. SZ RF. 2006. N 8. Statute 945.

[13] See: CC RF Resolution, dated 21 December 2011. N 30-P. Rossiisskaiia Gazeta. 2012. 11 January; Ruling of the CC RF, dated 11 November 2008. N 556 O-P. SZ RF. 2008. N 48. Statute 5722.

ing, law-creating forms of practical activity in fulfilling specific goals of state and public development.

As such, constitutional values serve as the gnosiological, and axiological, as well as the objective-ontological equivalent of the philosophy of modern constitutionalism. This is reflected in the fact that axiology is the sphere of values and is "the foundational attribute and responsibility of philosophy".[14] In other words, the philosophy of constitutionalism acquires a practical significance — partly as a result of constitutional justice — as a study of constitutional values. It becomes the study of values.

By this, we assume that a "value" is a universal and multifaceted concept, which encompasses all spheres and levels of social life, including those that are influenced by constitutional-legal and, especially, constitutional justice. At the same time, *constitutional values* comprise not only the general, doctrinal-gnosiological category of the philosophy of constitutionalism, but also a *category of existing law.* The specificities of its normative-legal nature are determined by its own (constitutional-legal) features, which are ultimately derived from the Constitution, a document that represents direct action, as well as the specificities derived from the normative-legal nature of its decisions.

The specific character of the normative energy of constitutional values is such that it both affects and assumes the political-legal shape of normative dimensions at the highest level of abstraction — general legal principles, constitutional principles, declarations, constitutional presumptions, categorical features of subjects of constitutional rule and constitutional phenomena, etc. Constitutional values help increase and actualise the normative content of corresponding norms, institutions, principles, as well as underpin their balanced interaction. From this perspective, constitutional values are not only instrumental means of normative control of constitutional institutions, but also, to some extent, the outcome of their work.

The normative-lawmaking value of constitutional values manifests itself when the CC RF employs them to identify and evaluate legal models of organisation of various spheres of social life, to overcome gaps and defects in legislative regulation, to identify the patterns of development of constitutional relationships, and to establish a constitutional strategy for improving legislation within the sphere of influence of constitutional normative control.

Social values, which are reflected in the Constitution, constitute the qualitative nature of state-legal phenomena of the highest order, associated with society's acknowledgement — through the prism of democratic experience and national-historical practice — of the concepts of human virtues, good and justice, the fundamental goals and norms of development, which represent the most reasonable forms of public and state organisation. During the process of constitutionalisation, corresponding social values become streamlined, assuming a particular hierarchical system of multi-level links and correlations, based on the existing state-organisational societal context. In representing a system of linkages between rights and obligations (freedom and accountability), the legal-social order serves as an actual measure of social values.

Therefore, constitutional values are closely linked — both explicitly and implicitly — with the normative energy of the Constitution. On the one hand, they serve as the social-legal generator of this energy, providing the bridge between generally accepted, universal and beneficial rules of everyday life and the normative content of compulsory constitutional

[14] See: *Guseinov A.A.* Philosophy: Between Knowledge and Values. Philosophical Sciences. 2001. N 2. P. 19–20.

resolutions. As such, publicly employed constitutional values that have come about as a result of adequate constitutional entrenchment (introduction into Constitutional norms) do not only legitimise the Constitution, but also obtain a formal-juridical normative nature and bind all legal subjects, including the state as a whole.

On the other hand, as a system of social-legal values becomes constitutionally formalised, actual axiological constitutional relationships become subject to compulsory norms of fundamental law and, therefore, can no longer develop by any other means than the correlated influence with formally established rules and norms. As such, the correspondence of actual social-legal values with formal ones doubles their normative potential; while their contradiction not only decreases trust towards the Constitution, but also complicates the implementation of its provisions, as it derives its roots from fundamental law. The harmonisation of real and formal social-legal values within the normative scope of existing Constitutional provisions is the strategic task of the RF Constitutional Court, as set out in its functions and powers.

One of the fundamental processes underlying the current epoch of human development is globalisation, whose processes directly affect constitutional values and their hierarchical nature.

Democratic constitutional values are the foundation of the processes underlying juridical globalisation. Juridical globalisation does not only reflect the spatial (quantitative), but also the qualitative, nature of the internationalisation of juridical life. At its centre is the accumulation of general, universal in terms of normative-legal standards, objective reality of modern civilisation. The most important thing, however, is that juridical globalisation reflects juridical patterns — the increase in the legal normalisation of the main spheres of social life. However, this only reflects one aspect of it. The other feature of juridical globalisation represents the reaction to the new global threats to humanity that have emerged in the 21st century. These include international terrorism, natural and anthropogenic catastrophes, ecological and energy crises, etc.

As such, the processes of juridical globalisation require constitutional evaluation at the level of national state-legal systems, although we must account for the fact that, as a result of global events as well as their own nature, these processes far exceed the boundaries of their own constitutional-legal systems. At the same time, the process of universalising constitutional values is accompanied by their transformation from mythologised political-ideological features into functioning normative-legal imperatives.

Within the scope of juridical globalisation, theses processes can manifest in various aspects: a) the institutional, lawmaking aspect, which links modern legal systems on the basis of the unity of their constitutional values; b) the legal implementation aspect, whereby supranational juridical authorities are formed to protect generally accepted values (foremost, individual rights and freedoms); c) the establishment of new legal ideology, whereby new types of legal conceptualisation and legal culture are established and result in the unification of legal values and the linking of fundamental features of national legal cultures; d) the constitutionalisation of universally accepted principles and norms of international law and the subsequent linking of internal state juridical-legal foundations with international relations, etc.

The elucidation of value criteria and reference points, embedded in legal globalisation and, thus in the juridical progress of democratic governments, plays a significant role. In a sense, it is the acknowledgement of the modern juridical globalisation axiom that these

processes must develop in the direction of *juridical freedom, authority and property*, as fundamental components of modern socio-political and economic systems. From this perspective, the "property-authority-freedom" axiom serves as the philosophical-existential trinity of modern constitutionalism's foundations.

In the modern world, the search for balance between values of this constitutional trinity and, ultimately, public values and private values is incredibly important. In the formal, normative-legal sense, this is an issue of reconciling the sovereignty of state power (emphasising the sovereignty aspect of power) and freedom, which directly or indirectly underpins the entire system of constitutional regulation and is present in every constitutional institution, as well as each norm and statute of the Constitution. In this sense, the search for balance between power and freedom comprises the most important element within the theory and practice of modern constitutionalism.

As such, globalisation directly affects the constitutional systems of modern states by setting out new criteria for developing their values, modernising and protecting various institutions and mechanisms of their implementation, including the system of "live" (judicial) constitutionalism.

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The Separation of Powers and the British Constitution[1]

This paper provides an account of the nature of the separation of powers and considers its application in the British constitution. It charts the developing understanding of the principle in British constitutional scholarship over the last century, and shows the ways in which the British constitution has shifted towards a modern understanding of the principle in the last twenty years.

Key words: Separation of Powers, British constitution, United Kingdom, Parliament, Judicial Independence, Rule of Law

The separation of powers is a troublesome concept. Some writers argue that it is an essential part of constitutionalism, and that, as such, all constitutions should adhere to it.[2] Others consider it a feature that only characterises presidential-style constitutions, and exclude other systems from its reach.[3] Allied to this, there is a profound, and often unexplored, division between those who see the separation of powers as normative principle, as a set of reasons that apply to all those who create and operate constitutions, and those who regard it as primarily as a mechanism of categorisation, a helpful way of dividing up different polities. Perhaps because of this uncertainty, the constituent elements and purpose of separation of powers are unclear. What the separation of powers requires to be separated and how absolute this separation must be, is subject to considerable debate.

This paper reflects on the nature of the separation of powers and, in the course of this discussion, its applicability to the United Kingdom's constitution. The paper begins by considering the content of the separation of powers, sketching some of its demands and drawing attention to some of its ambiguities. The middle sections consider the implications of separation of powers for the British constitution, and chart a shift in the attitude of commentators over the last fifty years or so. From almost universal scepticism in the 1960s and 1970s over the applicability of the separation of powers, the consensus has changed, with many writers now arguing that the principle does, indeed, speak to the British constitution.

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[1] This paper builds on ideas found in *Barber N.W.* 'Prelude to the Separation of Powers' (2001) 60 Cambridge Law Journal 59 and *Barber N.W.* The Constitutional State (Oxford: Oxford University Press, 2010). Thanks are due to Menaka Guruswamy and Jackie Fernholz.

[2] *Barendt E.* 'Is there a United Kingdom Constitution?' (1997) 17 Oxford Journal of Legal Studies 137, 140–142; *Vile M.J.C.* Constitutionalism and the Separation of Powers 2nd ed. (Indianapolis: Liberty Fund, 1998); *Lane J.* Constitutions and Political Theory (Manchester: Manchester University Press, 1996), chapter 2; *Carolan E.* The New Separation of Powers (Oxford: Oxford University Press, 2009).

[3] *Calabresi S.G., Bady K.* 'Is the Separation of Powers Exportable?' (2010) 33 Harvard Journal of Law and Public Policy 5; *Hathaway O.* 'The Case for Promoting Democracy Through Export Control' (2010) 33 Harvard Journal of Law and Public Policy 17.

The final section discusses the resurgence of the separation of powers as a constitutional principle, and the ways in which it may have affected the structure of the contemporary constitution.

The Separation of Powers

There are numerous versions of the separation of powers, but perhaps the most common understanding of the principle presents three types of division between three branches of state.[4] The three branches are the legislature, the courts, and the executive. The three divisions are between institutions, between powers, and between officials in those institutions. These nine elements can be placed on a table:

Institution	Legislature	Courts	Executive
Power	Legislative	Judicial	Executive Power
Officials	Legislators	Judges	Executive Officials

Looking along the first row, there are structural differences between the three institutions. Legislatures tend to consist of large groups of people gathered in a forum that facilitates debate and discussion. [5] The institution enables its members to express their views on issues: they can debate the broad policy direction of the state, and the particular decisions made by executive officers. Mechanisms exist for the legislature to reach conclusions following debates, such mechanisms enable this large group of disparate people to reach decisions about the acts and direction of the state.

The courts, in contrast, are essentially triadic in structure.[6] There is a judge who decides a dispute between two contesting parties. The decision-making processes focus tightly on the case at point: there are rules of evidence to test the parties factual claims, and the judge considers the parties' submissions about how the law should be applied in their particular situation.

Finally, the executive is bureaucratic in structure. It is a large organisation, divided into many different offices. The divisions within the executive generally track the technical divisions required by the tasks faced by the state. So, subsets of the executive focus on foreign affairs, education, social welfare and so forth.

Turning to the second row, a distinction is drawn between the types of power that the institutions characteristically act through. The legislature acts through resolutions and statutes. Statutes are a form of law-making instrument that is normally general and broad. They are general, in that they apply to a large number of people — often all the people in the state. They are broad, in that they normally apply to an area of law rather than a particular legal question. Statutes are also prospective: they change the law, but do so, normally,

[4] See generally Vile, note 2 above, chapter 4; Montesquieu C. The Spirit of the Laws, transl. by *Cohler A., Miller B., Stone H.* (Cambridge: Cambridge University Press, 1989), Book 11, chapter 6; *Gwyn W.B.* The Meaning of the Separation of Powers, (Tulane: Tulane Studies in Political Science, 1965), chapter 1.

[5] *Wheare K.* Legislatures, (Oxford: OPUS, 1968), 5.

[6] *Shapiro M.* Courts: A Comparative and Political Analysis, (Chicago: Chicago University Press, 1981), chapter 1.

only for the future. Resolutions are a second important form of legislative act. These are not legally binding, but allow the legislature to express an opinion on some issue.

The courts, in contrast, act through decisions, judgments, delivered in response to a particular course of litigation. Judgments ordinarily focus on a narrow issue of law. Normally, because judicial decisions are answers to disputes, the judgments are backward-looking: they provide an authoritative statement of the legal obligations and rights of the parties at the time the disputes arose. In some, older, accounts of the separation of powers the proper role of judicial power ended at this point: the power of the judges was simply to apply pre-existing law to a dispute.[7] However, it is now generally recognised that the judicial power, even narrowly understood, extends to developing the law. Judges can develop the law by interpreting and clarifying existing law, filling in gaps in the law, and — more debatably, perhaps — by changing the law. The judicial power to develop the law is very different from that of the legislature. Ordinarily, judges can only change the law through decisions on particular cases: the judicial law-making power is slow and incremental.

The executive enjoys the power to apply the law and policy of the state in a given case. One of the most important characteristics of executive power is its connection with force, coercion. The legislature and the courts can declare what the law is, but they rely on the executive to carry out the law: catching backsliders, locking up criminals. The executive also has a role in shaping the state's laws: within the boundaries set by the legislature and courts, the executive formulates rules governing the application of the laws.[8]

Finally, in the third row, the people who occupy these institutions tend to be appointed for very different reasons. Legislators are elected, and, consequently, they need not have any particular skills or abilities. Their purpose is to, in some way, represent the people of the state. On any given issue before the legislative, those representatives with technical expertise in an area will be out-numbered by their unqualified colleagues. Judges are appointed because of their knowledge of the law; they are legal experts. They are not, or not always, experts in the facts of the disputes they address: it is the task of the parties before the court to explain the facts to the judge. Finally, the executive is technocratic. Most officers of the executive branch are appointed for their skills in administration or their expertise in the particular subject regulated by their department.

There are, then, three possible types of division an account of the separation of powers might call for. First, it may call for a separation of *institutional structures*: perhaps every state requires each of these three types of institution. A large assembly, structured like a legislature, for instance, could not be substituted for the triadic structure of the courts. Second, it may call for a separation of *powers* (in the sense set out in the second row). Perhaps the state needs to exercise all three of these types of power: it needs to be able to produce general statutes, narrower administrative rules and decisions, and produce judgements that resolve disagreements over these rules. Perhaps it would be a mistake for an institution in one column to exercise a power found in another column: the legislature should not decide cases, the courts should not pass statutes. Finally, it may call for a separation of *persons*. Maybe the state needs three types of officers: those who are elected, and enjoy democratic legitimacy; those who are experts in resolving conflicts over the law; and those who possess technical expertise. Perhaps it would be a mistake for the type of person found in one column to also act in another column. Maybe judges can never properly act as legislators,

[7] *Montesquieu*, note 4 above, 158.

[8] *Carolan*, note 2 above, chapter 6.

or members of the executive should never sit in the courts — because their qualifications to act as one type of state official do not entitle them to act in another branch.

The lines between these columns are drawn by different writers with varying strength. A divide is commonly drawn between 'pure' and 'partial' versions of the doctrine.[9] The pure theory calls for complete separation of the three branches of the state; a strict delineation between the executive, the legislature and the judiciary. The lines drawn in our table would be hard: they would constitute absolute divisions between the institutions, powers, and people of the three branches. There must be three distinct institutions, each institution can only exercise the particular power type allocated to it, and no officer from one institution can serve in another institution.

The alternative vision of the doctrine, the 'partial' version, emphasises the significance of checks and balances within the constitution. The lines between the columns are soft, and can be crossed on occasion. Each of the institutions of state is given some power over the others, their functions are deliberately constructed so that they overlap. These overlaps may have offensive or defensive goals. Offensively, one branch may be given some control over the other: the legislature, for example, might be able to scrutinize the workings of the executive. One branch of state is empowered to examine and limit another. Defensively, institutions might get powers normally allocated to another branch to protect themselves from interference: so, judges might be given executive powers over the running of their courts, legislatures might be given judicial powers to punish their own members for misconduct. Whilst it is normally more appropriate for another institution to undertake this type of decision, judges are given administrative powers to insulate the courts from the executive, and the legislature is given some judicial powers to guard against the intrusion of the judges. Though the 'pure' version of the separation of powers is found in some of the older literature on the topic, it is now widely viewed as impractical, and few if any modern scholars would support it.[10]

Before moving on to discuss the separation of power in the British constitution, it is worth noting that there is a further, vital, question about the separation of powers that has, deliberately, been left to one side. Whilst the broad outlines of the common understanding of the separation of powers are relatively clear, the reasons that lie behind this understanding are far murkier. Why should the institutions, powers, and people found in each column be tied together? Why should, for example, judges decide cases whilst legislators produce statutes? As this paper progresses, the question of the purpose of the separation of powers will be considered: the common understanding of the principle is animated by good reasons, but it is only once we have identified these reasons that we can produce a full and satisfying account of the principle.

The Separation of Powers and the Old British Constitution

Most scholars writing on the British constitution[11] before about 1990 were profoundly sceptical about the applicability of the doctrine to the constitution. The objections were made at two levels.

[9] Vile, note 2 above, chapter 1; Gwyn, note 4 above, chapter 1.

[10] Vile, note 2 above, 19–20.

[11] Some doubt whether Britain has a constitution. It certainly lacks a Constitution with a capital 'c', a unifying constitutional text, but it does possess a set of rules that create — or 'constitute' — the state. When

First, and most basically, it was argued that the separation of powers should not be applied to parliamentary-style constitutions. Parliamentary systems were, it was claimed, based on a fusion of powers, not a separation of powers.[12] In a parliamentary system the legislature selects the political part of the executive branch, which then remains dependent on the legislature for its position and power. The prime minister, the leading executive official, is not elected by the people, and has no constitutionally protected area of power; she can only act with the express or tacit support of the legislature. In a presidential system, in contrast, the leading executive official is elected: the president is chosen by the people, and then gets to pick the other executive officers. The executive has a legitimacy that is independent of the legislature, and is given a constitutionally protected area of power over which the legislature may not encroach.[13] The presidential-style model of a constitution clearly matches the simple account of the separation of powers set out in the last section more closely than the parliamentary model. Perhaps, it might be thought, applying the separation of powers to a parliamentary constitution makes a category error: it applies a standard applicable to one type of constitution, the presidential, to an alternative type, the parliamentary.

Buttressing this argument, it was also observed that the British constitution contained many other instances where 'fusion' appeared to have been preferred over 'separation' of powers. Older constitutional scholars could hold up the office of the Lord Chancellor as an illustration of the inapplicability of the principle to the British constitution. The Lord Chancellor was a member of the legislature — he acted as speaker of the House of Lords — a member of the executive who sat in Cabinet, and, in what was left of his time, sat as a judge.[14] Furthermore, until recently, the highest court in the British legal orders was the House of Lords. A committee of the legislature served as the final domestic court, reporting its decisions back to a chamber of Parliament.

As we shall see, the constitutional reforms of the last decade have addressed these overlaps but other apparent violations remain within the British constitution. The executive has the power to make law through delegated legislation, and possesses a power to decide some legal disputes through a network of tribunals. The legislature is able to exercise judicial power over its members — punishing them for misconduct — and could, arguably, also exercise this power over other citizens in some situations. Finally, the courts play a significant role in the development of the law. The Common Law, the law that regulates a vast area of private transactions, has been crafted by the judges, not by Parliament.

Our first set of objections simply claimed that the separation of powers was not applicable to the British constitution. A second, and more profound, set of objections challenged the integrity of the separation of powers as a principle. The separation of powers rests on a mistake: there is no natural division of power between the three institutions of the

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academics talk of a British constitution they are referring to the constitution with a small 'c': that set of rules that constitutes the state. See further, *Barber N.W.* The Constitutional State, chapters 5 and 6.

[12] *Bagehot W.* The English Constitution (1867 edition) (London: Watts & Co, 1964), chapter 1; *de Smith S.A.* 'The Separation of Powers in New Dress' (1966) 12 McGill Law Journal 491; *Hood Philips O.* 'A Constitutional Myth: Separation of Powers' (1977) 93 Law Quarterly Review 11.

[13] *Linz J.* 'Presidential or Parliamentary Democracy: Does it Make a Difference?' in Juan J Linz and Arturo Valenzuela (eds.), The Failure of Parliamentary Democracy (John Hopkins University Press 1994); *Sartori G.* Comparative Constitutional Engineering 2nd ed. (New York: New York University Press 1997), 84.

[14] *de Smith*, note 12 above.

state. The stronger version of the objection argued that there was no material distinction between legislative, judicial and executive powers.[15] The weaker version of the objection contended that the division was blurred,[16] and, more subtly, that even so far as the division can be maintained this did not provide a reason to match these powers to the corresponding state institutions.[17] Whilst the first set of objections to the separation of powers argued that the principle ought not to be applied to the British constitution, the second set makes the far more radical claim that the principle ought not to be applied to any constitution. As Geoffrey Marshall put it, perhaps the separation of powers is 'a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds.'[18]

The Separation of Powers Reassessed

During the 1990s there was a slow resurgence of interest in the separation of powers. A number of eminent scholars argued that the principle was an aspect of the British constitution, that its force could either be detected in its institutional structure,[19] or should be applied to it.[20] There were two groups of reasons for this renewal of interest in the separation of powers.

First, the confident claim of older scholars that the British system was not characterised by the doctrine came under scrutiny: perhaps the gap between the demands of the separation of powers and parliamentary systems had been exaggerated. Some aspects of the separation of powers were indeed crucial to the British system. The judiciary, for example, has long been insulated from the other two branches of state. Under the Act of Settlement 1701 the position of judges in the higher courts was protected: they can, probably, only be removed after a resolution of both Houses of Parliament — a procedure that has only been used once in the last three hundred years. Furthermore, some of the apparent 'fusion' of the branches of state looked, on closer inspection, to be rather superficial. Whilst the highest court was, technically, a committee of the legislature, in reality a profound gap existed between the House of Lords (Judicial Committee) and the rest of Parliament. The members of the judicial committee were appointed for their legal expertise, and the rest of the Lords invariably accepted the judgments of the committee. Though judicial members of the House did participate in legislative debates, they constituted a tiny percentage of the legislature, and their role in the making of statutes tended to be limited and fairly technical.

Similarly, whilst there is a strong connection between the legislature and executive branches — with the political part of the government tying the two together — there are also profound differences. The executive branch in the United Kingdom is very large: depending on how you calculate it, there are hundreds of thousands, perhaps even a million, people working in the executive. There are civil servants, soldiers, policemen, nurses, all of

[15] *Jennings I. Law and the Constitution*, 5th ed. (London: London University Press, 1959), 281–282 and 303.

[16] A point recognised by Madison: *Madison J., Hamilton A., Jay J.* Federalist Papers, (London: Penguin Classics, 2003), N 37, 244.

[17] *Marshall G.* Constitutional Theory, (Oxford: Oxford University Press, 1971), 99–100.

[18] Ibid., 124.

[19] For a pioneering reassessment, see: *Munro C.* 'The Separation of Powers: Not Such a Myth' [1981] Public Law 19; *Allan T.R.S.* Law, Liberty and Justice (Oxford: Oxford University Press, 1993), chapter 3.

[20] *Barendt E.* 'Separation of Powers and Constitutional Government' [1995] Public Law 599.

whom could be considered part of this branch of the state. They, for the most part, do not sit in Parliament. Indeed, in a clear instance of the separation of persons, civil servants are barred from sitting in the House of Commons.[21] In their working life, these state employees are expected to be apolitical: following the policies set by the political branch of the state.[22] If we remove the political part of the government — which should, perhaps, be understood as a committee of Parliament — there is a profound divide between the executive and the legislature in the United Kingdom. The legislature, or rather, the Commons, is elected and sets the policy direction of the state. The executive is technocratic, its members are chosen for their administrative or practical skills, and its task is to realise the policies of the legislature as manifested in law and in the decisions of the Cabinet. In some ways the distinction between the executive and the legislative branches is more pronounced in a parliamentary system than in a presidential one.

Finally, some of the overlaps pointed to by the older scholars could be seen as instances of the operation of the separation of powers rather than violations of that principle. The executive's power to make rules through delegated legislation, for example, is a feature that most systems — presidential as well as parliamentary — possess. As Eoin Carolan has recently argued, what the separation of powers requires in this context is that this delegated law-making power be exercised in a way that reflects the institutional strengths and limits of the executive branch. The task of the executive, through administrative rule making, is to adapt and implement legislative rules, taking account of the context in which they operate.[23] The skills of the executive branch — its knowledge and ability to adapt quickly — complement the capacities of the legislative branch.

The second shift in British scholars' understanding of the separation of powers related to the nature of the doctrine. Older scholars seemed to regard it either as a purely descriptive term — a more or less accurate way of catching a group of constitutions that shared some common factors — or as a principle that applied only to a subset of constitutions, presidential-style constitutions. More recent writing on the separation of powers, however, has treated it as a principle of constitutionalism: a principle that applies to all constitutions at all times.[24] Recognition of the separation of powers as a principle of constitutionalism brings with it a danger: the risk of utopianism. Some of the writings on the division between presidential and parliamentary systems present the division as a competition between the two forms of constitution.[25] One of these models — or some combination of the two — is better than the other; there is a winner to be identified.

It seems unlikely that the separation of powers, taken as a principle of constitutionalism, will identify a single brand of constitution that is best for all states. There are a number of considerations that point against this. Most obviously, the best type of constitution for a country will depend, in large part, on local circumstances. Though we may be reluctant

[21] House of Commons Disqualification Act 1975, s.1(1)(b).

[22] See now the Civil Service Code, paras 13 and 14.

[23] *Carolan*, note 2 above, chapter 6.

[24] See, for example: *Barber N.W.* 'Prelude to the Separation of Powers' (2001) 60 Cambridge Law Journal 59; *Barendt*, note 20 above, and *Barendt E.* 'Is there a United Kingdom Constitution?' (1997) 17 Oxford Journal of Legal Studies 137; Lane, note 2 above, chapter 2; *Carolan*, note 2 above.

[25] See, for example: *Calabresi S.* 'An Agenda for Constitutional Reform' in *Eskridge W., Levinson S.*, eds., Constitutional Stupidities, Constitutional Tragedies (New York: New York University Press, 1998); *Ackerman B.* 'The New Separation of Powers' (2000) 113 Harvard Law Review 633.

to concede to Montesquieu that the national climate shapes the constitution,[26] it is certainly the case that history, geography, religion and ethnic divisions will all help determine the best division of power within a particular country. The optimal balance between the branches of state, in particular the judiciary and the legislature, varies widely. Some systems need strong judicial review: entrenched rights to protect minority groups and individuals from the legislature. In other systems — where, perhaps, there is a more tolerant culture — the legislature may provide a good forum for different groups in society to meet and discuss the direction of the state. Indeed, it may be that there is no unique best play off between the values that animate democracy and the values that underpin human rights. This might be a choice between incommensurables, between which different states could strike different — but equally valid — balances. Finally, and most basically, looking around the world it is plain that there are many examples of relatively successful presidential states and relatively successful parliamentary states. There are costs involved in radical constitutional change. There is the price of the shift itself: the disruption caused, the difficulty in creating new structures. There is the inevitable risk surrounding the outcome of the change: constitutional reforms are unpredictable things, and may bring unanticipated problems in their wake. But more importantly, people get to know and understand the constitutional structures of their own community. Americans have a decent understanding of the presidential structure, Britons have a good grasp of the parliamentary mechanism. Changing the basic structure of either of these states risks harming the constitutional culture that underpins them. The value of a citizenry that, in broad terms, understands how its political structures operate, should not be underestimated.

The point of the last paragraph was to show that if we take the separation of powers to be a principle of constitutionalism it is highly unlikely that it will pick between the presidential and parliamentary models. An attractive interpretation of the separation of powers will be flexible enough to allow both models of constitutions — and hybrid models, too — to satisfy its demands.

At the start of the renaissance of the separation of powers in British constitutional scholarship, the principle was presented as a simple protector of liberty. In Eric Barendt's paper, 'Separation of Powers and Constitutional Government', published in 1995, Barendt argues that the purpose of separation of powers is to protect the liberty of the individual by making tyrannical and arbitrary state action more difficult. Power is divided between the branches of the constitution, with each element checking the others. This interpretation gains the support of Justice Brandeis who, in *Myers v U.S*, wrote that the purpose of separation of powers 'was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.'[27] Concerted state action is made more difficult by the existence of checks and balances between the various organs of state.[28]

There are a number of difficulties with accounts that treat liberty as the sole objective of the separation of powers. First, they assume that that liberty and a strong state are in-

[26] *Montesquieu*, note 4 above, Part 3 Book 14.

[27] *Myers* v *US* (1926) 272 U.S. 52, at p. 293; see also *Montesquieu*, note 4 above, Book 19 chapter 27; *Barendt*, note 20, 605-606; *Calabresi S., Rhodes K.* 'The Structural Constitution: Unitary Executive, Plural Judiciary' (1992) 105 Harvard Law Review 1153, 1156, where separation of powers is described as 'institutionalising conflict'.

[28] *Vile*, note 2 above, 14.

evitably opposed to each other, that the citizen can only be truly free within a state whose power for concerted action is limited by institutional conflict. There are some theorists who treat liberty in purely negative terms, as absence of state constraint, but most modern philosophers draw attention to the claims of positive liberty.[29] The state's task is not just to avoid unwarranted limits on the actions of individuals, but also to ensure that there are valuable options to them.[30] A richer notion of the purpose of the state will point us towards a richer understanding of the separation of powers. Additionally, the simple liberty model of the separation of powers cannot explain why a particular power should be allocated to a particular institution, nor why a particular type of person should exercise these powers. A satisfying account of the separation of power would, for example, explain why courts decide cases rather than produce statutes, why we expect executive officials to be experts in some field or other but allow anyone to become a legislator.

Subsequent writers on the principle identified a different guiding purpose that may animate the separation of powers. Inspired, in part, by the resurgence of interest in institutional analysis in America,[31] an alternative approach to the separation of powers claims that the point of the doctrine is to promote efficient state action by ensuring that powers are allocated to the institution best able to make use of those powers.[32] There is a long tradition of scholars who place efficiency, rather than just liberty, as at the heart of the separation of powers.[33] James Madison, for example, noted the power of the doctrine to protect the people from tyrannical government,[34] but also recognised its capacity to enhance good government.[35] As one delegate at the Convention in Philadelphia put it, when all the powers of state were vested in a single body 'none of them can be used with advantage or effect.'[36] In one of the best recent interpretations of the doctrine, Eoin Carolan provides a re-interpretation of the doctrine that stresses its dependence on the values that underpin the state.[37] We can only fully understand the demands of the separation of powers once we have understood the proper objectives of the state.

Identifying efficiency as at the core of the separation of power is only the first step towards producing a satisfying account of that principle. 'Efficiency' is, in itself, an empty

[29] *Berlin I.* 'Two Concepts of Liberty' in *Berlin I.* Four Essays on Liberty (Oxford: Oxford University Press, 1969).

[30] See, for example, *Raz J.* The Morality of Freedom (Oxford: Clarendon Press, 1988).

[31] *Komesar N.* Imperfect Alternatives (University of Chicago Press: 1996); *Rubin E.* 'The New Legal Process' (1996) 109 Harvard Law Review 1393.

[32] *Barber*, note 24 above; Carolan note 2 above; *Gerangelos P.* The Separation of Powers and Legislative Interference in Judicial Process (Oxford: Hart Publishing, 2009).

[33] *Gwyn*, note 4 above, 32–34; *Anderson A.* 'A 1787 Perspective on the Separation of Powers', in *Goldwin R., Kaufman A.* ed. The Separation of Powers — Does it Still Work? (Washington: AEI Press, 1987), 145; *Morgan D.* The Separation of Powers in the Irish Constitution, (Dublin: Round Hall Ltd., 1997), 4; *Laslett P.*, in *Locke J.* Two Treatises of Government ed. P. Laslett, (Cambridge 1988), 118-120; *Peabody B., Nugent J.* 'Toward a Unifying Theory of the Separation of Powers' (2003-2004) 53 American University Law Review 1, 26.

[34] *Madison*, note 16 above, especially N 47.

[35] Ibid, N 37, 243. Madison wrote: 'Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government.'

[36] *Farrand M.* The Records of the Federal Convention of 1787, vol. III, at p. 108 (Yale: Yale University Press, 1966).

[37] *Carolan*, note 2 above.

concept: we need some values that are worth maximising before an efficient maximizer becomes attractive. There is not enough space to address the purpose of the state fully here,[38] but any plausible account of what the state ought to do would accommodate, in some way, the importance of democracy: of mechanisms that allow the members of the state to determine the state's policies. Democracy requires, most obviously, that the bodies that set the direction of the state are under the control of its citizens. In presidential and parliamentary systems the legislature is elected by the people, and determines the broad policies of the state. In a presidential system the people also elect the head of the executive, who is given some constitutional latitude over the implementation of the statutes passed by the legislature and, within limits, is also given some power to autonomously determine state policy. In a parliamentary system the executive is connected to the electorate through the legislature. The head of the executive branch only has the latitude that the legislature is willing to allow her.

Democratic government cannot be realised simply through the creation of democratic institutions. These institutions must also be capable of achieving the objectives set by their members: the elected elements of the state must be effective. This requires at least two further elements, each of which is vital to the separation of powers.

First, there must be some mechanism that allows the integration of expertise into the process. Technical expertise needs to inform the creation of laws and policies, both by dissuading elected officials from foolish or impractical schemes and, also, by showing how sensible policies can be implemented. Once the policies are in place, experts are needed to carry on the business of government and, within bounds, modify the policies over time. The need for expertise within the constitution brings with it a need for some form of accountability in government. Unelected experts may gain their place in the constitution because of their expertise, but democracy requires that their influence on legislation be mediated through elected representatives, and, when implementing or modifying policies, that they explain and justify their decisions to those who enjoy a democratic mandate.

Second, democracy can only function in a system in which there is a reasonable degree of certainty over the meaning and application of the law. If the elected officials of the state are to set its policies, they must be able to identify the rules that presently guide the conduct of state officials, and they must be able to effectively alter these rules. The statutes produced by the legislature, for example, must be applied by state officials and must, to an extent, make the difference they aspire to make. Otherwise the state may possess democratic institutions, but it will not be governed democratically. For a number of different reasons, therefore, the separation of powers requires us to subscribe to a further principle: that of the rule of law. Both the separation of powers and the rule of law require that the courts are, to a significant degree, independent of the other branches of state, and that judges make decisions according to the relevant law and not because of bribes or political pressure. This is not just a matter of applying the law to private parties: the rule of law and the separation of powers each demand that the law also be applied to state officials, tying them to the decisions made by the elected elements of the constitution. It is only once the rule of law exists in a state that the legal instrument of the statute is rendered effective — and it is only once statutes are effective, that democracy can flourish.

[38] I discuss the purpose of the state in greater detail in *Barber N.W.* The Constitutional State (Oxford: Oxford University Press, 2010), chapters 2 and 3.

These last paragraphs have presented a very simple and very thin account of the purposes of the state, tying the aim of the state tightly to values instantiated by democracy. This is not enough to provide a satisfying account of the state — there is more to the state than a mere vehicle for democratic processes — but it does demonstrate how quickly reflection on the nature and point of the state can help clarify the nature of the separation of powers. And, moreover, this richer account of the separation of powers begins to explain some of what the older writers on the principle assumed. It explains why there is a need for different types of institution in the state, why they should be allocated and exercise different types of power, and why different types of person should act within these institutions.

The Resurgence of the Separation of Powers

It would be rash to draw a causal link between the reawakening of academic interest in the separation of powers and the increasing political appreciation of its demands. Nevertheless, in a number of areas the British constitution has shown a fresh awareness of the claims of the principle: separation of powers has been a consideration behind a number of constitutional reforms over the last twenty years, leading Vernon Bogdanor to argue that it has become the basis of the modern constitution.[39]

The most obvious and widely discussed constitutional reform linked to the separation of powers has been the ending of the judicial role of the House of Lords and the creation of the Supreme Court.[40] The Constitutional Reform Act 2005 created a new Supreme Court, separate from the legislative branch, consisting of judges who no longer sit in the House of Lords.[41] Though this change is likely to be largely cosmetic — the same type of people will exercise the same type of powers in the same type of way as under the old system — it has removed one of the most obvious and least justifiable overlaps of power in the British system.[42] Alongside the creation of a supreme court, the Constitutional Reform Act also reduced the role of the Lord Chancellor. The Lord Chancellor lost the power to sit as a judge, and also lost his role in judicial appointments. The office of the Lord Chancellor still exists, but he is now equivalent to a minister for justice; a Cabinet member with special responsibility for the courts and the legal process who is under a legal duty to support the judges, and to defend their independence.[43] The Lord Chancellor has also ceased to serve as speaker of the House of Lords,[44] though he remains a member of Parliament. Older writers used to hold up the Lord Chancellor as a one-man refutation of the relevance of the separation of powers to the British constitution: following the Constitutional Reform Act 2005, this charge can no longer be made.

Whilst the creation of the Supreme Court and the reform of the role of the Lord Chancellor may be the most prominent moves towards the separation of powers, there are a number of other, less obvious, areas in which the influence of the principle has been felt. The enactment of the Human Rights Act 1998 has given further domestic legal protection to the rights

[39] *Bogdanor V.* The New British Constitution (Oxford: Hart Publishing, 2010), 285.

[40] See further, *Steyn J.* 'The Case for a Supreme Court' (2002) 118 Law Quarterly Review 382.

[41] The Constitutional Reform Act 2005.

[42] *Woodhouse D.* 'The Constitutional and Political Implications of a United Kingdom Supreme Court' (2004) 24 Legal Studies 134 and D. Pannick, 'Replacing the Lords By a Supreme Court' [2009] Public Law 723.

[43] Constitutional Reform Act 2005, s.3.

[44] Constitutional Reform Act 2005, s.18.

contained in the European Convention on Human Rights. Article Six of the Convention requires that on decisions about a person's criminal liability or that adjudicate on her civil rights and obligations, she is 'entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' Applying this provision, the courts have handed down decisions that have restricted the judicial powers of Ministers, ending the power of the Home Secretary to set the effective length of sentences for 'life' prisoners.[45] Sentencing is, it seems, part of the judicial function and, as such, should be exercised by judges and not officers of the executive branch.

Conclusion

This paper has charted the renaissance of separation of powers in the British constitution. In part, it has told a story of a shift in fashion, of the development of one of the hardest to analyze aspects of constitutional life: the constitutional culture that lies behind the rules and decisions that define the state. Whilst it was once rejected out of hand, scarcely discussed by academics and lawyers, the separation of powers has slowly found a place in British constitutional thought. Now it is accepted as a principle that underpins the British constitution; it is a principle that is cited by judges[46] and invoked in political debate. Alongside this resurgence in practical effect, there has also been a reassessment of the nature of the principle. In its early, simple, forms it was a crude protector of liberty, frustrating tyrants by insisting on the division of powers. In its modern incarnation, it is seen as a principle of effective institutional ordering: demanding that its supporters consider the point of the state, and the ways in which the constitution should be structured to achieve the state's objectives. Whilst its full meaning and implications have yet to be worked through, it seems that separation of powers will play an important role in the development of the British constitution, and — in its incarnation as a principle of constitutionalism — of constitutions more generally.

[45] R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46, and see now Criminal Justice Act 2003.

[46] For example: Matthews v Ministry of Defence [2003] UKHL 4. For a good discussion, see: *Turpin C., Tomkins A.* British Government and the Constitution 7th ed. (Cambridge: Cambridge University Press, 2012), 130–139.

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Constitutional Justice in a System of Separation of Powers

The author examines the separate problems of assessing the place and the role of the judicial system as a whole and constitutional justice, in particular, within the system of separation of powers, whilst accounting for the modern juridical nature of various governmental bodies' powers, as well as their functions.

Key words: governmental power, separation of powers, judicial bodies, judicial independence, functions of governmental bodies, constitutional principles, constitutional justice

The entrenchment of the principle of implementation of governmental power on the basis of a system of separation of legislative, executive and judicial powers, as outlined in article 10 of the Russian Federation Constitution, signalled Russia's return to fundamental constitutional-legal values. Meanwhile, it is obvious that the principle of separation of powers — as a fundamental principle of a rule-of-law state — has its own historical origins, rooted in an entirely different political and legal reality. Therefore, the contemporary analysis of the structural-functional characteristics of governmental authorities inevitably leads to the conclusion that we need to modernise our understanding of the concept of separation of powers.

At different stages, the course of societal development inevitably generates a distinct scientific understanding of the specific features related to the structuring and functioning of governmental authorities. Contemporary classical theory of the concept of "separation of powers" is interesting only as a "constructive casing", which allows us to outline the fundamental principles of building a system of governmental power. For historical reasons, the theory itself cannot be accepted in its literal interpretation, with centuries having passed since its initial formulation by Montesquieu.[1]

The power function is the primary aspect of the structure of power. The formulation of the power function must precede the creation of the power structure (body), which is designed to implement the given function, and not the other way around. Unfortunately, the reality of state building reveals many examples when the creation of a governmental body (for instance, for a particular individual) precedes the modeling of its functions, sometimes objectively not corroborated by public needs.

The preservation of the principle of separation of powers in modern constitutionalism mainly derives from the differences inherent in juridical mandates. As such, the idea of a

[1] *Montesquieu C.L.* Selected Works. Ed. M.P. Baskin. Moscow, 1955.

representative mandate, obtained from a direct sovereignty bearer, is rigidly connected to the system of legislative power. The administrative mandate predetermines the nature of executive power, as an agent charged with the implementation of governmental functions, as assigned by legislative power. Finally, the legal nature of judicial power is predetermined by the idea of the jurisdictional mandate, obtained either directly from the bearer of sovereignty or obtained by a court (judge) as a result of interaction between the two other systems of governmental power (representative and executive).

The modern — "post-classical" — understanding of the constitutional principle of the separation of powers is expected to assume as its basis the system of checks and balances. In an exclusive sense of providing the principles underlying the rule-of-law state, the latter means a more intensive interpenetration of norm-setting, norm-implementing, and norm-stabilising functions of legislative, executive and judicial power.

The public designation and the inherent legal nature of parliament derive primarily from representation (the representative mandate of legislative power). As such, this governmental authority cannot be isolated from the system of legal enforcement either in relation to the organisation of its own work or in relation to the opportunities for adopting individual legal acts, directed at other participants of the political-juridical process — for instance, the cadre decisions of the State Duma (the approval of the appointment by the President of the Russian Federation of the Chairman of the Government, solving the issue of confidence in government, the appointment and dismissal of the Chairman of the Central Bank, the Chairman of the Accounts Chamber and half of its auditors, as well as the Human Rights Commissioner) and the Federation Council (the appointment of judges to the Constitutional, Supreme and Supreme Arbitration Courts, the appointment and dismissal of the Prosecutor General, the deputy Chairman of the Accounts Chamber and half the auditors).

The parliament also functions as a body that resolves public conflicts and, as such, can be classified as a subject of constitutional juridical activity (for example, the State Duma can bring charges against the President for his impeachment and the Federation Council can impeach the President). The implementation of such activity by the representational body is only possible through specific parliamentary means, which reflect the representative nature of the mandate of this body of governmental power. It should further be noted that the latter function of the representative body of power is not a primary one and is more of auxiliary nature.

The availability of the norm-creating (but not the law making) competency of the bodies of executive power is obvious; though this competency is not carried out only within the rigid juridical-technical formula of "implementing the law", but also within the scope of the more flexible formula of "on the basis of the law" (or "in accordance with the law"). In carrying out its main social designation, that of providing professional administration of public processes (administrative mandates), executive power cannot achieve this goal without the norm-creating function that regulates these processes. However, the specific character of normative regulation is obvious in the executive system with a significant number of legal regulations being operative in their nature. These specified regulations underpin the implementation of the principles and general norms passed by the body representing the nation.

At the same time, it is impossible to deny the executive authorities' involvement in the mechanisms of legal dispute resolution, especially in the administrative sphere and in the

sphere of administrative legal relationships. As such, the list of the federal and regional bodies of executive powers, which are authorised to consider cases related to administrative offences, is directly entrenched in article 22.1 of the Code of Administrative Offences of the Russian Federation. Of course, the execution of the latter function by the executive power (the bureaucracy) takes place through specific administrative means, which are not related to judicial procedures and which carry a subsidiary character in terms of the titular direction of the activity of the bureaucratic system — positive social administration.

Finally, judicial power, whose main social design is to provide balance in a developing public system, obtains its goal by means of resolving legal disputes through the mechanism of legal procedure (juridical mandate). As such, the main function — court activity — comprises the resolution of a particular legal dispute. However, the work of judicial power does not stop there. At a certain level of its development, the function of norm regulation arises. It comprises the evaluation of the legality of a regulatory act. In the process of norm control the norm-creating function emerges as part of the function of the court, which can operationally and professionally resolve a public dispute by authentically filling the legislative gap.

The acceptance of the necessity and consistency of judicial norm creation, at least applied to constitutional justice, represents a very important guarantee against a situation, in which ineffective implementation or non-implementation of norm-creating regulations by other "branches" of governmental power can threaten the implementation of the governmental function providing public consolidation. The acceptance of the judicial norm as a formal source of law significantly enriches the national legal system through additional juridical opportunities of positive regulation of social relations. Additionally, this route offers more dynamic and professional opportunities, compared to the traditional regulatory process. It is assumed that a positive resolution of this problem in general Russian theory and practice will lead to new opportunities in scientific knowledge.

It must be noted that such questions do not arise in some countries of the post-Soviet space, despite the fact that these legal systems are directly related to the continental family. For instance, the Constitution of the Republic of Kazakhstan (article 4) declares that the law in effect includes not only the Constitution itself, as along with laws, regulatory legal acts, and international agreements related to it, but also the normative declarations of the Constitutional Council and the Supreme Court of the Republic.[2]

We must not deny the significant meaning of the resolutions passed by the plenums of the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation. In a number of cases, the consideration of the texts established by such resolutions provides room for thought regarding the relationship between judicial interpretation of the juridical norm and the norm-creating process. As an example, consider resolution N 57of the plenum of the Supreme Arbitration Court of the Russian Federation, dated 23 July 2009, "On some procedural questions of the practice of processing cases, which deal with the non-execution or ineffective execution of contractual obligations".[3]

Frequently, the boundary between the normative and the interpretational components of court decisions is a blurred one. It can be argued that judicial acts, which are the result of the generalisation of judicial practice and are simultaneously tasked with setting out the

[2] The official website of the President of the Republic of Kazakhstan: http://www.akorda.kz/.

[3] Vestnik VAS RF. 2009. N 9.

vector for further development of such practice, possess a mixed legal nature. They can be said to be of a normative-interpretative nature. And yet, legal science has not developed a clear set of criteria for separating law enforcing (judicial) interpretations, which lead to filling in gaps in legal regulation on the basis of principles of analogy of law, and law enforcing (judicial) norm creation, which leads to the creation of judicial norms.

This problem had little relevance within the context of a closed legal system and the absence of an institution of constitutional norm control (Russia before 1991) because the questions of the normative nature of judicial acts would arise only in relation to the resolutions of the plenums of the Supreme Court. In the context of active processes of globalisation, coupled with the convergence of legal families and the emergence of constitutional justice, the necessity for solving questions set out by juridical practice increased significantly.

In this context, it is relevant to mention institutions of civil and appeal procedural law, such as judicial recourse to ensure the protections of rights, freedoms and legal interests of indefinite numbers of people (articles 45 and 46 of the Civil Procedural Code of the Russian Federation) and the examination of cases related to the contestation (or admission of voidance) of normative legal acts (judicial activity in the sphere of norm control) (chapter 24 of the Civil Procedural Code of the Russian Federation, chapter 23 of the Arbitration Procedural Code of the Russian Federation).

Clearly, the resulting outcomes of the courts' law enforcement activity in the abovementioned procedural institutions substantially differ from the courts' juridical decisions in the general and appeal jurisdiction, which are arrived at by considering regular legal disputes. Judicial decisions, which are made within the context of the abovementioned procedural institutions, possess the qualities of standardisation, in the precedent setting sense, through the depersonalisation of the direction of its action.

It is essential to emphasise the value of the gradual, but steadfast, penetration into Russian legal culture of the acceptance of the normative elements of the decisions of the Constitutional Court of the Russian Federation, the consideration of the number of legal positions related to the formulation of general and appeals juridical practice inherent in them, and the inclusion of direct references to the relevant acts of the Constitutional Court of the Russian Federation into texts of court decisions as a means of their establishment.

The executive function is also extended to judicial power. At the same time, it is not the chief function in terms of the legal nature of judicial power. It comprises internal and external aspects. The internal aspect of the legal-executive function of the court adds up to the adoption of respective legal acts that concern the organisation of its work as a body of governmental power. The external aspect concerns the inclusion of judicial bodies into the system of checks and balances, which is a direct component of a system of "separation of powers".

As such, each system of governmental power (legislative, executive and judicial), separated from a perspective of their differing social designations (mandates), possesses the respective set of functions, which can be implemented in a norm-formulating, norm-executing, or juridical form. Each of these systems of governmental power promulgates compulsory norms of behaviour, is an important component of the administrative process (in a broader sense) and, finally, is involved in the removal of public contradictions by means of resolving juridical disputes. At the same time, each branch of governmental power employs a specific set of legal mechanisms, inherent only to it, for carrying out the respective func-

tions, and it is this given specificity that determines the special features of the legal nature of each system of governmental power.

Thus, the presence of "atypical" functions in different systems of governmental power requires the adoption of a titular function that corresponds to the mandate of the governmental body (law making, law application, judicature) alongside the subsidiary functions, which each body must implement in direct relation to the implementation of titular functions. As such, a court is not entitled to undertake norm-creating activity outside of the context of its juridical functions. For instance, in resolving a constitutional-legal dispute and, at the same time, disqualifying a norm that leads to a gap in legal regulation, the Constitutional Court must resolve the issue of overcoming (compensating for) this gap through setting up of an order of implementation of its decision through the assignment of responsibilities to another body of governmental power (legislative, executive) to implement corresponding regulation in a certain period, while also introducing temporary regulation using the formula "until such time as...". Consequently, the overcoming of (compensation for) the legal gap takes place as part of judicial norms (in this context, it is different from a judicial precedent). The elimination of the gap is carried out by legislative or executive power, depending on the norm that is disqualified by the outcome of constitutional legal proceedings.

In discussing judicial norm creation, we are generally discussing the emerging, distinctive system of reciprocal discretionary restraint between the legislator and the courts, since the norm-creating function of either facilitates the obvious improvement of the professional activity of the other. In receiving an unequivocal, norm-setting signal from the Constitutional Court, the federal assembly has the opportunity to eliminate defects. The vector of legislative modernisation gets its roots from the norm of the court resolution, which carries the constitutional-legal sense of that real-life situation, that interlacement of pubic relationships, the regulation of which is found to be unsound in the final decision of the Constitutional Court

However, this logic must be complete. This takes into account a very important condition, which according to part 4 of article 70 of the federal constitutional law "On the Constitutional Court of the Russian Federation", whereby the Constitutional Court adopts a resolution that creates a normative legal act that does not correspond or does not fully correspond with the Constitution and the content of this decision results in the necessity of eliminating the emerging gap in legal regulation, then the Constitution must be applied until a corresponding new legal act is adopted.

It is obvious that constitutional-legal principles, whether textually reproduced in the Constitution or given effect by means of the constitutional lawmaking procedure ("the spirit of the Constitution"), prescribed into the foundation of the non-constitutionality of the disqualified legislative norm, are the result of the direct application of the Constitution. It is these principles, per se, that create the framework of the new system of legal regulation, applicable to the corresponding area of public relationships. In this instance, the legislator is not within his right to carry out norm creation outside the context of or in contradiction to the context of the new constitutional legal sense of the disputed normative situation.

When the Constitutional Court, in formulating its decision, employs the technical-juridical algorithm to eliminate the legal gap using the principle: "up to the moment of the legislative adoption of a corresponding act, the following norm conditions must be employed...", we are witnessing the creation of a judicial norm that ensures the direct action

of the Constitution, the necessity of which ensues directly from the legislative directions of part 1 of article 15 of the Constitution of the Russian Federation and part 4 of article 79 of the Federal constitutional law "On the Constitutional Court of the Russian Federation".[4] On the one hand, such a judicial norm fills in the juridical gap, which is inevitably created as a result of a disqualification of a legal norm during the constitutional process, and, consequently, ensures the continuity of legal regulation of a corresponding group of social relationships and the stability of the functioning of the public system in the corresponding sector. On the other hand, such judicial normative prescription legally limits the discretion of the legislative power during the course of implementing legal regulation of the lawmaking process.[5]

That said, in some cases, the Constitutional Court sets out the judicial norm in a concrete form, contained in the operative part of the resolution[6], while, in others, the resolution of the Constitutional Court contains a prescription for the legislator to use the content of the legal position, outlined in the preamble part of the resolution that highlights the legal necessity of directly applying the Constitution with the corresponding constitutionally significant values (for instance, the non-admission of disproportionate limits to the rights of citizens for individual undertaking of pre-electoral propaganda against all candidates at a personal expense[7]; the non-admission of disproportionate limits of property rights of citizen-debtors and creditors as business entities of real estate,[8] etc.)

Legal science must pay closer attention to the issue of judicial norm disqualification and related issues of conception, typology, characterisation of legal consequences of "negative (nullifying)" norm creation.

It should be noted that the decisions of the Constitutional Court can accept the norm under question as unconstitutional; however, they can also deem it "conditionally consti-

[4] Federal constitutional law N 1-FKZ, dated 21.07.1994 (amended on 28.12.2010.), "On the Constitutional Court of the Russian Federation (effective from 09.02.2011), SZ RF, 25.07.1994, N 3, statute 1447.

[5] See, for instance, Constitutional Court of the Russian Federation resolution N 3-P, dated 15 January 1998; SZ RF. 1998. N 4, statute 532, dated 16 June 1998, N 19-P; SZ RF. N 25. 1998, statute 3004, dated 23 December 1999, N 18-P; SZ RF. 2000. N 3, statute 353, dated 18 February 2000, N 3-P; SZ RF. 2000. N 9, statute 1066, dated 27 June 2000. N 11-P; SZ RF. 2000. N 27, statute 2882, dated 27 April 2001, N 7-P; SZ RF. 2001. N 23, statute 2409, dated 14 March 2002, N 6-P; SZ RF. 2002. N 12, statute 1178, dated 2 April 2002, N 7-P; SZ RF. 2002. N 14, statute 1374, 12 April 2002, N 9-P; SZ RF. 2002. N 16, statute 1601, dated 10 April 2003, N 5-P; SZ RF. 2003. N 17, statute 1656, dated 15 March 2005, N 3-P; SZ RF. 2005. N 13, statute 1209, dated 11 May 2005, N 5-P; SZ RF. 2005. N 22, statute 2194, dated 14 July 2005, N 9-P; SZ RF. 2005. N 30 (part II), statute 3200, dated July November 2005, N 10-P; SZ RF. 2005. N 47, statute 4968, dated 22 March 2007, N 4-P; SZ RF. 2007. N 14, statute 1742, dated 24 May 2007, N 7-P; SZ RF. 2007. N 23, statute 2829, dated 10 July 2007, N 9-P; SZ RF. 2007. N 29, statute 3744, dated 12 July 2007, N 10-P; SZ RF. 2007. N 30, statute 3988, dated 23 December 2009, N 20-P; SZ RF. 2010. N 1, statute 128, dated 21 January 2010, N 1-P; SZ RF. 2010. N 6, statute 699, dated 26 February 2010, N 4-P; SZ RF. 2010. N 11, statute 1255, dated 2 March 2010, N 5-P; SZ RF. 2010. N 11, statute 1256, dated 21 April 2010, N 10-P; SZ RF. 2010. N 19, statute 2357, dated 28 May 2010, N 12-P' SZ RF. 2011. N 6, statute 897, dated 2 June 2011, N 11-P; SZ RF. 2011. N 24, statute 3526, dated 22 November 2011, N 25-P; SZ RF. 2011. N 49 (part 5), statute 7333, dated 6 December 2011, N 27-P; SZ RF. 2011. N 5, statute 7552 and others.

[6] See, for instance, the Constitutional Court of the Russian Federation resolution N 18-P, dated 23 December 1999; SZ RF. 2000. N 3, statute 353.

[7] The Constitutional Court of the Russian Federation resolution N 10-P, dated 14 November 2005, SZ RF. 2005. N 47, statute 4968.

[8] The Constitutional Court of the Russian Federation resolution N 10-P, dated 12 July 2007, SZ RF. 2007. N 30, statute 3988.

tutional". In other words, the norm can be retained within the legal system only because it allows for the existence of a constitutional-legal meaning described by the Constitutional Court of the Russian Federation (under the condition of its use in this strict sense).

Therefore, in the first instance, when the norm is completely disqualified, the Constitutional Court's decision, with the aim of ensuring the principle of the stable functioning of the legal system, must contain measures directed at overcoming the emerging legal gap. These should include directions for when the decision comes into power, as well as the timeline, deadlines and specific features of its implementation that need to be published in accordance with item 12, part 1 of article 75 of the Federal constitutional law "On the Constitutional Court of the Russian Federation"; must give corresponding assignments (prescriptions) to governmental bodies, which are part of the norm-creating process, regarding the adoption of the normative acts that help fill the regulatory gap within specific timeframes; must establish temporary regulation of public relationships ahead of filling the legal gap, in the instance that the principle of analogy of law cannot be applied (for instance, if a normative disqualification occurred in the sphere of regulation of imperative administrative, criminal and other relationships). The last option, in essence, gives meaning to the known postulate of the direct application of the Constitution until such time that a new normative act is adopted in the instance of a disqualification of a given norm (part 4, article 79 of the Federal constitutional law "On the Constitutional Court of the Russian Federation").

In the other instance — when the norm is recognized as "conditionally constitutional", in other words, it meets the constitutional criteria only within the bounds of its contents, as set out by the Constitutional Court, whereby the norm is recognised only in the sense corresponding to the Constitution (so, this can also be described as a partial or semantic disqualification of the norm) — the formal gap in legal regulation is absent. In this situation, it is the regulatory practice that is disqualified, as it diverges from the original constitutional sense of the norm and its retention implies the acknowledgement of the use of unconstitutional regulation, which, of course, is inadmissible.

The gap, as such, is considered filled by the Constitutional Court's decision, which contains the new and only possible interpretation of the norm in future regulatory activity. This comprises a new normative-judicial text.

However, the absence of a regulatory gap in a semantic disqualification of a norm does not imply that there is no need for corresponding governmental activity to be adjusted, in order to ensure that the partly disqualified normative material (formally and textually retained in the normative act) corresponds with its new constitutional-legal sense.

Therefore, in this instance, it becomes necessary to employ the mechanism of parliamentary norm creation, among other things, due to the inclusion of the Russian legal system in the continental legal family. A constitutional-judicial decision, comprising a distinctly expressed normative component, initiates legislative activity, which eventually leads to the amelioration of a norm defect that was identified by the Constitutional Court.

Discussion regarding the place and the role of judicial power in the system of separation of powers is not possible outside the context where judicial power is characterised by its independence and autonomy, which are ensured by the corresponding system of legal guarantees for judges (the chamber) to reach decisions on individual cases.

When examining the interactions of judicial power with other "branches" of governmental power, judicial power is frequently perceived as a control mechanism over executive

power. Areas of such control are distinguished by a separation of types of judicial process in the Constitution of the Russian Federation. "The Russian Federation employs a branched control mechanism of judicial power over executive power, which is executed through constitutional, civil, administrative and criminal legal procedure. This allows for identification of judicial control over bodies of executive power in the following areas: constitutional control, control over courts of general jurisdiction, control of arbitration courts".[9]

Of further interest is the examination of the system of constitutional principles, which determines the elements of activity of judicial power. These include "objective fundamental origins that reflect its nature as an autonomous branch of power, ideational foundations of its organisation and activity, directly entrenched in constitutional or normative acts or emerging from their contents, and the legal nature of judicial power itself".[10]

Constitutional principles should be examined as "juridical" values of constitutional importance. Of specific importance is the emphasis on principles that are not included directly in the text of the Constitution. As such, the latter can be considered an exclusive domain of the Constitutional Court as a body of constitutional norm control: a) it isolates a specific legal principle, which emerges from the nature of public relations that are under analysis ("spirit of the Constitution"); b) it formulates this principle, introducing it into the regulatory systems; c) it formulates a judicial norm on the basis of the given principle. In essence, in this instance, we are talking about the analytical stages of constitutional norm creation.

Modern approaches to constitutional regulatory government in the Russian Federation dictate a number of new principles, which are related not only to the work and organisation of power itself, but also to relationships with other bodies, organisation and systems of power, its resource provision, the status of its providers, its functions and the status of acts that are adopted by the bodies of judicial power, etc. This approach has come about as a result of objective factors of Russian legal activity and the demands of legal development when building a rule-of-law state. At the source of the formation of both the complexity of the functioning principles (the number and the system of functioning principles), as well as their content, lies the autonomy of judicial power.

The entire complex of principles, which the modern field of constitutional law treats as related to the foundation of organisation and activity of judicial power, should be connected to the category of autonomy, which is ensured, first of all, by the prohibition of external interference and, secondly, by the establishment of a foundation of non-interference and provision of autonomy internally. As such, all fundamental sources can be divided into principles that determine the external autonomy of judicial power or the ideas of autonomy of the court in the system of "separation of powers" in Russian statehood and principles that set out the internal (inter-system) autonomy, which include principles related to the judge's status and the principle of legal procedure as a basis for the provision of its autonomy in the process of implementing justice.

Meanwhile, the system-forming principle of autonomy of judicial power will serve as the primary principle and will be applied to both groups of principles.[11]

[9] *Goncharov V.V.* The Relationship Between Executive and Judicial Power in the Russian Federation. Rossiiskii sudya. 2008. N 4.

[10] Ibid.

[11] Ibid.

The normative foundation of judicial autonomy, the independence of judges, as well as the system of their legal guarantees, were formulated with the adoption of the Constitution of the Russian Federation through the Federal constitutional law, dated 31 December 1996, "On the judicial system in the Russian Federation", as well as through the Russian Federation law, dated 26 June 1992, "On the status of judges in the Russian Federation". The abovementioned acts not only legislatively consolidated the meaning of "independence of judges", but also of "independent legal procedure", "independence of the courts", "independence of judicial power" and "autonomy of courts", "autonomy of judicial power".

The concept of "independence", in contrast to "autonomy", can be used by the legislator only in relation to the direct implementation of legal procedure, the regulation of procedural practice by the courts and the judges, and their actions and decisions in relation to deciding particular cases. The "independence" category is narrower than autonomy, with independence being an element of autonomy. Autonomy is the basic, system-forming category. The concepts of "autonomy" and "independence" can only be examined as interdependent concepts. The autonomy of judicial power is a necessary condition of the independence of legal procedure and those charged with executing it. And, conversely, without secure guarantees of independence for judges and with respect to legal procedure, autonomy is not possible in judicial power.[12]

In concluding this article, it must be stated that there is a need for more flexible approaches to the characterisation of the principles of separation of powers, with the accent on the idea of checks and balance and the corresponding constitutional-legal constructs. There should also be a consideration of an approach that departs from the existing division of the system of power into legislative, executive and judicial powers due to the impossibility of "including" other "atypical" bodies of governmental power in the parameters of one of the traditional "branches".

[12] *Terekhin V.A.* Provision of Independence to the Courts — Prioritisation of the Judicial-Legal Policy. Rossiiskaiia Yustitsiia. 2009. N 10.

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Parliamentary Sovereignty and the Constitution

The doctrine of parliamentary sovereignty of the United Kingdom parliament is often presented as a unique legal arrangement, one without parallel in comparative constitutional law. By giving unconditional power to the Westminster parliament, it appears to rule out any comparison between the Westminster Parliament and the United States Congress or the German Bundestag, whose powers are limited by their respective constitutions. Parliament in the UK appears to determine the law unconditionally and without limit. Nevertheless, a fuller understanding of parliamentary sovereignty as a legal and constitutional doctrine shows that this first impression is false. The nature of the British unwritten constitutional order is entirely similar to the written one prevailing in the United States or Germany. This is because the doctrine of parliamentary sovereignty, contrary to Dicey's classic view, does not consist in a single dominant idea but in a number of related and mutually supporting principles that constitute higher law. The way in which these principles interact is parallel to the interaction of the main clauses of the United States Constitution or the German Basic Law. This analysis shows that the constitution, written or unwritten, never requires a pouvoir constituent. The constitution emerges from the law as the result of moral and political principles that breathe life into our public institutions.

Key words: doctrine of parliamentary sovereignty, parliament, Constitution, Dicey

The doctrine of parliamentary sovereignty of the United Kingdom parliament is often presented as a unique legal arrangement without parallels in comparative constitutional law. By giving unconditional power to the Westminster parliament, it appears to rule out any comparison between the Westminster Parliament and the United States Congress or the German Bundestag, whose powers are carefully limited by their respective constitutions. Parliamentary sovereignty is thus seen as a unique feature and a result of the unwritten constitution. I shall call this the "classic" view. Nevertheless, a closer look at the theoretical presuppositions of parliamentary sovereignty shows that this conclusion is unsustainable. If parliamentary sovereignty is to be a legal doctrine (and not a sociological or historical observation) it must rely on a list of powers that belong to parliament as an institution. These legal powers are organised in powers and disabilities and are thus both empowering and limiting. In other words, all legally organised parliaments have limited powers. The Westminster parliament has constitutionally limited powers, very much like its German and American counterparts.

The classic view is based on Dicey's understanding of sovereignty in terms of a hierarchical order of power, or a scheme of delegation. It follows from the idea that for a

constitution to be higher law it needs to be backed by a special, distinct and higher *pouvoir constituant*. Nevertheless, this classic view can be seen to lead to a well-known problem. The doctrine of parliamentary sovereignty appears to be the only thing that parliament cannot change. But then what does it mean to say that parliament is omnipotent? Here is something that it cannot do, namely to change the terms of its own power. Its powers appear thus to be in some sense permanent. There is no lawful constitutional change of these terms. If so, the UK constitution is both the most flexible constitution and the most rigid.

This paradoxical position was exposed in the *Jackson* judgment of the House of Lords.[1] The applicants argued that parliament could not have lawfully passed the Parliament Acts through which the power of the House of Lords was reduced. The logic of their argument was fully in line with Diceyan orthodoxy: Parliament cannot change the terms of its legislative actions. Nevertheless, a unanimous House of Lords rejected this view of parliamentary sovereignty and ruled that parliament can indeed amend the rules of its own procedure. This has the consequence that the acts passed according to the procedures of the Parliament Acts are ordinary laws, even though they are the result of some interference with sovereignty. This is now the law as far as the UK is concerned. But the general issues behind this problem merit a more sustained philosophical exploration for they teach us something about constitutions and constitutional change in general. Here the starting point ought to be Dicey's formulation of the problem.

Dicey's View

Dicey defines parliamentary sovereignty as follows:

> "The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined [i.e. as the 'King in Parliament'] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament".[2]

Dicey says that the definition has a positive and a negative dimension. The positive side refers to a power, or set of powers, to bring about valid laws. The negative refers to an immunity, or set of immunities as against everyone including the courts to affect the validity or intended effect of Parliament's laws. We may thus rephrase Dicey's account in terms of powers and immunities as follows:

> (1) POWER: Parliament enjoys a comprehensive and exclusive *power* of law-making, the power to make, change and unmake any laws.
>
> (2) IMMUNITY: Parliament enjoys a comprehensive and exclusive *immunity* of law-making against any other person or body: its laws are not to be changed or unmade by any other person or body.

Dicey did not use the language of powers and immunities. Nevertheless, he put the matter more or less in these terms when he noticed a positive and a negative aspect (i.e.

[1] Jackson and Others v Attorney General [2005] UKHL 56 [2006] 1 AC 262.

[2] *Dicey A.V.* Introduction to the Study of the Law of the Constitution, 8th ed., London: Macmillan, 1915; reprinted Indianapolis: Liberty Fund, 1982. 3–4.

the power and the immunity), both of which were complete and absolute. After a thorough discussion of the opinions of jurists and the relevant cases that confirmed his interpretation of English law, he concluded as follows:

> "Parliamentary sovereignty is therefore an undoubted legal fact. It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parliament is a fit subject for legislation. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament. No one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance, either from the statute-book or from the practice of the Courts".[3]

Dicey thought that this definition was complete. It has now achieved universal acceptance as a classic statement of the doctrine of parliamentary sovereignty.

But it is not clear that Dicey's theory is successful even in outline. Many distinguished legal theorists and constitutional scholars have noticed that it leaves several questions unanswered. Latham and Heuston observed that this account appears plausible only because it relies on an ambiguity of the term "Parliament".[4] In a separate argument John Finnis has showed that any account of the foundation of a legal order requires additional tools, which he calls rules of identification, in order to account for legislation pre-existing the current Parliament.[5] These objections highlight, in my view, two very serious structural problems with Dicey's account, which I shall explore in some detail.

The first objection is this. What is Parliament and when does it act? As a matter of standard practice Parliament is taken to mean the Lords, Commons and the Queen acting in unison according to standing legislative procedures. This means that a group of people (which does not have as a meeting or collection of individuals any legal or constitutional power) whenever constituted as a public institution qua Parliament (on the basis of some rules and under certain circumstances) enjoys the power to legislate as "the Queen in Parliament" i.e. the ultimate legislature. When it so legislates, we have as a result an Act of Parliament. So the group does not do what it likes with the law. In order to legislate, it complies with rules of its own composition and with a set procedure. As Richard Latham observed, "the King, Lords and Commons meeting in a single joint assembly, and voting by majority, or even unanimously, could not enact a statute".[6] This is because this joint meeting does not follow the procedures of law-making.

Nevertheless, Dicey does not draw the distinction between the group or meeting of individuals and the results of a proper legislative procedure. When he speaks of the right of Parliament to make or unmake any law whatever he speaks as if Parliament can decide

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[3] *Dicey*, Introduction, 24–25.

[4] *Latham R.T.E.* The Law and the Commonwealth (Oxford: Oxford University Press, 1949), 522–525, R. F. V. Heuston, Essays in Constitutional Law, second edition(London: Stevens, 1964), 1–3. For further support for the "new view" see also Sir Ivor Jennings, The Law and the Constitution, 4 ed. (London: University of London Press, 1952), 146–149 and *Marshall G.* Constitutional Theory (Oxford: Clarendon Press, 1971), 35–57. On Richard Latham's life and work see P. Oliver, 'Law, Politics, the Commonwealth and the Constitution: Remembering R. T. E. Latham, 1909–1943' 11 King's College Law Journal (2000) 153.

[5] *Finnis J.* 'Revolutions and Continuity of Law' in A.W.B Simpson (ed.), *Oxford Essays in Jurisprudence: Second Series* (Oxford: Clarendon Press, 1973), 44–76.

[6] *Latham*, The Law and the Commonwealth, 523. N 3.

how to legislate in any way it sees fit, i.e. has the bilateral power to make or not to make a law and then to unmake it. But no person or group of persons has such a power. Parliament is an institution bound by the rules of its composition and the rules of procedure. When Dicey says that Parliament's authority cannot be challenged, he is right about the result of the work of parliament whenever it takes the form of the Act, but he is wrong about Parliament as an institution. Occasionally, the institution (though not the Act) is thwarted. For example, if Parliament passed a resolution attempting to set aside an Act of Parliament, it would not — legally — has its way. It would also be wrong to say that Parliament is never thwarted whenever it acts as a legislative body, which is perhaps the sovereign manifestation of Parliament (i.e. whenever the two Houses approve of a Bill separately according to the standing rules and receive the Royal Assent). We have no way of determining whether parliament has acted successfully as a legislative body other than by looking if the product of its actions is an Act of Parliament according to the law. So we retrospectively say that something that is an Act because the processes and all other conditions have been met was produced by the legislative body. But this is only a roundabout way of saying that the institution Parliament has produced an Act of Parliament by following the correct procedures. 'Institution' and 'Act' remain the only active concepts, and the idea of a 'legislative body' is entirely dependent on them. There is not such a thing, a sovereign 'legislative body', that can be contrasted to the institution of Parliament or the Act of parliament.

English law recognises this fact. This is shown by the famous case of parliamentary privilege, *Stockdale and Hansard* the facts of which are known to all common lawyers since their first year of university education.[7] In the course of refuting the argument that the parliamentary privilege of the House of Commons escaped any judicial scrutiny, Lord Denman CJ said: "The supremacy of Parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only a co-ordinate and component part of Parliament".[8] Patteson J said that the House of Commons:

> "is the grand inquest of the nation, and may enquire into all alleged abuses and misconduct in any quarter, of course, in the Courts of Law, or any of the members of them; but it cannot, by itself, correct or punish any such abuses or misconduct; it can but accuse or institute proceedings against the supposed delinquents in some Court of Law, or conjointly with the other branches of the Legislator may remedy the mischief by a new law".[9]

This case confirms that in the constitutional tradition of the United Kingdom, the supremacy of Parliament is something defined and limited by law. This law, which must be a fundamental law of the constitution, lays out what is parliament and in what ways it can produce valid Acts of parliament. So there are things that the House of Commons alone cannot do and this means that even the clear intentions of Parliament's dominant component, the Commons, do not have any legal significance. In this sense, and in spite of Dicey's apparent explanation of sovereignty in terms of the commands or intentions of Parliament, the dominant element of the sovereign body is not omnipotent. Its expressed

[7] 9 A & E. 1. See also *Keir D.L., Lawson F. H. Cases in Constitutional* Law, 4 ed. (Oxford: Clarendon Press, 1954) 127–140.

[8] *Keir* and *Lawson*, Cases in Constitutional Law, 127.

[9] *Keir* and *Lawson*, Cases in Constitutional Law, 130.

desires or directives do not create law. To say that they do is to confuse the actions of parliament with Acts of Parliament.

Dicey was of course aware of the judicial limits to Parliament's privileges and aware of the difficulty it posed for his view of sovereignty, even though he did not realize their seriousness. He said that 'there exists some difficulty in defining with precision the exact effect which the Courts concede to a resolution of either House'.[10] He takes this to show that a mere resolution of the House of Commons is not law, which is true, but he fails to draw the obvious conclusion. If the House of Commons, which is the principal part of Parliament and the foundation of its power, is denied a superior position as an institution in making law when its desires are clear and indisputable, what is the content and meaning of sovereignty? If the Commons is at the top of the hierarchy of delegation, why does it need to submit to procedures of law-making?

The assumption that Parliament is defined by the higher law of the constitution and is not beyond the law, is also made in cases whenever the courts are asked to assess the validity of an Act of Parliament. In the *Wauchope* case Lord Campbell said this:

> "All that a court of justice can do is to look at the Parliamentary Roll; if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses".[11]

Lord Campbell's words are ambiguous because they refer both to Parliament and to its products, the Acts. Yet the meaning of his words must be that even though courts will not review the propriety of the internal procedures of Parliament, they will look at whether this purported Act is really an Act, i.e. that the Bill at least appears to have passed both Houses and received the Royal Assent. And at least since the *Prince's Case*, the courts will check if they bill was passed according to the standing rules of legislative power.[12] The courts are not just to rely on the word of the Clerk of Parliaments. In the Privy Council case of *Bribery Commissioner v Ranasinghe*, for example, Lord Pearce said that "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law".[13] So it is the task of courts to ascertain that a legislative Act is truly such an Act, according to the rules regarding law-making. This is a fundamental and uncontroversial part of British constitutional law, which is correctly connected to the ideal of the rule of law but is not covered by Dicey's account of parliamentary sovereignty in (1) and (2), for it appears that parliament's will and intention may be reviewed by the Courts (even though an Act of parliament cannot be so reviewed and challenged).

Sir William Wade correctly took the view that this flaw in Dicey's doctrine was serious and introduced a correction. What Parliament is and how it acts successfully in producing an Act is not a matter of fact to be determined by politics, but a matter for law. Wade presupposes thus a higher constitutional law that organises the relations of statutes with the

[10] *Dicey*, Introduction, 14.

[11] *Edinburgh & Dalkeith Ry. V. Wauchope* (1842) 8 Cl. & F 710, discussed by Heuston, 17 ff.

[12] The Prince's Case (1606), 8 Co. Rep. 1a, at 20b. See also Harris v Minister of the Interior and Another 1952 (2) SA 428.

[13] Bribery Commissioner v Ranasinghe [1965] AC 172, at 197.

common law and is therefore prior to both. Without such a rule, there is no way of explaining how we may set aside any statute at all, old or new. This determination is a matter of higher law, not in the sense of higher moral law, as in Corwin's idea of higher law, but in the sense of an organising law.[14] In this sense the law of the constitution is higher law only because it organises the architecture of the legal order as a whole. It is used in this same sense by Bruce Ackerman, when he writes of the process of constitutional amendment as "higher lawmaking".[15] And if such a higher law exists and determines how we make and unmake our constitution, the question arises as to how this higher law may change.

Wade's conclusion is simple, yet startling in its originality. The rule enjoining judicial obedience to statutes is one of the fundamental rules upon which the legal system depends and is not subject to any legal change, since it is not subject to change according to ordinary legislative procedures.[16] Wade concluded that:

> "if no statute can establish the rule that the courts obey Acts of Parliament, similarly no statue can alter or abolish that rule. The rule is above and beyond the reach of statute, as Salmond so well explains, because it is itself the source of the authority of statute. This puts it into a class by itself among rules of common law, and the apparent paradox that it is unalterable by Parliament turns out to be a truism".[17]

How can it be that the higher law of the constitution is law that cannot change? Wade's view is prima facie very strange. Clearly this idea is not a "truism". There are very many theoretical issues surrounding the idea of a higher law, which Salmond's idea of a judge-based creation, does not resolve. In his later work Wade repeated that the rules constituting Parliament are so important, that they are beyond its powers. They are a "constitutional fundamental" that cannot be lawfully changed even by an Act of Parliament. Wade wrote that "it is futile for Parliament to command the judges not to recognize the validity of future Acts of Parliament which conflict with a Bill of Rights, or with European Community law, if the judges habitually accept that later Acts prevail over earlier Acts and are determined to go on doing so. In this one fundamental matter it is the judges who are sovereign".[18] This is how Wade explains the legal feature that Parliament cannot bind itself.

Dicey did not consider such points. The fact that the omnipotent Parliament is bound by the rules that constitute itself (and may perhaps be unable to change them) was not part of his view of constitutional change. His view of the immutability of sovereignty was based on logical and factual reasons, not on reasons of law. He wrote that "fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely by Parliament acting in its ordinary legislative

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[14] See: *Edward S. Corwin*. The "Higher Law"Background of American Constitutional Law (Ithaca, N.Y.: Cornell University Press, 1955). The doctrine for higher law, for Corwin, asserts that there are 'certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community' (p. 89).

[15] *Ackerman B.* 'Higher Lawmaking' in Sanford Levinson (ed.), Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Princeton: Princeton University Press, 1995), 63. See also *Ackerman B.* We The People: Foundations (Cambridge, Mass.: Harvard University Press, 1991) where the idea of higher law is associated with the distinction between normal politics and constitutional politics.

[16] *Wade H.W.R.* 'The Basis of Legal Sovereignty' (1955) Cambridge Law Journal 172, at 187.

[17] *Wade*, 'The Basis of Legal Sovereignty', 187–188.

[18] *Wade H.W.R.* Constitutional Fundamentals (London: Stevens, 1980), 26–27.

capacity".[19] But if there is no distinction between constitutional laws and ordinary laws, then perhaps Parliament can bind itself after all. Dicey does not deal with this problem.

Defenders of the orthodox view face, therefore, a dilemma. Either they side with Dicey for whom parliamentary sovereignty is immutable because it is an extra-legal logical and historical fact. Or they side with Wade, for whom the immutability of sovereignty is based on a special constitutional doctrine.

We cannot ignore this dilemma. These questions as to the role of Parliament as a legislative institution are central to the recent debates over the Parliament Acts 1911 and 1949. As is well known, under circumstances determined by these acts, Parliament legislates without the assent of the Upper House. The Parliament Acts do not change the composition of Parliament as an institution nor do they change the fact of parliamentary sovereignty (as Dicey himself notes in his short discussion of these acts in the introduction to the eighth edition of his book).[20] The Acts only change the legislative *procedure* by removing the veto of the Lords. But Wade disagreed. He was so insistent on the principle that the legislative procedure requires the assent of all three (because sovereignty is an immutable constitutional fundamental), that he considered the products of the Parliament Acts delegated legislation.[21]

This view has been now roundly rejected by all the judges that looked at the *Jackson* case and finally and conclusively by the House of Lords.[22] As a matter of constitutional law the Hunting Act 2005 is not a piece of delegated legislation but a genuine Act of Parliament on an equal footing with all others. There are important constitutional implications of this judgment. It seems to reject both Wade and Dicey's views. I draw attention to it here to show that Dicey's account of sovereignty is in need of a great deal of refinement in order to arrive at a clearer account of Parliament. The same point was made by Richard Latham, who observed that in the United Kingdom the sovereign is not an "actual person" but a body whose designation "must include the statement of rules for the ascertainment of his will, and those rules, since their observance is a condition of the validity of his legislation, are rules of law logically prior to him".[23] This is not a factual question but a question of constitutional law.

The problem of defining Parliament and fixing its legislative and constitutional powers and immunities is only the first problem with Dicey's view. The second problem has to do with identifying what counts as a law. For Dicey, Parliament has the full power to legislate on any subject. Nevertheless, as John Finnis has explained, a constitutional order is much more than a set of powers to legislate for the future. The constitution also needs rules about the recognition and continuing operation of laws enacted in the past. This existing law was created under the old body or by some other means that at the time was legally recognized. The fact that old law is still valid depends on rules of continuity. Such rules assume that a

[19] *Dicey A.V.* Introduction, 37.

[20] *Dicey A.V.* Introduction, xlii.

[21] *Wade*, Constitutional Fundamentals 28.

[22] Jackson and Others v Attorney General [2005] UKHL 56, [2006] 1 AC 262. For commentaries see Tim Mullen, 'Reflections on Jackson v. Attorney General: Questioning Sovereignty' 27 Legal Studies (2007), *Alison Young L.* 'Hunting Sovereignty: Jackson v Her Majesty's Attorney General' (2006) Public Law 187, *Lakin S.* 'Debunking the Idea of Parliamentary Sovereignty: the Controlling Factor of Legality in the British Constitution' 28 Oxford Journal of Legal Studies (2008), 709.

[23] *Latham*, The Law & the Commonwealth 523, (footnotes omitted).

legal order is not fully determined by the person or body, such as it is, that happens to enjoy the power to legislate at the highest level at that time.

This means that a complete account of any constitution must explain not only how new laws are made but also how the old laws still bind, even though they were created under a now obsolete set of constitutional arrangements, e.g. an old Parliament or an amended process. So in addition to the set of power-conferring rules any constitution needs a separate rule or set of rules which provides not powers but duties to continue respecting earlier laws even though the institutions that created them have now ceased to exist. This has been explained by Finnis as follows:

> "But we have seen that there is another element, viz. a rule of identification, which is not a rule of competence since it confers no powers on any existing body, but which identified, and validates, *eo nomine* and for the present, the rules created in the past by a rule-making body that then was, but now perhaps is not, qualified (by a rule of competence) to create those rules".[24]

So the basic constitutional arrangement of the United Kingdom cannot simply include rules empowering Parliament but must also include a set of rules setting out duties *vis a vis* pre-existing laws. It is obvious that such rules of identification are supplemented by rules of change and competences of law-making. Under the doctrine of parliamentary sovereignty, any existing law can be changed by the present parliament. But until they are so changed, the rules of the past remain valid on terms determined at the time they were enacted, which may include a constitution or other legal device now obsolete and repealed. This also suggests that the way in which the pronouncements of the dominant legislature are to be understood and the way they interact with the existing law is also a matter of pre-existing laws. The new legislation takes its place within the pre-existing set of rules and principles, including constitutional principles shaping the relations between the Executive, the Legislature and the Judiciary.

The joint force of these two arguments shows that the classic view of parliamentary sovereignty is at least incomplete. Dicey says that Parliament has an absolute power to make laws and an absolute immunity against the courts. This is widely taken to mean that law in the United Kingdom has only one or one dominant source. Jeffrey Goldsworthy, for example, concludes his illuminating historical survey of parliamentary sovereignty by stating that it is the "rule of recognition" of United Kingdom law. He writes that "for many centuries there has been a sufficient consensus among all three branches of government in Britain to make the sovereignty of Parliament a rule of recognition in H. L. A. Hart's sense, which the judges by themselves did not create and cannot unilaterally change".[25] We have identified, though, two other constitutional doctrines that are also part of British law and are essential components of Parliament's competence to legislate. First, the very nature and composition of Parliament depends on existing constitutional law and is subject to it. Parliament as an institution has a standing duty as against the courts not to act outside the terms of the Parliament Acts, the Representation of the People Acts and the other rules affecting its own composition and procedures whenever it seeks to act as a legislative body. Whenever it acts against this duty, Parliament is faced with a disability, in that its actions are ineffective. A resolution,

[24] *Finnis J.* 'Revolutions and Continuity of Law' 58. The same point is made by Joseph Raz in 'The Functions of Law' in Raz, The Authority of Law (Oxford: Clarendon Press, 1979), 163–179, at 178.

[25] *Goldsworthy J.* The Sovereignty of Parliament: History and Philosophy (Oxford: Clarendon Press, 1999), 234.

for example, cannot amend an Act of Parliament. This is the essence of the distinction we normally draw between actions of parliament and Acts of Parliament. This creates a liability, in that the effects of parliament's actions are to be determined by the powers of the courts, as in *Stockdale*. In other words the courts have the correlative power to hold some actions of parliament as inconsistent with what parliament may do in order to create Acts of Parliament. Actions that violate these organizational rules are not Acts of Parliament and do not develop legal effects, even if they are actions imputed to parliament. These legal relations bind both Parliament as the institution and its individuals members.

Either way, parliament is not only the beneficiary of legal powers but operates under layers of legal duties, disabilities and liabilities as well: the duties to respect the standing rules, the disabilities in creating Acts outside the established procedures and the liabilities in having the courts ascertain what is an Act of Parliament. The classic view, however, is not just incomplete but is also false in that it takes such constitutional questions not to be subject to legal determination. Dicey simply assumes that sovereignty is immutable as a matter of fact. Wade tells us that this is because of some special constitutional doctrine. But both views contradict the *Jackson* judgment, where we find explicit recognition of the powers (and correlative liabilities) of Parliament to shape its own rules concerning the making of laws.

In order to see how *Jackson* defeats the orthodox view we need to look deeper into its structure. The courts are not to set aside an existing Act, as Dicey correctly observes. But the courts have the power and duty to determine if an Act of Parliament exists as a matter of the standing law of the constitution. A similar limitation arises out of the constitutional rules of identification, the rules that address the past. Parliament is under a disability as far as the identification of the past law is concerned, for it is to accept the validity of the existing law, those laws made under the old parliament or under the old constitution, even though the majority of its members may deplore them and wish to change them at once. Again, parliament is bound by a set of legal restrictions which have to do both with the rule of law but also with the separation of powers and the basic liberty of the citizen. Quite simply the immunities that result form these disabilities of Parliament belong to every ordinary citizen of the land and will be vindicated before any court.

We may put these findings as follows:

> (3) LIABILITY. Parliament and its members are subject to the supervision of the courts as to the authoritative determination of its compliance with the standing constitutional rules regarding the legal enactment of new Acts of Parliament, on the basis of the constitutive rules of parliament and its standing procedures.
>
> (4) DISABILITY. Parliament is incapable of unsettling the existing laws until it takes positive action to amend them according to the standing procedures. The correlative immunity is held by every ordinary citizen, whose rights and duties can only be changed according to the standing constitutional rules and procedures.

Both (3) and (4) are standard manifestations of the rule of law as it applies to institutions and the legal order as a whole. They are also entailed by the doctrine of parliamentary sovereignty as a legal doctrine, since it does not make sense without them. They are accepted in Britain but are also to be found in all modern constitutions. They are matters of the rudimentary structure of the separation of powers and are both confirmed by *Stockdale*. I think Dicey was aware of them and spent a number of pages explaining their force and outlined a conception of the rule of law as he found them in celebrated authorities. But

Dicey effectively thought that the rule of law was an entirely subordinate part of the constitution. I do not think he saw that they are entailed by parliamentary supremacy.

Nevertheless, from the formulation offered above, it appears that parliamentary sovereignty and the rule of law seem to be pulling toward different directions. For (3) and (4) partly deny (1) and (2). They deny not the first part of Dicey's definition of parliamentary sovereignty, namely the broad positive competence to legislate, but its second part, i.e. that "there is no power which ... can come into rivalry with the legislative sovereignty of Parliament' or that 'no limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence". Dicey is strikingly wrong on this. Such powers are evidently in existence and they belong not just to courts but in everyone residing in the legal system. They are enforceable by the courts whenever Parliament seeks to violate its own procedures, or whenever it seeks to arbitrarily ignore the law of the past. The principle of the rule of law requires that Parliament is not omnipotent in the sense of enjoying absolute and conclusive powers and immunities. This is the whole point of the distinction between actions of parliament and Acts of Parliament, which the English courts have always drawn.

This is entailed by the very existence of parliament as a constitutional law-maker. The very constitution of Parliament as a body is fixed according to the law and this depends on law pre-existing the meetings of Parliament. Or at least this is what effectively the arguments by Latham, Heuston and Finnis show. Both as a group of people and as a complex institution, parliament is ordinarily created by prior rules and is therefore bound by legal liabilities and disabilities under the constitutional doctrines of the rule of law and the separation of powers. Whenever Parliament enacts a new Act, it is this Act that escapes supervision and review. But the other actions and procedures of parliament do not escape supervision and review by the courts. Dicey's sweeping definition of parliamentary sovereignty misses this distinction and is to this extent false.

That the rule of law and the separation of powers complement that of parliamentary sovereignty is not surprising. It is in fact accepted by the leading British constitutional theorists today.[26] Under the influence of Diceyan orthodoxy, however, it is not often acknowledged, that the latter two doctrines organise and ultimately limit the scope of the first. We cannot say that legislative supremacy is prior to the rule of law or the separation of powers. They operate jointly, or not at all.

As we saw above, Wade argued, against Latham and Heuston that Parliament cannot change the "manner and form" of legislation. This is the hallmark of the continuing view of parliamentary sovereignty, the view that holds that Parliament cannot shape the constitutional fundamentals that put it at the higher place in the hierarchy of sources.[27] But the continuing view differs from the self-embracing view only in that it recognises a disability in Parliament of the form described in (4). Wade argues that as a matter of the standing law, the higher law of the constitution binds Parliament in this sense: "If no statute can establish the rule that the courts obey Acts of Parliament, similarly no statute can alter or abolish

[26] See most recently, *Barendt E.* 'Fundamental Principles' in David Feldman (ed.), English Public Law (Oxford: Oxford University Press, 2004), 3, at 30–43. For Barendt the three principles of the constitution are the legislative supremacy of Parliament, the rule of law and the separation of power. For an extremely useful account of recent developments regarding these issues see House of Lords Select Committee on the Constitution, Relations between the Executive, the Judiciary and Parliament, 6th Report of Session 2006–2007 (HL Paper 151) (London: The Stationery Office, 2007).

[27] For the contrast between continuing and self-embracing views of parliamentary sovereignty see *Hart H.L.A.* The Concept of Law, 2nd ed. (Oxford: Oxford University Press, 1994), 149.

that rule. The rule is above and beyond the reach of statute".[28] In other words, the doctrine of parliamentary sovereignty is coupled with a particularly rigid, if rudimentary, doctrine of the separation of powers: the courts will give way to the wishes of the current Parliament.

It is not important to discuss here in any detail the reasons that Wade gives for his particular formulation of the higher law idea. In any event Wade's view gives support to the anti-Diceyan conclusion that sovereignty is legally determined. The "continuing view" of sovereignty which Wade advocates postulates an identification rule (in Finnis' technical sense described above) which identifies as part of the British constitution a disability that prevents Parliament from changing the standing rules concerning its composition and procedures (or any other manner and form conditions). So even Wade accepts (implicitly or not, it does not matter) that Parliament is not just a holder of all the powers and immunities in the area of legislation and therefore rejects Dicey's (1) and (2). The conclusion we must draw is that even Wade agrees that Dicey's account of sovereignty is false because it fails to see that sovereignty is something constitutionally created and defined.

Austinian Simplicity

Let us now return to an earlier question. How is it possible that Dicey's argument may be so inadequate yet so very influential? We must pause to comment on and explain the prominence of what appears to us an obvious failure. Dicey was not an inexperienced lawyer or thinker.[29]

The source of Dicey's confusion on this matter is not, in my view, his lack of attention to detail but his reliance on Austin's general theory of a legal system. The character of the Westminster Parliament is defined for Dicey by the logic of sovereignty. The reason why modern lawyers approach these issues with greater clarity than their predecessors is because they have now unequivocally rejected Austin's command theory of law and the associated theory of sovereignty.

It is striking how F. W. Maitland's reflections on the constitution, coming as they do before Dicey achieved his great prominence, were very critical of Austin's theory of sovereignty. Maitland offers a rival view that is much closer to the view presented above because he considered constitutional law as a "living body, every member of which is connected with and depends upon every other member".[30] Maitland thought that Austin's view of constitutional law was far too narrow, including as it did only "those rules which determine the composition of the sovereign body".[31] But Dicey was an admirer of Austin. Dicey refers to Austin's theory at various places in the course of his exposition of parliamentary sovereignty.[32] As

[28] *Wade*, 'The Basis of Legal Sovereignty', 187.

[29] See for example Richard A Cosgrove, The Rule of Law: Albert Venn Dicey, Victorian Jurist (Chapel Hill: The University of North Carolina Press, 1980).

[30] *Maitland F.W.* The Constitutional History of England, edited by H. A. L. Fisher (Cambridge: Cambridge University Press, 1908), 539. These lectures were completed in 1888 and do not cite Dicey's Introduction, the first edition of which was published in 1885.

[31] *Maitland*, The Constitutional History of England, 531.

[32] Dicey mentions Austin and discusses his ideas while presenting the doctrine of parliamentary sovereignty in *Introduction* pp. 18, 26, 27, 28, 29 and elsewhere. He speaks of the 'commands' of parliament in p. 268: ('the commands of Parliament, consisting as it does of the Crown, the House of Lords, and the House of Commons) can be uttered only through the combined action of its three constituent parts, and must, therefore always take the shape of formal and deliberate legislation'.

is well known, Austin argued that a legal order existed when a sovereign obeyed the commands of no one and whose commands were obeyed by everyone.[33] In any legal system, Austin assumes, there is only one source of legislative authority, that of the sovereign. The law is expressed through the actions and words of the sovereign, whenever these are effectively communicated to the subjects by way of commands. Austin wrote that "a command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded".[34] In this model, law is derived from the volition of an identifiable political superior.

Dicey observes that Austin's argument focused on the reality of sovereignty, not the legal construction of it: "Austin owns that the doctrine here laid down by him is inconsistent with the language used by writers who have treated of the British Constitution".[35] He observes that Austin considers the electors, not the Commons to be part of the sovereign body. This is the result, Dicey notes, of Austin's confusion of legal with political sovereignty. It is a political fact that the Commons are bound by the electors in important ways. But this is not important for legal sovereignty. Even though Dicey carefully distinguishes his own constitutional theory from Austin's general jurisprudence (and emphasises how in his account sovereignty is a legal, not a political concept), his account of parliamentary sovereignty employs the same idea of the "sovereign" as the author of voluntary directives that through the force of their irresistible power create the legal order as a whole.[36] His argument for the unchanging nature of sovereignty is what he calls a "logical reason", which is entirely Austinian. He writes that "limited sovereignty" is in his view "a contradiction in terms".[37] He also notes that "[a]ll that can be urged as to the speculative difficulties of placing any limits whatever on sovereignty has been admirably stated by Austin and by professor Holland".[38]

So for Dicey, the sovereignty of Parliament and not the rule of law is "the dominant characteristic of our political institutions".[39] Just like the sovereign in Austin's legal system, the sovereign in the British constitution can change any law whatever, so that "there is no law which Parliament cannot change, or (to put the same thing somewhat differently), fundamental or so-called constitutional laws are under our constitution changed by the same body and in the same manner as other laws, namely by Parliament acting in its ordinary legislative character".[40] This leads Dicey to deny that the distinction between higher and ordinary law, drawn in other constitutional traditions, applies in the case of the United Kingdom.

He cites approvingly Tocqueville's suggestion that in the United Kingdom the Parliament is both a legislative and a constituent assembly and agrees with him because "there

[33] See: *Austin J.* The Province of Jurisprudence Determined, edited by Wilfrid E. Rumble (Camridge: Cambridge University Press, 1995).

[34] *Austin*, The Province, 21.

[35] *Dicey*, Introduction, 29.

[36] *Dicey* discusses the differences between his constitutional theory and Austin's jurisprudence in Introduction, 26–30.

[37] *Dicey*, Introduction, 24, note 48. At p. 27 he says that 'the term "sovereignty", as long as it is accurately employed in the sense in which Austin sometimes uses it, is a merely legal conception, and means simply the power of law-making unrestricted by any legal limit'.

[38] *Dicey*, Introduction, 18.

[39] *Dicey*, Introduction, 3.

[40] *Dicey*, Introduction, 37.

is under the English (sic) constitution no marked or clear distinction between laws which are not fundamental to constitutional and laws which are fundamental or constitutional".[41] Whatever Parliament wishes, it becomes the law. By fixing on a single source of law, the system retains thus a remarkable simplicity. This is why Dicey explicitly denies that there is higher law limiting or organising it. The doctrine of sovereignty for Dicey is a result of both logic and fact. In this sense Dicey's view is not exactly the continuing view defended by Wade (although it reaches the same conclusion). Sovereignty is not a matter of legal rules but perhaps an immutable fact or a "sacred mystery of statesmanship".[42]

Nevertheless, as we saw above, it is clear that such a theory cannot explain British constitutional law nor any (modern or developed) law at all. The Austinian idea of sovereignty is just inapplicable to the modern legal order, where offices and competences are divided among many different persons and bodies. As we saw above, Parliament and its powers are constituted by prior legal rules of constitutional nature. Wade has carefully explained how the order of priority of statutes over the common law and the priority of later statutes over earlier ones (i.e. the doctrine of implied repeal) rely on something higher than statute, which he takes it to be a constitutional fundamental.

Once the idea of a fundamental law is in place, the key question is in what way this law defines Parliament and its powers. We need to know what counts as Parliament, the institution, and what constitutes the actions of that institution that we take to mark the creation of laws. Austin never dealt with such questions because he hid them behind the supposed political reality of sovereignty. They emerge, however, even within his own system, whenever he wishes take the holder of sovereign to be not a single person but a body or group. For, when does such a body act? When all the members agree? When a simple majority? How many members should have been warned about an imminent vote? These questions arise also with the idea that the composite body Queen in Parliament may be sovereign.

This cannot just be a pattern of facts. Austin assumes that the sovereign is obeyed by everyone (because of his skills or strength or cunning, makes no difference). His power is a feature that helps us explain what law is: it is the order created in a political society whenever an effective sovereign exists. But one cannot turn this simple description of fact into a theory of the constitution. We cannot replace the person of the sovereign with a highly complex body such as the Queen in Parliament. What constitutes this body, who it is composed by and by what procedures it acts in the various ways that it does act, cannot be a matter of fact or a pattern of practice. Answering these questions invites a set of sophisticated criteria. And Austin' theory is not conceptually equipped to provide them.

Austin did not see it this way, of course. As is well known, he believed that a composite body could be sovereign.[43] But he was very confused over this, as was shown by Latham.[44]

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[41] *Dicey*, Introduction, 37.

[42] *Dicey*, Introduction, CXXVI. Dicey uses this phrase to criticise his predecessors.

[43] He wrote as follows: "In the case of an aristocracy or government of a number, the sovereign number is an aggregate of individuals, and, commonly, of smaller aggregates composed by those individuals. Now, considered collectively, or considered in its corporate character, that sovereign number is sovereign and independent. But, considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts"; *Austin J.* The Province of Jurisprudence Determined, 184. But how are we to determine if and when this body is constituted and expresses its will? There is a need for having and respecting rules of procedure that are prior to and binding on the body itself. So a body cannot be sovereign, in Austin's original sense.

[44] *Latham*, The Law and the Commonwealth, 523-4.

A group of men cannot be held to be acting in any relevant sense, unless there are some procedures for identifying its actions. This is why at the basis of a body's actions lies a general rule outlining its proper procedure. This introduces a degree of rule-based complexity that cannot be captured by the Austinian scheme.

In an effort to defend the orthodox view of parliamentary, some recent constitutional theorists have revived this Austinian simplicity of sovereignty. They have argued that even though Parliament is legally sovereign as a body, the rules that determine when and how it acts are not themselves legal rules. This argument effectively says that there is no higher law in the United Kingdom, at least not a higher law defining Parliament in the sense we have been using it here. For this view, the Westminster Parliament is very much like the Austinian sovereign. Its composition and process lies beyond the law, they are at most rules of "positive morality". Hence, Richard Ekins recently wrote that "neither the rule of recognition nor the common law specifies how Parliament legislates".[45] This entails that "Parliament was not constituted by law and the way in which it may act is not prescribed by law".[46] But then what is the legal component of parliamentary sovereignty? Ekins argues that the legal doctrine involves only the basic rule that Parliament enjoys the highest legislative authority, but does not extend into specifying how this is to be exercised or what counts as Parliament. As a result, the courts do not have, strictly speaking, jurisdiction to pass judgment on the validity of the Parliament Acts. Even though these Acts purport to be law, they are in fact, for Ekins, only a "decision-making procedure that supplements joint assent"[47] which for that reason is something that courts should not touch, but allow the Speaker to resolve without judicial supervision:

> "The 1911 Act is a statute and is the duty of courts to interpret statutes. This statute, however, concerns the process by which the Queen, Lords and Commons legislate. Thus, while the matter may be prima facie justiciable in that it involves statutory interpretation, it is in the end non-justiciable because the interpretive question touches too closely on how Parliament acts, which is a matter that the courts ought to leave to legislators".[48]

Ekins' proposal thus returns us to the simplicity of Dicey's model. It gives a defence of propositions (1) and (2) and assumes that Parliament is beyond the law, or at least the definition of Parliament is beyond the law so that we do not need a legal account of Parliament as an institution implied by (3) and (4).

This argument is no doubt prompted by the real anxiety that if we allowed the idea of higher law to determine how Parliament was constituted, then Parliament would not be the exclusive holder of all the available powers and immunities that Dicey attributes to it. There would have to be a higher rule determining first what Parliament is and, second, under what conditions it can legislate and this open up the fundamental rules of constitutional law to legal interpretation, implied by (3) and (4). It would also open up the problem of constitutional amendment through a special or ordinary legal process. All such issues may then become controversial and open to legal judgment.

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[45] *Ekins R.* 'Acts of Parliament and the Parliament Acts' 123 Law Quarterly Review (2007) 91, at 105.

[46] *Ekins*, 'Acts of Parliament and the Parliament Acts', 101.

[47] *Ekins*, 'Acts of Parliament and the Parliament Acts', 108.

[48] *Ekins*, 'Acts of Parliament and the Parliament Acts', 113.

The worry is real and the implication is correct. Dicey's doctrine promises a certain simplicity and perhaps determinacy because it takes sovereignty to be a matter of logic and of fact, something that lies beyond legal interpretation. But the solution proposed is far worse than the supposed problem. Ekins draws a distinction between the doctrine of parliamentary sovereignty, as a narrowly conceived legal doctrine, and the definition of Parliament, as something which is not law but fact. This distinction is strange and sits uneasily in our public law. It has no other function but to save Dicey's doctrine from its obvious flaws and inconsistencies. No political theory of the constitution, say a democratic or liberal or welfare theory, is called upon in its support. There has never been any support for such a distinction in the courts. As the cases of parliamentary privileges show, whether Parliament is action is something that does not escape the scrutiny of law. In a long list of cases, from the *Case of Proclamations*, to the *Prince's Case* down to *Jackson*, it has been held that the powers of Parliament and the other political institutions are subject to the ordinary law of the land, be that criminal law or the law of tort or another area of law. Under Ekins' proposal, Parliament would be excluded from the rule of law.

In a famous statement Lord Bridge said that. "the maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law".[49] Ekins return to Austin's view of sovereignty is entirely inconsistent with this passage. The argument is also inconsistent with the very recent *Jackson* judgment (something which is noticed by Ekins but to which, surprisingly, he gives little weight). Not only did the House of Lords unanimously consider the application justiciable, but it also unanimously confirmed that the matter of the procedures of Parliament is a matter of law to be determined through ordinary legal arguments, which in this case turned out to be statutory interpretation. *Jackson* is not an isolated instance but follows a long list of authorities supporting the conclusion that parliamentary sovereignty is not beyond the law.

A Higher Law

If we reject the Austinian idea of a sovereign body that is mysteriously and extra-legally constituted, we are back to the idea of a higher law defining what counts as Parliament and outlining the scope of its powers. What goes under the higher law of the Constitution? One suggestion is that the higher law is very simple. It only identifies the all-powerful body which, precisely as described by Dicey, has the sole power to legislate. This remains faithful to Dicey's model, even if it abandons one of its arguments. Jeffrey Goldsworthy has explored the idea that the orthodox view can be defended by removing the Austinian background and replacing it with the idea of higher law following Hart's rule of recognition. As a matter of that higher law, Goldsworthy argues, the Westminster Parliament is sovereign "if it has unlimited power as to the substance of legislation, even if it is governed by judicially enforceable norms that determine its composition, and the procedure and form by which it must legislate".[50] This accepts part of the "new view", whose main argument was from the start the logical requirement of a higher law defining Parliament, but does not ac-

[49] X v Morgan-Grampian Ltd. [1991] AC 1 at p. 48.

[50] *Goldsworthy*, The Sovereignty of Parliament, 16.

cept Heuston's view in its entirety, because it rejects the view that under the higher law of the constitution Parliament can amend its own rules. In this view (3) and (4) are correct, but their content is minimal.

Goldsworthy is ambiguous as to how constitutional doctrine treats its own amendment. He does not believe that ordinary statute can change such higher laws. But he also considers Wade's view, that no one can change it, "debatable".[51] Goldsworthy seems to treat this problem as entirely one of politics and advises caution: "By unsettling what has for centuries been regarded as settled, the courts would risk conflict with the other branches of government that might dangerously destabilize the legal system".[52] So he leaves this question legally indeterminate, making his answer sound much closer to Wade rather than Latham. We may then say that for the orthodox view, as defended by Goldsworthy, the higher law of the constitution includes the powers and immunities of Parliament as well as a single disability on the part of Parliament in changing these higher rules. Under this account, when we introduce the idea of higher law, we do not compromise the most important dimension of Dicey's position: courts are never to challenge the authority of an Act of Parliament.

At first sight it seems that this defence of the orthodox view follows from Hart's view on the rule of recognition as a matter of judicial practice. Hart's view was that the establishment of a rule of recognition is a complex fact that has to do with the role of the officials and the acceptance by them of certain standard rules. Nevertheless, as we have already seen, it is not obvious that what goes into the rule of recognition is just the resolution of the contest for power between the courts and the legislature. Goldsworthy sees this question as one of ultimate power in exactly this way, hence the higher law is a simple determination. He says that what is at stake in this debate is 'the location of ultimate decision-making authority'.[53] This is why this account of the higher law of the Constitution is not that different from Dicey's. It is a theoretically sophisticated version of the same idea, entailing that under the higher law we have a rule that allocates all the powers in one person or body, this time legally defined. But this view misunderstands the functions of constitutional law as higher law. The constitution does a lot more than referee a contest between two rival sources of power.

Here we must return to Finnis' idea of rules of identification that are not rules conferring power of legislation. The higher law in a constitutionally organised state is not simply a rule about powers. Goldsworthy's view overlooks the effect that pre-existing legal structures have on the very existence and exercise of law-making power. It overlooks the other organisational principles that join parliamentary supremacy at the summit of British law. The highest constitutional principles include duties and disabilities as well as powers and immunities so as to allow the continuity of law in a way not envisaged by the powers of the present legislator. And once such principles co-exist, they start interacting with each other in important ways. The powers and immunities depend on the duties and liberties, and vice versa. These rules support each other not in the way of the links of a chain, but rather as the legs of a chair. We do not know what Parliament is until we have taken into account all of the relevant rules and principles, including those about the possible amendment of

[51] *Goldsworthy*, The Sovereignty of Parliament, 245.

[52] *Goldsworthy*, The Sovereignty of Parliament, 246.

[53] *Goldsworthy*, The Sovereignty of Parliament 3. See also Jeffrey Goldsworthy, 'Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty' (2005) 3 New Zealand Journal of Public and International Law, 7–37.

standing rules. This recalls perhaps Trevor Allan's view of the constitution as a common law body of rules and principles and argumentative techniques that jointly give shape to the constitution.[54] There is a very strong analogy between the view taken here and Allan's view. Nevertheless, the point made here does not rely on the premise that the rules are made by judges. The point is rather that, whoever is responsible for its creation and continuing authority, the constitution must, if it is to make any sense as higher law, include not only powers for the legislature to legislate but also disability and liability rules limiting that legislature as an institution and as a group of persons. Parliamentary sovereignty does not make sense without such organisational rules outlining offices and competences.

This argument is not related to the procedural point that judges interpret statutes and have therefore the last word. Allan's view is that in the absence of a written constitution, all constitutional law is common law and therefore subject to the interpretive role of the courts: 'For it is when we turn to the interpretative power of the courts, accompanied by their necessarily exclusive authority in the application of statutes to particular cases, that we discover the dual nature of sovereignty in the British constitution, properly understood'.[55] For Allan, the higher rules of the constitution emerged through judicial law-making through the substantive elaboration of a 'consistent and coherent corpus of common law, binding private citizen and public official alike: its contents provided the fundamental principles of legitimate governance with which the executive must comply, and which governed the interpretation and application of statute'.[56] Allan, for example, argues that the rule of parliamentary sovereignty, conceived as a rule of 'absolute or unqualified sovereignty' is unhelpful, since it does not help us interpret the content of any statute: 'Satisfied by the avowed application of duly enacted statutes, and violated only by their explicit rejection, the rule has little or no bearing on what an Act is understood to mean.'[57] Allan concludes: A rule of ''recognition'' identifies a statute as a source of law; but the practical consequences are, necessarily, a separate matter of normative legal theory'.[58] This may or may not be the case, but the argument I am making here is quite different, if parallel to this.

My argument supports the same conclusions, but the point is not that the sovereignty of parliament is to be interpreted by courts, hence it is a common law doctrine. The argument is, I think, deeper. The sovereignty of parliament must, if it is to make any sense at all as a constitutional doctrine, be part of a complex set of rules explaining how the powers of parliament are organised and exercised and how they fit with laws made before that parliament and outside the present constitutional arrangement. The law-making powers of parliament, such as they are, are only one element in the larger edifice of the constitution. For the constitution to do its work we must add a great deal many other doctrines and principles. All these doctrines, of course, are to be interpreted by courts, whose starting point must be that parliament, like other bodies or ordinary persons, has both powers and disabilities (as indeed do the courts themselves). So when Allan says: 'legislative supremacy, or

[54] *Allan T.R.S.* Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism (Oxford: Oxford University Press,1993) and *Allan T.R.S.*, Constitutional Justice: A Liberal Theory of the Rule of Law (Oxford: Oxford University Press, 2001).

[55] *Allan*, Constitutional Justice, 13.

[56] *Allan*, Constitutional Justice, 17–8.

[57] *Allan T.R.S.* 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority' 63 Cambridge Law Journal (2004), 685–711, at 686.

[58] *Allan*, 'Legislative Supremacy', 687.

parliamentary sovereignty, therefore entails a counterbalancing judicial sovereignty',[59] he is right, but only through this further premise. The entailment is a matter of the coherence and completeness of any constitutional order, not of the necessary further application of the doctrine by courts in concrete circumstances. The issue is one of the general constitutional structure of a political society governed by the rule of law, not a consequence of the practical finding that the courts have the last word. Any person or body interpreting the constitution, including parliament itself, are to make the same conceptual assumptions about the powers and disabilities of parliament.

This point is actually parallel to the criticism very effectively made by Hart against Austin's command theory. Among other things, Hart noticed that Austin's idea of the sovereign made it impossible to secure the succession of a sovereign. Austin's theory, Hart noted, was incapable of offering a legal standard for identifying the constitutional successor to the sovereign. The problem identified by Hart was that of defining the relevant political office or institution by means of rules of identification. Such pre-existing are required to allow the powers of law-making to pass from one person to another. Austin needed, thus, a set of higher rules to supplement the actual powers that he recognized in the existing (as a matter of fact) sovereign. This leads us to the solution endorsed by Latham and Heuston. At the foundation of the British constitution lies not a person or body but a set of interacting rules whose contents do not consist in the allocation of powers alone, but provide also for the recognition of the various public institutions, including the legislatures and the courts. Such rules are not of course all made by the legislature in place.

Finnis explains the principle as follows: "A law once validly brought into being, in accordance with criteria of validity *then in force,* remains valid until *either* it expires according to its own terms or terms implied at its creation, or it is repealed in accordance with conditions of repeal in force *at the time of its repeal"*.[60] This means that in the British context, the work of the present parliament is dependent on the existing landscape formed by the rules of public law developed through the practice of the courts and by previous statutes. Parliament is a public institution operating under the law, very much like all other public bodies. For this body to work as an institution several other principles or rules must already be in place. This set of principles must be part of a well-ordered constitution.[61]

If the higher law of the constitution includes both powers and duties of the kind just described, we could perhaps organise its contents as follows:

> i) *Principles of composition* determine who is to become an officeholder of public institutions. They include the rules on Royal succession, the election of Members of the House of Commons and the appointment of Peers. This part of the constitution defines the composition of Parliament as a group of persons.

[59] *Allan*, 'Legislative Supremacy' 687. For the debate between Allan and Goldsworthy see *Allan T.R.S.*, 'Texts, Context and Constitution: The Common Law as Public Reason' and *Goldsworthy J.* 'The Myth of the Common Law Constitution' both in 'Douglas Edlin (ed.), Common Law Theory (Cambridge: Cambridge University Press, 2007) at 185 and 204. See also *Allan T.R.S.* 'Constitutional Justice and the Concept of Law' and *Goldsworthy J.* 'Unwritten Constitutional Principles' both in Grant Huscroft (ed.), Expounding the Constitution: Essays in Constitutional Theory (Cambridge: Cambridge University Press, 2008) at 219 and 277.

[60] *Finnis*, 'Revolutions and Continuity of Law', 63.

[61] *Neil MacCormick* makes a very similar distinction between 'rules of change' and 'rules of recognition' in *Neil MacCormick*, Questioning Sovereignty: Law, State and Nation in the European Commonwealth (Oxford: Oxford University Press, 1999), 83 ff.

ii) Principles of procedure determine how the group may reach decisions in the name of the institution (including rules concerning the manner and form of law-making, such as the Parliament Acts 1911 and 1949). This part of the constitution defines Parliament as an institution.

iii) Principles of competence determine the effect of the institutions' decisions in the legal order as a whole (including the principle that Acts of Parliament take precedence over the common law, the principles concerning implied repeal and the rules concerning statutory interpretation, the limitations posed by the human rights Act and by European Union law). This part of the constitution defines the powers of Parliament and outlines the way in which Acts of Parliament and the other sources of law are to be understood.

iv) Principles of identification tell us what past rules are identified as continuously binding, even though they were made before the current officeholders were created or their institutions took shape. They will include the principles recognizing the continuous effect and development of the common law. This part of the constitution specifies the disabilities and liabilities limiting Parliament as an institution as well as the liberties and duties of its members, covering all the principles (i) — (v), including itself.

v) Principles of succession determine how current law may be changed, including the principles governing the amendment, suspension or replacement of any rule. (These principles may be a sub-category of principles of competence under (iii) but they need not be, since constitutional change need not be in the hands of any institution).

Once presented in this way, it is easier to see that none of these sets of principles is more fundamental than the others, although they are fundamental in relation to all other rules addressed to the ordinary citizen. They make sense as a whole and resist the attempt to make one set of them dominant. There is no way in which one of them may be taken to be the foundation of the unity of the system, incorporating and determining all the others. For if we started with (iv) the principles of identification and said that they were the foundation of all true law, we would be contradicted by the fact that the rules of competence under (iii) would create new rules that changed the law for the future (and may even change the rules of identification themselves). A good example of such a change, where the rules under (iii) encroach on (iv) is invoked by John Finnis, who reminds us that the Interpretation Act 1889 reversed the earlier rule of English law that the repeal of a repealing Act revived the Act originally repealed.[62] If, conversely, we start with (iii) the rules of competence and we took them, like Goldsworthy, to be dominant we would be faced with the problem that the very composition and identity of the body enjoying these powers relies on rules of identification. So, competence and identification are in continuous tension, each one undermining the effects of the other.

The same applies to the principles of succession. Their supposed dominance is undermined by their dependence on both (i) and (ii) and (iv). These rules can of course themselves be changed, but until changed determine the content and effect of (v), since the rules of change need to take place through institutions and procedures defined by (i) and (ii). In normal circumstances, namely in a legal order that lives on and develops through time by continuously creating and amending laws, institutions, public offices and roles, these constitutional principles can only exist together or not at all. This mutual dependence of all the basic principles of the system on all the other basic principles leads Finnis to draw the conclusion, which constitutional lawyers may find surprising, that "the legal system, considered simply as a set of 'valid rules', does not exist, since considered simply as a set of

[62] *Finnis*, 'Revolutions and Continuity of Law', 61.

rules, of interdependent normative meanings, there is nothing to give it continuity, duration, identity through time".[63] Similarly, Joseph Raz concludes that the "identity of legal systems depends on the identity of the social forms to which they belong" and that "the criterion of identity of legal systems is therefore determined not only by jurisprudential or legal considerations, but by other considerations as well, considerations belonging to other social sciences".[64] It is the political society that gives the legal system its identity and not the other way round.

This structure of the higher law of the constitution introduces a degree of complexity to the creation of institutions of constitutional law which is shared both by the written and the unwritten constitution. For the way in which the various principles relate to each other is a continuous interpretive project. No single set gives the answer to a constitutional dilemma: our work must take into account all of them at once. Constitutional interpretation is not therefore the identification of an intention — say the intention of Parliament — but the process of deliberation, balancing and adjusting of a set of various jointly applicable principles. This is well known in the case of the US constitution, which provides for rules on the composition of Congress, on the procedures for law-making, on the competence of the various bodies as well as rules of continuity and explicit rules for its own amendment. All such principles are part of the same document and are therefore to be read and understood alongside each other. The process of interpreting and understanding the written constitution depends on understanding how these principles interact with one another in the course of actual disputes that go through the courts.

Neil MacCormick has put this very well when he argues that "[t]here has to be reciprocal matching between the criteria for recognizing valid law, and the criteria for validly exercising the power to enact law (including any special procedures required for validity of a legislative change that changes provisions of the constitution itself)"[65] The device of the written document that puts together a set of the principles taken to be equal parts of the higher law of the constitution makes explicit the anyway necessary interdependence of the basic rules. But there is no material difference between written and unwritten principles. A well designed written constitution will have the same features as a well worked out unwritten constitution — developed by judicial decisions and Acts of Parliament. The route taking us there is different, but the process of constitutional deliberation is similar. In both cases the higher law of the constitution is a set of mutually supporting principles.[66]

The Westminster Parliament occasionally takes this view itself. The House of Lords Constitution Committee defines the Constitution, for the purposes of the exercise of its functions at least, as "the set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual".[67]

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[63] *Finnis*, 'Revolutions and Continuity of Law', 69.

[64] *Raz J.* The Concept of a Legal System, 2nd ed. (Oxford: Clarendon Press, 1980), 189.

[65] *MacCormick*, Questioning Sovereignty, 85.

[66] For some interesting reflections on this see Michael J. Perry, "What is 'the Constitution'? and Other Fundamental Questions" in Larry Alexander (ed.), Constitutionalism: Philosophical Foundations (Cambridge: Cambridge University Press, 1998), 99.

[67] House of Lords Committee on the Constitution, Reviewing the Constitution: Terms of Reference and Method of Working, First Report of Session 2001–2002 (HL Paper 11), (London: Stationery Office, 2002)

The Constitution as Higher Law

This point shows something of great significance for constitutional law in general, not just for the United Kingdom. The constitution, written or unwritten, is not the ultimate foundation of the legal order. It is not its basis or bedrock. As we have just seen the basic principles of a constitutional order are many and their relations complex and not all of them can be included in the written document (for the document itself needs rules of interpretation and amendment). These principles are mutually supporting and yield results through a process of deliberation. So the intellectual constructions of constitutional law proceed the other way round than Dicey suggests. They move from the particular to the general. For the particular cases will tell us how the rules of procedure may affect the rules of competence. Even when a written text of a constitution is available, its understanding and application is the result of a complex deliberation that uses all the available materials of the legal order in order to make sense of its most abstract organising principles. It is a construction that starts from the legal materials and gradually builds answers to the questions posed by (i) — (v) using, if available, the constitutional text in the process. But the constitutional text alone is incapable of answering all of these questions by itself. In this sense the constitution is the result of the common law not in the sense that it is made by the judges, but in that it is made and remade in the process of deciding particular cases in specific contexts. The point has been well developed by Ronald Dworkin, who observed that any claim "about the place the Constitution occupies in our legal structure must ... be based on an interpretation of legal practice in general, not of the Constitution in some way isolated from that general practice".[68] This also means that the constitution has a necessary historical dimension. If the constitution is thus extrapolated from particular cases, the knowledge of the constitution requires also knowledge of its history and of the mechanisms through which constitutional rules continuously develop and change through time.[69]

So we need to reverse the argument made by Wade. Wade acknowledges that the higher law of the constitution is created thorough the practices of the common law, even though is not part of the common law. It is not subject to statute, for it determines the validity and force of all statutes. But Wade wrongly concludes that it is not only higher in the sense of fundamental, but higher also in the sense of a bedrock or starting point in our reasoning. He says that "when we are dealing with the fundamental doctrine under which the judges declare what statutory directions they will accept, we are dealing with a unique principle which is more than just an ordinary rule of law. Not only is it part of the network of legal rules; it is also the peg from which the network hangs".[70] But there is no such peg. This is true of the United Kingdom constitution, as much as it is of other constitutional orders.

If the arguments made here are correct, then Maitland's view seems to be far closer to the truth than Dicey's. The constitution is open to the same interpretive constructions and

chapter 2, par 20. In the same Report the Committee states that the "basic tenets" of the United Kingdom are: Sovereignty of the Crown in Parliament, the rule of law, encompassing the rights of the individual, Union State, Representative Government, Membership of the Commonwealth, the European Union, and other international organisations.

[68] *Dworkin R.* 'The Forum of Principle' in Dworkin, A Matter of Principle, 33, at 37.

[69] This point is brilliantly shown for the case of the British constitutional settlement by *Allison J.W.F.* The English Historical Constitution: Continuity, Change and European Effects (Cambridge: Cambridge University Press, 2007).

[70] *Wade*, Constitutional Fundamentals, 32.

arguments as the rest of the law. This makes constitutional law relatively open-ended, but this is precisely how it achieves stability and continuity. This theoretical argument is I think what animates Trevor Allan's analysis of English public law in practice. And this argument has recently been further strengthened in a wonderful work of historical and comparative scholarship by John Allison. In his recent *The English Historical Constitution* Allison shows in great detail how competing interpretations have jointly shaped the English institutions of public law, through various elaborations and European loans of the idea of the crown and the doctrines of the separation of powers, parliamentary sovereignty and the rule of law. Allison concludes that:

> 'what is constituted at the centre of the historical constitution is not a principle but an overarching mode of change that respects continuity, at least in form, and the reassurance it affords. That mode is not derived from normative theory but has evolved in legal and political practices of conservation and innovation by which the institutions of government are controlled and facilitated as they evolve, and stability is secured or re-established'.[71]

The orthodox view has been resistant to the fluidity and openness that this interpretive and historical view of the constitution entails. This is why, I believe, Wade endorses the strange view that the constitution cannot be changed at all, even through an Act of Parliament. He tried to insulate the rules of identification under (iv) from the normal effect of rules of power under (iii) and (v) — just like Dicey had tried to insulate the principles of power (iii) and amendment (v) from the effect of the principles of identification. But both these answers fail, because they provide a conception of the English constitution that is both unfamiliar and unrealistically rigid. The constitution depends on both sets of principles equally and simultaneously.

Allison suggests that the historical constitution is not the result of a single normative theory. This is true, but it should not be taken to mean that normative principles are not constantly at work (including a normative principle of fidelity to the materials). If the constitution is thus the interpretive construction of the law, it is also partly a construction of the political morality that sustains and justifies the main institutions of the state. The process of legal deliberation in constitutional law proceeds through the working out of such principles. This is evident in the most recent constitutional judgments of the House of Lords, including *Jackson*. And here we find the deeper reason for the enduring similarities between the written and the unwritten constitution. In any modern liberal democracy, constitutional law and its doctrines seek to make pubic and articulate the foundational principles behind the idea of public institutions of government. It is the attempt to establish a public order of rules that can be justified for a society of equals. But the attempt is not static, nor does it escape controversy. The content of the higher law of the constitution is thus derived as the interpretation of a moral requirement, the contents of which are of course open to various different interpretations and its results change over time. The standing of the constitution does not, therefore, derive from the superior power or the legitimacy of the authors of the constitution in the sense of a "*pouvoir constituent*". It is the result of the various and often competing legal interpretation of our institutions by the various officers, judges and political players that are involved in the standing processes of law and government. These interpretations and conversations continue to shape and give ever changing meaning to our public institutions.

[71] *Allison*, The English Historical Constitution, 235.

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The Russian President's "Delegated" Powers As a Means of Expansion of his Authority

The first part of the article considers the significance and the legal meaning of the Russian Federation President's objectives and functions, as established by the Russian Constitution, as well as their relationship to presidential powers. The second part of the article illustrates the author's thesis regarding the great, but theoretically undervalued, significance of the regulations contained in statute 80 of the Russian Constitution, which set out the process for expanding presidential authority. This section presents the findings of the author's analysis of the scope and nature of the powers that had been delegated to the President through legislation and provides commentary to these findings.

Key words*: head of state, Russian Federation President's authority, President's powers, (functions) of the President, delegated authority*

1.

In this article, I set out to demonstrate that a significant number of the Russian Federation President's powers are not constitutional, but exist as a result of legislative delegation. This deduction is corroborated by the findings of this study, as the author identifies and classifies the powers of the President the Russian Federation, which had been legislated following the adoption of the Russian Constitution in 1993. This article also touches upon theoretical issues. However, their conception requires further study and, as such, in this article, I limit myself to a brief discussion.

One such question is: "Are all the Russian Federation President's powers, as outlined by federal law, *delegated*?" The answer is N Strictly speaking, delegated powers are those powers that are *vested* in a government agency, or are vested in a particular level of government, but are then delegated to a different government agency (or organisation) or a different level of government. Though, in such a case, there arises a new question: "How do we match the given meaning with the assertion made in the literature that "the principle of *non-delegation* of powers emerges from the theory of separation of powers and implies that no other branch of government can share its powers with another?" (the emphasis in quotes is mine. — M.K.).[1] The solution to the problem depends on the form and nature of the anchoring of a given power.

[1] *Albert R.* "Benefits" Accessible to Presidential Republics, within the Conditions of Parliamentary Democracies. Comparative Constitutional Review. 2011. N. 3. P. 36.

Firstly, it is necessary to determine whether the power to be delegated is organic or whether it is intended singularly for the delegating agency. If it is singularly intended, it cannot be delegated. The abovementioned R. Albert cites a Canadian Supreme Court decision, which finds that some functions can *only* be "judicial, executive or legislative in their nature and, as such, *cannot be delegated*."[2] Secondly, another criterion to consider is the degree of specificity of the original judicial expression of a given power. For example, the first parts of articles 102 and 103 of the Constitution, which underlie the powers of the chambers of the Russian Parliament, begin with the words "The area of responsibility includes..." and are followed by utterly specific powers, which only the given chamber — the Federation Council or the State Duma — is authorised to carry out (though separate constitutional powers of the chambers are contained in other statutes as well). As such, it would be a gross violation of the Russian Constitution if the powers to approve boundaries between federal subjects of the Russian Federation or to grant amnesty were delegated to the President. Equally, the President, whose competency to some extent overlaps with the competency of the government, does not have the right to delegate his powers, which may include the right to pardon or approve/reject federal laws, to the latter.

As I will demonstrate later, the powers that the lawmaker awards to the head of state can be separated into *administrative* (for instance, the power of appointment) and *regulatory* (provision for the adoption and approval of various laws and regulations). But the assignment of regulatory powers to the President does not imply that Parliament is delegating its own "exclusive" powers. The President is within his right to carry out legislative regulation without any additional permission from legislators. In reality, the Russian Constitution formulates the President's powers as regulatory; however, by separating the President's acts into decrees and orders (article 90), it implies that *decrees can be normative*[3], and orders can be individual in their nature. Additionally, article 115 speaks directly to the President's *normative decrees*, although it doesn't specify the scope of their applicability.

The decision of the Constitutional Court of the Russian Federation whereby the court found that the President's right to issue *decrees, which address legislative gaps*, does not violate the Constitution contributes to the argument that the President's creation of regulatory acts is not a power delegated from Parliament. The decision does specify that the President's decrees are not in violation "on the condition that such decrees do not violate the Russian Constitution and federal laws, and that their temporal scope is limited until a corresponding legislative act is adopted."[4] At the same time, many of the Constitutional Court decisions establish that the existing *powers of the Russian government*, which outline the terms for adopting normative legal acts, are in fact *delegated*. The Court employs this term in relation to the powers of other organisations — both governmental and non-governmental — but never in relation to the powers of the Russian President.

[2] See: Ibid. P. 42. For the Court Decision cited by R. Albert, see: Reference re Remuneration of Judges of the Provincial Court (P.E.I.), [1997] 3 S.C.R. 3. Para.139

[3] In practice, many of the decrees are individual in nature (for example, decrees that establish the appointment of federal ministers)

[4] See: P. 4 of the preamble of the Russian Constitutional Court resolution, dated 30 April 1996, N 11-P. "Regarding the Inspection of Constitutionality of item 2 of the Russian President's Decree, dated 3 October 1994, N 1969 "On Consolidating the Unified System of Executive Power in the Russian Federation" and item 2.3 of the regulation of the head of administration of a krai, oblast, federal city, autonomous oblast, autonomous okrug of the Russian Federation, ratified by the said Decree" // SZ RF 06.05.1996. N. 19, statute 2320.

This could be explained by the weakly developed theory of power delegation, which, in turn, is conditioned by weak demand for corresponding application in practice — both in the legislature and the courts. If "the primary incentive" for both the lawmaker and the legal practitioner is the satisfaction of immediate political and economic issues (in this instance, I do not consider the degree of their "moral justification"), one should not expect an objective theoretical basis.

As such, it is incorrect to describe the powers, ascribed to the President by legislation, as delegated. Nonetheless, for the sake of simplicity, in this article I describe them as "delegated", albeit I put in them in quotations (as a sign of theoretical compromise).

2.

It is understood that the term "competency" can be defined in various ways in juridical literature; however, it is most frequently defined as a sum total of issues, functions[5] and corresponding powers. The actual scope of "power" of a government body or an official is determined by the scope of his powers. As such, it makes sense to use the same approach when considering the constitutional competency of the Russian President (i.e. to examine the scope of presidential power and its degree of political significance by considering the *powers, outlined in the Russian Constitution*).

An examination of such powers reveals that they are limited in number. More importantly, in their sum total, these powers do not explain why, despite the existence of democratic principles, proclaimed in the Constitution, there exists a phenomenon of *personalistic rule*[6] in modern Russia. Practically all significant decisions originate with the head of state, while other agencies of public power depend on him in one way or another. Some may disagree with me and point to the head of state's constitutionally appointed capabilities to single-handedly form the government, fully control its activity[7] and essentially prevent the State Duma from having access to executive power.[8] Raymond Legeais, a famous comparativist, has eloquently stated that the Constitution provides the President of the Russian Federations with "significant powers, making the government into an agency that makes important decisions, which can only partially be considered its own."[9]

Indeed, in many ways, the political constitutional powers of the President and the lack of corresponding checks and balances from the Parliament set out the misbalance in the

[5] In this article, the author considers "tasks" and "functions" to be synonymous.

[6] For more details on this phenomenon, see: *Krasnov M.A.* The Personalistic Regime in Russia: An Institutional Analysis. Moscow, 2006; *Krasnov M.A., Shablinsky I.G.* Russian System of Power: A Triangle with One Angle. Moscow, 2008.

[7] The current "diarchic" or "duumvirate" state of affairs, whereby the political weight of the President has clearly weakened, does not refute — but actually supports — the above said, as the shift of power to the Head of Government as the locus of power is correspondent to factors external to institutions. Constitutionally, the President retains decision-making levers vis-a-vis the government, but for reasons, which we can only guess at, he does not use them to their full capacity.

[8] The 2008 amendment of the Russian Constitution, which states that the State Duma must hear annual accounts of the work carried out by the Russian Government (part 1, article 103), has not resulted in the smallest expansion of the Duma's powers, for a negative account of the work of the Government does not award the Duma the ability to recall the Cabinet. The fate of the Cabinet lies exclusively in the hands of the President.

[9] *Legeais R.* Great Modern Legal Systems: a Comparative Approach. Translated from French by Gryadov, A.V. 2nd ed. Moscow. 2010. P. 212.

existing system of checks and balances. Nonetheless, ***these powers alone*** *cannot serve (at least, not in the long term) as a juridical basis for the* ***dominant position***[10] *within the system of governmental power agencies, which, in actuality, is occupied by the Russian President, independent of his trust rating.*

It is well known that the initial popularity of the first Russian President, B.N. Yeltsin, peaked during the course of August 1991 events, then began to drop, before, finally almost disappearing by mid-1990s. This trend was reflected in the first elections to the State Duma, which were held concurrently with a referendum on adopting the first non-Soviet Constitution on 12 December 1993. Out of 450 seats, Yeltsin's supporters (who, at that time, were represented by Russia's Choice) received 64 seats, while his ideological opponents (the Communist Party of Russia, the Agrarian Party, and the Liberal Democratic Party of Russia) won 143 seats and the democratic bloc, "Yavlinsky-Boldyrev-Lukin", which would eventually become Yabloko, took 27 seats. The remaining legislative seats were divided among parties, blocs and movements, which neither supported the presidential course of action nor opposed it. Additionally, 77 deputies of the first Duma, elected in single-member districts, were not part of any faction and, as such, in combination with the vacillating factions, comprised a "swamp".

In the 1995 elections (according to the transitional nature of the Russian Constitution, the State Duma was elected for two years), the Communist Party of Russia won 157 seats (99 deputies through the party list and 58 through single-member districts). With 20 deputies from the Agrarian Party and 9 deputies from the newly formed legislative group[11] "Power to the People", the total number of deputies in the "leftist bloc" comprised 186. The Liberal Democratic Party of Russia won 51 seats in the second Duma, while Yabloko obtained 45. It is revealing that the party that was formed with the President's and government's initiative and support (Our Home is Russia) — the "party of power" at the time — won only 55 seats.

The December 1999 election results depended on an entirely different political situation. From August of that year, V.V. Putin, the new Prime Minister, had begun to quickly accumulate political leverage, while B.N. Yeltsin had distanced himself from influencing the political course, allowing his "successor" the opportunity to prove himself. In this political environment, the federal and regional bureaucracies began urgent work to create two new parties — "Unity" (in reality, Putin's party) and "Fatherland — All Russia" (the party of the regional elite, whose patrons were Moscow's mayor Yu.M. Luzhkov and Tatarstan's president M.Sh. Shaimiev). Both had fairly successful results: "Unity" won 73 seats and FAR won 66.[12] Curiously, "Our Home is Russia" won only 7 seats — all in single-member districts (i.e. the popularity of personal candidacies likely helped secure these seats). The Communist Party of Russia won 113 seats (several dozen of its seats had gone to new bu-

[10] The term "dominant position" is borrowed from the Federal law "On Protection of Competition", dated 26 June 2006. N 135-FZ (SZ RF, 31.07.2006. N 31 (part 1, statute 334), where according to statute 5 "dominant" is defined as "the status of the business entity (group of persons) or several business entities (groups of persons) on the market of a given good, which provides said business entity (group of persons) or business entities (groups of persons) the opportunity to exert *critical influence on the general conditions* of circulation of the good on the corresponding goods market, and/or *eliminate other business entities from the goods market*, and/or *obstruct access* to the goods market by other business entities". In fact, this is the threshold of *monopolistic* provision.

[11] At this time, the State Duma Regulations do not permit the formation of legislative groups.

[12] Later these two parties merged into a single party — "United Russia".

reaucratic parties); the Liberal Democratic Party of Russia ("Zhirinovsky's bloc") won 17 seats, Yabloko secured 20 and the Union of Right Forces (liberal democrats) won 29. The remaining seats went to candidates running under the majority system in single-member districts and left-nationalist movements. In other words, the post-1999 elections Duma comprised blocs that largely opposed B.N. Yeltsin.

In the 1990s, the ideological opponents of the first President persisted to an even greater degree in the federal regions — both in terms of the "gubernatorial corps" and regional legislative bodies. As such, the Federation Council (the "regional" chamber) was also beyond the influence of the President.

However, it should be noted that *even in unfavourable conditions, the President remained the most important political actor. He alone made significant decisions.* So, was it Yeltsin's personality that played a role? Perhaps, to a certain degree. But the main reason is *institutional.*

The animosity of the legislators and the regional elite did vex the President. But, objectively, this proved useful for implementing completely new principles of constitutionalism. If the situation following the adoption of the Russian Constitution in 1993 was similar to today's political environment, whereby elite loyalty to the "political leadership" has reached the level of servility, we would not have the number of legal positions available to the Constitutional Court vis-a-vis the scope of presidential competency. As such, we must admit that, to a great degree, *the low rating of the Russian President* helped create a legal course, despite the costs of the post-revolutionary period.

It was in the 1990s that the Court considered the majority of the cases relating to the competency of the President and the interpretation of the norms of the Constitution related to his competency. A great number of such cases can be explained by the fact that parliamentary groups, the chambers of the Federal Parliament, regional heads, and regional legislative bodies were not afraid to officially question the Constitutional validity of Presidential acts and to challenge them in the Constitutional Court.

In any case, what interests us now is the content of those decisions. A closer examination reveals that practically all of them were resolved *in the President's favour*. These Constitutional Court decisions underline *the priority of the competency of the head of state vis-a-vis the competency of other public authority bodies*. This is noted by other scholars as well.[13] We can formulate hypotheses related to the Court's position, but whatever they are, the Constitutional Court would not be able to deliver verdicts that legalise the expansion of the scope of presidential competency if it could not rely on the numerous tasks (functions) set out for the head of state in article 80.

In my opinion, it is a mistake, frequently made by other researchers, to underestimate the functions set out in article 80 of the Constitution. For instance, when discussing the tasks (functions) of the Russian President listed in statute 80, Legeais suggests that these "general Constitutional clauses can lose their meaning in the absence of a number of important prerogatives", by which he means the appointment of the Prime Minister and members of the government, the right to dismiss the State Duma and others.[14] However, in my opinion, it is precisely the constitutional tasks (functions) that comprise the main juridical base for the process of expansion of the head of state's competency. More precisely,

[13] For instance, see: Russian Model for Separation of Powers in the Decision of the Russian Constitutional Court. Abstract... Candidacy in juridical sciences. Moscow. 2009.

[14] See: *Legeais R.* Ibid. P. 212.

this process becomes possible due to the *combination* of the President's constitutional powers and his tasks (functions).

This combination creates a certain *synergetic effect*, when the discretionary potential of the president's powers[15] is multiplied by an even greater discretionary potential of his functions. This conclusion is supported by the President himself, who frequently refers to article 80 of the Russian Constitution and the decisions of the Constitutional Court in his decrees.

Finally, by relying on statute 80 of the Constitution, **the lawmaker expands not only the already broad discretionary potential of the head of state, but also the overall scope of presidential competency.** I describe this in greater detail in the next section of the study.[16]

3.

The goal of the research was to identify:

- the overall number of powers "delegated" to the President of the Russian Federation through federal legislation;
- the evolution of "delegated" powers from 1994[17] to the present[18];
- the relationship between those powers that comply with the Constitution, those that comply with it conditionally and those that do not comply with it at all;
- the Russian Federation President's powers to adopt normative legal acts (regulatory);
- the administrative powers (see below for their definition).

An analysis of federal legislation[19] revealed that (as of **1 September 2011) 120** federal laws contain **480** new presidential powers (laws, which had previously "delegated" powers to the President but have since lost their effect are, of course, excluded from the list). The number of "delegated" powers is continuously expanding; however, it differs across different temporal periods.

The **growth dynamic** is as follows: during B.N. Yeltsin's presidency (following the adoption of the Constitution), i.e. from 1 January 1994 to 31 December 1999, the federal lawmaker "delegated" **166**[20] powers; President V.V. Putin "received" **226** new powers from 1

[15] In reality, not all constitutional powers of the Russian President retain the same potential. As such, the President has little freedom of choice in realising powers related to setting the elections for the State Duma and making decisions regarding letters of appointment and resignation for diplomats and others.

[16] Partial findings of this analysis were published in: The powers of the Russian President, as Delegated by Legislation. International Research Conference "Government and Law: 21st century challenges (Kutafin readings)". Theses Anthology. Moscow. 2010. P. 54–59; *Krasnov M.* Legislation-based Powers of the Russian President: Necessity or Servility? Comparative Constitutional Review. 2011. 4. In this article, the research findings offer the latest data and, more importantly, are considered from a somewhat different perspective.

[17] 1994 is chosen as a starting point because the Russian Constitution was adopted on 12 December 1993. Elections to the State Duma and Federation Council were held on the same day (if the reader recalls, this was a transitory parliament, as the term for both sets of parliamentarians was set at two years and the Federation Council was formed through direct elections). But the work of the new Parliament began only in 1994.

[18] The analysis of the legislation extends to 1 September 2011.

[19] The analysis was conducted on the basis and with the assistance of the ***legal reference software "ConsultantPlus" Professional Version.***

[20] In reality, there were slightly more of them, but the laws were changing and the corresponding powers were "attributed" to the following presidents.

January 2000[21] until 6 May 2008; **88** powers were "delegated" to President D.A. Medvedev from 7 May 2008 until 1 September 2011.

Of course, the statistics alone do not offer us much information. They only provide us with a general picture of the volume of "delegation" of legislative powers. However, it must be noted that a large number of powers that were "delegated" to B.N. Yeltsin by a Parliament that was not favourably disposed to the first President of Russia. So why did Parliament continue to legislatively increase the presidential competency? I believe this happened because parliamentarians perceived additional powers allotted to the head of state as a natural concretisation of the constitutional functions.

General statistics reveal a significant jump in the number of powers delegated to the head of state during V.V. Putin's presidency. This period is defined by a dynamic increase in the loyalty (servility) of Parliament towards the President. However, this dynamic is not so much illustrated by the number of "delegated" powers, but rather through their content, which I describe below. When considering the number of powers, D.A. Medvedev's presidency, during which the degree of servility was not reduced, yielded even to the number of powers delegated to B.N. Yeltsin. At the same time, Medvedev's incumbency was much shorter and most of the powers were introduced in the preceding presidential period.

More illustrative are the number of **powers, which, according to the author's analysis, do not conform to the Russian Constitution or conform to it conditionally.** Naturally, it is my job to explain why some powers may have been "discarded". For this purpose, it makes sense to divide the powers into groups.

First group: ***powers, which do not conform to the constitutional tasks (functions) of the President.*** The lawmaker presented the Russian President with powers in various spheres, including the organisation and activity of governmental bodies (but excluding governmental agencies in the spheres of security, defense, and law and order); budget policy and financial control; culture; science and technology; education, as well as a number of other spheres which could hardly be considered "the presidential sphere of responsibility". The following powers can be used as examples (these powers and those from other groups are summarised in Table 1):

- participation in regulating *family relationships* (1995);
- determination of coordination procedures for the federal state registration authority and its territorial branches, which served as authorised registration authorities, *for state registration of non-governmental organisations* (2002);
- nomination of candidacies to the State Duma for appointment and dismissal of *the Chairman of the Russian Audit Chamber* and nominations of candidacies to the Federation Council for appointment and dismissal of *the Deputy Chairman of the Russian Audit Chamber* (2004);
- nomination of candidacies for the posts of *auditors to the Russian Audit Chamber* to the Federation Council and State Duma (2007);
- the approval of the list of federal state *post-secondary educational institutions*, which have the capacity to put into action self-implemented post-secondary and post-graduate programmes (2007);
- *appointment and dismissal of chancellors* at the Lomonosov Moscow State and St. Petersburg State universities.

[21] Perhaps, in a juridical sense, it is incorrect to consider the beginning of Putin's presidency from 1 January 2000, as he served as an acting Russian President until his official inauguration in May 2000. However, in reality, the powers were "awarded" specifically to him.

Some may argue that these powers do not contradict the Constitution, as the Constitution sets out presidential functions, such as *the determination of the general direction of domestic and foreign policy* (part 3, article 80) and *provision of coordinated operation and interaction between governmental agencies* (part 2, article 80).

The first one of these functions logically spans *all spheres* of public life, which means that the President is entitled to powers in all spheres. However, even if we ignore the fact that this function contradicts the principle of separation of powers and the logic of a constitutional state, the formulation itself is indicative of the expansion of the "presidential sphere of responsibility". The Russian Constitution describes only the *determination* of the direction of policy, i.e. it does not imply any other Presidential decisions or actions, apart from setting out such a direction.

The "coordinated operation" function is a dubious one, as, from a constitutional perspective, it is formulated in a way that implies that all governmental life occurs "under the wise guidance" of a given leader. Indeed, some scholars identify the abovementioned function as a function of *political arbitration*[22], which is a characteristic of a head of state in a semi-presidential regime. In my opinion, this is a weak argument.

Indeed, the French Constitution directly discusses the head of state's function of political arbitration. However, the arbitration function cannot (should not) be carried out by a politically committed head of state. Additionally, to a great degree, the term "arbitrator" suggests the function of mediation, i.e. it serves as an analogous term for terms such as "referee" and "mediator". This meaning of arbitration implies that the parties in dispute *voluntarily request* that the authority figure (body) act as a mediator and take it upon themselves to accept and execute his decision. When considering the head of state, this action "algorithm" is inappropriate, if only because he is the guarantor of the constitutional system and, consequently, he is politically obligated and legally has the right to *use his own initiative* to get involved when the constitutional system's stability is threatened by a conflict between other agencies of public authority.[23]

Finally, the given function is so indefinite[24] that it captures *practically any intervention from the Russian President* into the work of other government bodies, both federal and regional. Some try to justify this task (function) by the fact that the President is responsible for the provision of *unity of governmental power*.[25] But if we are considering such unity, then we must implicitly assume that constitutional norms, regulating the competency and operating procedures of state power authorities, are not sufficient.

Second group: ***powers, which conform to the Russian Constitution conditionally***. The question of "conditionality" is related to the abovementioned opinion regarding the provision of coordinated operation and interaction of governmental authorities. The question

[22] For example, see: *Chirkin V.E.* Presidential Power. State and Law. 1997. N 5. P. 20.

[23] Generally the manifestation of this function of the Russian President is attributed to part 1 of article 85 of the Russian Constitution — on the use of conciliatory measures in disputes between federal and regional subjects or between regional subjects. But this can hardly be considered arbitration for reasons described above, not even mentioning that conciliatory procedures, unlike arbitration, may not even lead to a solution. And it would be somewhat strange if the implementation of the presidential function was limited to such an insignificant power.

[24] The author has counted six Russian Constitutional Court decisions, which offer different manifestations of the provision of coordinated operation and interaction. In other words, even the authority that oversees constitutional law cannot determine the precise content of this given task (function).

[25] See: *Chirkin V.E.* Ibid. P. 18.

is: *how do we consider* this presidential task (function)? *If* it is a function of providing "unity of governmental power", then the President's powers of, for instance, *managing the public service* (civil, military and security[26]) can be considered substantiated by the Constitution. And there are a number of such powers, granted through legislation.

But *if* we take into account the fact that the President cannot remain politically neutral within the existing framework (although all three Russian presidents have avoided *formal* membership in any party), then the "delegation" of his management of public service (and not just military and security, but also civil) promotes the undermining of the principles of separation of powers (statute 10) and political pluralism (article 13).

Third group: ***powers, which concretise or specify the Russian President's constitutional powers but, in reality, contradict the Constitution.*** Up until now, we were discussing the expansion of presidential competency on the basis of the excessively broad interpretation of the head of state's tasks (functions). In this group, we consider *direct distortion of constitutional norms*, which set out specific presidential responsibilities.

Example: item "f" in article 83 of the Russian Constitution establishes that the President presents the Federal Council with candidates for the appointment of justices to the Constitutional, Supreme and Supreme Arbitration Courts of the Russian Federation. Note, that the Constitution does not specify the rank at which the justices are appointed! However, laws "On the status of judges in the Russian Federation", "On the Constitutional Court of the Russian Federation", "On general jurisdiction courts" set out that the President presents the Federal Council with candidates for *chairmen* for the Constitutional, Supreme and Supreme Arbitration Courts of the Russian Federation, as well as their *deputies* and candidates for *members of the Presidium* of the Supreme Court of the Russian Federation and candidates for the *chairman and members of the Board of Appeals* for the Supreme Court of the Russian Federation. I am not discussing the idea of judicial independence here. In this case, I am underlining the direct violation of specifically formulated constitutional powers of the Russian President.

Fourth group: ***powers, which regulate the issues of the Russian President's administrative powers, as set out by the Constitution*** (there are only three such powers). Here, I am talking about article 89 of the Russian Constitution, which sets out that, among other things, the Russian President *decides the issues* of Russian citizenship, *confers* Russian Federation awards, and *grants* honours. However, in accordance with the laws, the President is now authorised to do the following:

- affirm (i.e. adopt) the Regulation on the Marshall Zhukov State Prize[27] (1995);
- affirm the Regulation on the Procedures for Considering Issues of Russian Citizenship (2002);
- determine the procedures for awarding special titles to the employees of the Investigative Committee of Russia (2010).

Most likely, the lawmaker acted on the basis of the following logic: since the Constitution sets out that the "*President decides the issues*", then he is within his right to also define the rules that condition the solution of these problems. Curiously, the President follows the same logic: article 89 discusses the President's powers to issue pardons, although the Criminal and the Criminal Procedure Codes of the Russian Federation do not set out the

[26] The given examples of public service were taken from the Federal Law "On public service system of the Russian Federation", dated 27 May 2003. N 58-FZ (3 RF. 02.06.2003, N 22, statute 2063).

[27] Strictly speaking, the Russian Constitution does not mention prizes. But I thought that in this case, we can equate them with awards and honours.

President's power to define the rules underlying petitions for pardon. He determined these rules on his own.[28]

And now, corresponding to the proposed classification of powers, I present the data on the number of presidential powers that do not conform or conform conditionally to the Russian Constitution. For a clearer illustration, the information in the tables is also divided into the different presidential periods.

Table 1

The "delegated" powers of the Russian President that do not conform to the Russian Constitution

Groups of powers		B.N. Yeltsin	V.V. Putin	D.A. Medvedev
Powers, which do not conform to the constitutional functions and general[29] constitutional powers of the Russian President		20	62	19
Powers, which conform to the Russian Constitution conditionally	in relation to managing and directing military and security services	13	9	3
	in relation to managing and directing civil services	3	34	5
Powers, which concretise or specify the Russian President's constitutional powers but, in reality, contradict the Constitution		2	3	10
Powers, which regulate the issues of the Russian President's administrative powers, as set out by the Constitution		1	1	1
Total		**39**	**109**	**38**

Table 2 shows the relationship between the President's powers that conform and don't conform to the Constitution (the latter include those powers that conform conditionally).

Table 2

The relationship between the Russian President's "delegated" powers that conform and do not conform to the Russian Constitution

RF Presidents	Powers that conform to the Russian Constitution		Powers that do not conform to the Russian Constitution	
	Absolute value	%	Absolute value	%
B.N. Yeltsin	125	76	39	24
V.V. Putin	114	51	112	49
D.A. Medvedev	44	54	38	46

[28] See: Regulation on the Order of Consideration for Petitions for Pardon in the Russian Federation. Adopted by means of RF Presidential Decree, dated 28 December 2001. N 1500.

[29] This term is sometimes used in the literature to designate powers, which resemble functions. These include, for instance, the power to manage foreign policy, to take up the post of the Commander in Chief of the Armed Forces of the Russian Federation, etc.

The last column on the right is quite illustrative: during "Yeltsin's epoch", powers, which could be considered questionable from a constitutional perspective, make up a quarter of the overall number of powers "delegated" to the President. During the "Putin epoch", these powers make up almost half of the overall number, while about half are present during the "Medvedev epoch".

Until now, I had considered the problem of expanding presidential competency from the basic point of formal compliance with the Russian Constitution. But it is equally important to understand the *nature of the new powers*, which had been delegated to the head of state by the lawmaker. In this regard, the *regulatory and administrative powers* are quite revealing (see Table 3).

Table 3

Regulatory and administrative "delegated" powers of the Russian President

Type of powers	B.N. Yeltsin	V.V. Putin	D.A. Medvedev	Total
Regulatory powers	62	92	30	184
Administrative powers	17	44	23	84

As discussed above, the **regulatory** powers of the Russian President are the powers related to the issuing of normative legal acts. Most frequently, the laws determine the *procedures* (and sometimes *the conditions and timelines*) that allow to implement any type of normative law like, for example, the procedure for awarding special titles to staff at the security authority; the procedures and conditions for posting staff; the procedures and timelines for delivering reports on various achieved and planned indicator values from the head of the federal subject to the President. Sometimes, the law speaks directly to the form of the normative legal act (in this way, the Russian President adopts[30] the *Regulation* on the Federal Bailiff Service, its structure and number of personnel). At the same time, it must be noted that a relatively large number of powers related to procedures of various *lists* — posts, authorities and organisations, types of products, etc. — were not considered as regulatory, although, to some extent, they can be addressed as such.

The Russian Federation President's regulatory powers are recorded in various ways in the laws, with a varied degree of generalisation: in addition to the specific regulatory powers, one also comes across "the right to participate" in the regulation of certain public relationships (this is typical of various types of codes, including the Customs Code, the Forestry Code, the Water Code). There are also various general formulas, such as the "enactment of normative legal acts in such-and-such sphere" (for example, the sphere of mobilisation preparation and mobilisation).

When considering the array of legislation, the President's **administrative** powers can be said to imply not only his prerogatives for making appointments, setting the terms of appointment (endowing with powers), and dismissal of various officials, managers and members of consultative, overseeing and other authorities, organisations and establishments, but also his prerogatives to introduce class rankings in the public service, military and special titles, to institute disciplinary proceedings or extend term of office, etc. Regulatory powers in administrative policies were not considered as administrative powers in this

[30] The term "adopts" should not mislead: frequently, it is used as a synonym for "approve".

case. Take, for example, the conferment of a public service class rank by the President. An actual public servant of the Russian Federation of the 1st, 2nd or 3rd class was interpreted as an administrative power, while *the procedure* of awarding and maintaining the class ranking within the federal public service wasn't.

The importance of the President's administrative powers comes from the fact that he is presented with critical levers in one of the most important spheres for the bureaucracy (and not just for them). These levers allow entry into the formal "elite", and also pose a threat for the removal of this desired "status" from those who have it. And this extends beyond public servants or those serving in government posts to the chancellors of the country's two biggest state universities, and heads of several government corporations. One can argue that it is the President's administrative powers that, in the grand scheme of things, comprise the biggest factor in the unbalanced powers of the Russian President. And, as we can see, the lawmaker has appreciably expanded an already extensive set of administrative powers of the head of state.

Summary

The legislative delegation of powers, which concretize his constitutional functions, to the President is not in itself an unusual phenomenon. Such powers allow the head of state to fulfill his constitutional duties more effectively. However, there are plenty of powers within the "delegated" legislation that can hardly be explained by referring to the Constitution, although there are likely to be jurists ready to take on that challenge.

I am not saying that the process of expansion of presidential competency as a result of "gifting" powers to him, a process that is dubious from a constitutional perspective, is not compatible with Russia's status as a rule of law state. There are more pragmatic reasons against the expansion of presidential competency in such a manner.

The great number of spheres where, it is presumed, the new powers of the head of state will be realised, require a fairly multidivisional and comprehensive state machinery, which would result in a greater number of specialists in different areas. It is understood that the head of state (for example, in his role of overseeing the space programme) would act through the corresponding bodies of executive power. But, firstly, even then, someone in the president' administration must understand the issues at hand, at least in order to prepare the President's recommendations to the agencies and his ability to supervise their implementation, etc. Secondly, in this way, executive power further reduces its independence, as guaranteed by the Constitution. And, thirdly, the expansion of presidential competency inevitably means the increase in the degree of duplication and competition with the Government and other federal authorities of executive power (ministries, services, agencies). As a result of this, the President's ability to carry out the functions of a politically neutral institution, whose responsibility is to ensure *the stable development of the state in a constitutional and legal regime* rather than to solve executive problems that are generally politicised by party positions, is reduced.

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Demarcation of Powers Between the Russian Federation and the Federal Subjects of the Russian Federation During the First Decade of the 21st Century: Overview and Some Observations

This article considers the dynamics and the foundational legal forms of the demarcation of powers between the Russian Federation and the subjects of the Russian Federation (constituent entities at the beginning of the 21st century. It examines initial conditions and the reasons behind such demarcation, the opportunities for the Russian Federation to demarcate powers, and the legislative decisions, which had set out the demarcation of powers. The article illustrates the organisation of contemporary power demarcation between the federal centre and the subjects of the Russian Federation, following a series of legislative changes.

Key words*:* federal relations, competency, powers, demarcation of powers, delegated powers, inherent powers, exercise of authority, demarcation of powers agreement, delegative agreement for exercising authority, subventions, financial guarantee of authority

Russia is a federal state. This is reflected in the country's interchangeable name: "Russia" or "the Russian Federation". The 1993 Russian Federation Constitution established the principles of Russia's federal organisation: state integrity, the unified system of governmental power in the Russian Federation, the demarcation of authority and powers between governmental bodies of the Russian Federation and the governmental bodies of the subjects of the Russian Federation, and the equality of subjects of the Russian Federation in their relationship with the federal centre. The Constitution sets out the terms of exclusive authority (article 71), joint authority between the Russian Federation and the subjects of the Russian Federation constituent entities (part one, article 72), and establishes complete authority of the subjects of the Russian Federation concerning authority outside the scope of the Russian Federation, as well as the authority of the Russian Federation in relation to

joint authority between the Russian Federation and the subjects of the Russian Federation (article 73 of the Russian Federation Constitution).

The Russian Constitution has not been altered in its scope of regulating federal relationships. However, federal relationships in the Russian Federation have undergone serious alterations during the same period. The relationship changed from the factual disregard of federal legislation by a number of regions and the lack of delineation of responsibilities between the Russian Federation and its subjects to a clear demarcation of rights, responsibilities and real accountability of regional governmental bodies of authority, with elements of centralisation between the federal centre and the regions. This was not a change in the constitutional model of Russian federalism, but rather an implementation of its "flexibility", or fluidity, as set out by the Constitution of the Russian Federation.

The analysis of regulations set out in the abovementioned article (71–73) of the Constitution of the Russian Federation lends itself to the conclusion that when it is necessary and the required political will is present, the Russian Federation is not only capable of taking on a substantial portion of the powers, but is also capable of legislatively regulating the demarcation of powers between itself and its subjects. For instance, it is impossible to imagine social interactions, whose legislative regulation is not related to the regulation and protection of rights and freedoms (item "c" in article 71) or the protection of rights and freedoms (item "b" in part 1 of article 72 of the Russian Federation Constitution). According to article 2 of the Constitution of the Russian Federation, the individual and his rights and freedoms comprise the highest value. The acknowledgement, observance and protection of the rights and freedoms of the individual and the citizen are the state's responsibility and, according to article 18 of the Constitution of the Russian federation, the rights and freedoms of the individual and citizen determine the meaning, content and application of the law, as well as the work of the legislative and executive authorities and local governments. As such, all relationships regulated by law can be perceived through the prism of rights and freedoms.

A number of the positions taken by the Constitutional Court of the Russian Federation, the supreme body of judicial authority that interprets the Constitution, were formulated within the scope of this issue. As such, the Constitutional Court's Resolution N 1-P, dated 9 January 1998, dealing with the review of the constitutionality of the Forestry Code of the Russian Federation[1], reflected the following legal position: "According to article 11 (part 3) of the Constitution of the Russian Federation, the demarcation of areas of competency and powers between the governmental bodies of the Russian Federation and the governmental bodies of the subjects of the Russian Federation is implemented by the Constitution of the Russian Federation, and federal and other agreements regarding the demarcation of areas of competence and powers. As a normative legal act of public action that regulates various areas of joint competency, the federal law sets out the rights and responsibilities of participants in a legal relationship, including the powers of governmental bodies, and thereby determines the demarcation of these powers. On the basis of article 11 (part 3), 72 (items "c", "d", "e" and "l" of part 1), 76 (part 2 and 5) and 94 of the Constitution of the Russian Federation, it follows that the federal assembly is within its right to determine the legislative regulation of issues, which relate to the given areas of joint competency and to define the subsequent specific powers and competency of governmental bodies of the

[1] SZ RF, 19.01.1998. N 3, st. 429.

Russian Federation and governmental bodies of the subjects of the Russian Federation" (paragraphs three and six of item 4 of the declaration section). At the same time, "on the basis of the federative nature of their (Russian Federation and its subjects) legal relationship emerges... the inadmissibility of arbitrary appropriation of the entirety of the powers of joint areas of competency by the governmental bodies of the Russian Federation, i.e. without the consideration of interests of the subjects of the Russian Federation and the role of their governmental bodies in the system of public power." This legal position is reflected by the Constitutional Court in Resolution N 6-P, dated 11 April 2000, dealing with the review of the constitutionality of individual resolutions of item 2 of statute 2, item 1 of article 1 and item 3 of article 22 of the Federal law "On the public prosecutor's office of the Russian Federation".[2] This position, however, by virtue of its streamlined formulations, does not prevent the Russian Federation from distributing responsibilities of joint competency in a way that is perceived rational by the federal legislator.

One of the decisions reached by the Constitutional Court of the Russian Federation sets out a concrete example of how a federal lawmaker is within his right to independently regulate specific issues. The Russian Federation Constitutional Court's Resolution N 4-P, dated 4 March 1997, dealing with the review of the constitutionality of statute 3 of Federal law, dated 18 July 1995, "On advertising"[3], not only confirmed the ability of the Russian Federation to regulate a specific issue, such as advertising, but also determined that, in certain aspects of regulating advertising, the Russian Federation maintains the exclusive prerogative.

During the last (20th) century, the Constitutional Court of the Russian Federation formulated a number of other legal positions related to the demarcation of powers between the Russian Federation and its subjects in areas of joint competency:

- "on the basis of article 72, 76 (part 2) and 77 (part 1) of the Constitution of the Russian Federation, the lack of corresponding federal law on issues of joint competency does not prevent the federal subject from adopting its own normative act, as it emerges from the nature of joint competency. That said, following the enactment of a federal law, the federal subject must bring its own law to correspond with the federal law. This is set out in article 76 (part 5) of the Constitution of the Russian Federation. The necessity of the implementation of this condition must be stipulated in the constitution or the statutes of the federal subject" (Resolution N 3-P, dated 1 February 1996, of the Constitutional Court dealing with the review of the constitutionality of a number of resolutions of the Statutes-Constitution of the Chitinsk Oblast[4]; paragraph two of item 10 of the declaration section).
- in the absence of a federal law on joint areas of competency, the Russian federal subjects' recognition of the right to carry out pre-emptive legal regulation on the subject of joint areas of competency does not automatically grant them complete decision-making power over all issues related to the given areas of competence, especially those that have a universal significance not only for the lawmaker of the Russian Federation's subject, but also for the federal lawmaker, which are, thereby, subject to regulation by federal law (Constitutional Court Resolution N 5-P, dated 21 March 1997, related to the review of the constitutionality of the resolutions of paragraph two of item 2 of article 18 and article 20 of

[2] SZ RF, 17.04.2000, N 16, st. 1774.

[3] SZ RF, 17.03.1997, N 11, st. 1372.

[4] SZ RF, 12. 02. 1996, N 7, st. 700.

the Russian federal law, dated 27 December 1991, "On the foundations of the taxation system in the Russian Federation"[5]; paragraph three of item 2 and item 3 of the declaration section — not quoted directly).

• "if the subject of the Russian Federation has not adopted a law on an issue, designated as part of its competency by the federal lawmaker, as set out by article 72 (item "o" of part 1) and 76 (part 2) of the Constitution of the Russian Federation, then the federal lawmaker, if necessary, is within his powers to implement legal regulation in that sphere (Constitutional Court Resolution N 15-P, dated 3 November 1997, on the review of the constitutionality of item 1 of article 2 of the federal law, dated 26 November 1996, "On the provision of constitutional rights of Russian Federation's citizens to elect and be elected to the bodies of local government", in relation to the inquiry from the Tula regional court[6]; paragraph four of item 2 of the declaration section).

As such, at the onset of the 21st century, the Constitutional Court of the Russian Federation has formulated a number of legal positions, resulting from its interpretation of the Constitution of the Russian Federation, that illustrated that the powers of the Russian Federation in relation to the legal regulations of the demarcation of powers between different levels of public authority were very broad.

Nonetheless, significant changes in the sphere of federal relations in Russia have already taken place in the 21st century. The Russian Federation Presidential Decree N 741 "On the Russian Federation Presidential Commission on preparing proposals regarding the demarcation of powers between the federal authorities and the federal subject authorities of the Russian Federation" was signed on 21 June 2001.[7] The decree stipulated that in order to improve the legislative foundations of federal relations and implement the federal law "On principles and order of demarcation of powers between the federal authorities and the federal subject authorities of the Russian Federation" a Presidential Commission, charged with overseeing the demarcation of powers between the federal authorities and the federal subject authorities of the Russian Federation, had to be formed. First and foremost, the Commission was tasked with the development and introduction of proposals related to the demarcation of powers between the federal authorities and the federal subject authorities, and local governments of the Russian Federation to the President of the Russian Federation. The Commission was also expected to implement a variety of other tasks related to the demarcation of powers. Within the scope of the Commission, working groups were created which developed proposals that dealt with different spheres of power demarcation between levels of government and also considered general issues of power demarcation. In fact, the work of the Commission has served as the basis for further changes in power demarcation.

What compelled the leadership of the Russian Federation to systemically address issues surrounding power demarcation? The general lack of power demarcation between the levels of public authority served as one of the primary reasons. Frequently, the demarcation of public authority powers necessary for satisfying the demands of individuals and the public were not at all provided for by the legislation. In the instance that the particular power was delineated in a law, the law frequently failed to specify which authority body was

[5] SZ RF, 31.03.1997, N 13, st. 1602.

[6] SZ RF, 10.11.1997, N 45, st. 5241.

[7] SZ RF, 25.06.2001, N 26, st. 2652.

responsible for carrying it and did not specify at which level of government this would have to be addressed. In other words, the power was assigned to all levels of government at once, without specifying which one of those levels was in fact responsible for implementing it. Furthermore, no order or parameters for implementing powers were set up. In demarcating powers, the public authority generally assigned powers to the level of government that was most capable of dealing with it in a rational fashion.

The legislative oversaturation of declarative norms, dealing with the sphere of power demarcation, and the inconsistency of legislation at the level of subjects of the Russian Federation (although most of these were addressed before the formation of the Commission) also played a role. There was also an established practice of agreements and treaties between the governmental authorities of federal subjects and the federal government of the Russian Federation. Such agreements and treaties are permitted within the scope of the Constitution of the Russian Federation, but rather as an exception to the rule when there is an actual need to establish the specificities of power. However, at the end of the last century, the conclusion of such agreements between the federal and regional authorities became a distinct political pattern.

Most notably, the work of the Commission led to the ratification of the Federal law N 95-FZ, dated 4 July 2003, "On introducing changes to and supplementing the Federal law 'On general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation'"[8] and the new Federal law N 131-FZ, dated 6 October 2003, "On the general principles of organisation of local governance in the Russian Federation".[9] The 4 July 2003 Federal law unified the Federal law "On general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation" and the Federal law "On principles and order of demarcation of powers between the federal authorities and the federal subject authorities of the Russian Federation" (which consequently expired) into one legislative act, significantly, if not cardinally, changing the provisions of the latter and adding new provisions that deal with the financial and economic aspects of the organisational foundation and functioning of governmental authority of the subjects of the Russian Federation.

The fundamental innovation was the introduction of three categories of powers for the subjects of the Russian Federation when addressing issues of joint competency.

The first category includes powers, whose implementation was financed from the budget of the subject of the Russian Federation (provisionally — "inherent powers" of governmental authorities of the subjects of the Russian Federation). The Law includes a "basic" list of powers that must be implemented across the entire country in order to satisfy citizens' rights and legal interests. The subjects of the Russian Federation are obligated to implement the powers set out in that list: their inclusion in the list indicates that the subjects of the Russian Federation are obligated to implement these powers. In other words, the powers contained in this list represent the subjects' of the Russian Federation obligations, not rights.

At the same time, there are provisions that guarantee the inherent interests of the subjects of the Russian Federation. Federal laws can set out the fundamental elements of le-

[8] SZ RF, 07.07.2003, N 24 (part 2), st. 2709.

[9] SZ RF, 06.10.2003, N 40, st.3822.

gal regulation. However, they cannot include provisions that set out the scope and, as a rule (with few exceptions), the order of the subjects' of the Russian Federation budgetary expenditures related to the implementation of these powers. The subjects of the Russian Federation are entitled not only to administrative powers, but also to the corresponding regulatory powers. They also have the capacity to approach the implementation of most of these functions in a creative and economical way.

The subjects of the Russian Federation also had the right to execute other decisions using their budgets, if those functions were not relevant to the federal area of responsibility and issues of local significance. However, the situation became somewhat ambiguous later (this is discussed later).

The second category includes powers concerning joint areas of responsibility, assigned to be implemented by the subjects of the Federation but funded by targeted subsidies from the federal budget (provisionally — "delegated powers" of the governmental authorities of the subjects of the Russian Federation). The order and the scope of carrying out these functions are regulated in detail by the Russian Federation. Such laws must clearly set out the criteria for calculating subsidies. Even so, it is clearly set out that federal laws, normative legal acts issued by the President of the Russian Federation and the Government of the Russian Federation, which concern the subsidies to the budgets of the subjects of the Russian Federation with a view of implementing the abovementioned functions, are reviewed annually within the scope of the federal budget if the federal law on the federal budget includes the provision that the subjects of the Russian Federation are to be presented with subsidies. As such, the logic behind the federal budget sets out that if there is no federal financing, the subjects of the Russian Federation have no obligation to carry out these functions.

Federal financing gives the executive branch of the federal authorities the right to control their implementation. The law outlines that federal executive authorities are within their right to publish necessary acts in order to implement such functions, as well as oversee their direct implementation.

The third category of powers includes powers which do not require any expenditure, except for the everyday expenses needed to ensure organisational operation. On the basis of the systemic regulations in the Law, it follows that the federal authorities possess the right to implement fairly detailed normative legal regulations in relation to the order and scope of carrying out these powers. According to legal norms, the provision of subsidies from the federal budget to the budgets of the subjects of the Russian Federation can be circumnavigated only "if the powers, established by corresponding laws, do not require the creation of new governmental bodies within the subjects of the Russian Federation, budgetary institutions and enterprises, additional budgetary investments, budget payments to citizens and legal entities, or an increase in government personnel numbers in the subjects of the Russian Federation and governmental budget institutions". This legal construction contains guarantees that ensure that the governmental bodies of the subjects of the Russian Federation are not responsible for carrying out federal functions that are not financed.

The Law has rebranded the role of agreements and treaties. Accordingly, treaties are to be concluded only in exceptional cases, where there exists an economic, geographical or other specificity of the subject of the Russian Federation, and insofar as the listed specificities frame a demarcation of powers that is different than what is established in federal law. A treaty with a specific subject of the Russian Federation must be consolidated by federal

law and should set out specific rights and obligations of both sides. As a special act, such a treaty, having been confirmed by federal law, will have priority over other federal laws (such a treaty currently exists with the Republic of Tatarstan).

In accordance with the Law, the use of a treaty as a means to delegate power from the federal executive authorities to the executive authorities of the subjects of the Russian Federation should be implemented only in the instance when the implementation of powers cannot be assigned in equal measure to the executive authorities of all the subjects of the Russian Federation through federal law. One of the provisions included the affirmation of the treaties by the federal government, which would oversee the treaties' contents and implementation. Previously, the affirmation of treaty projects was carried out by the federal government. But the scope of this affirmation was never clearly laid out, leading to various issues, including concerns regarding who was authorised to sign the document and the scope of the document itself.

For the first time, the Law provided guidance for instances when federal executive authorities temporarily delegated powers to the executive authorities of the subjects of the Russian Federation. Such delegation is not a sanction, but rather a provisional measure of normal functioning of governmental power, serving the interests of the denizens of the respective territory. In essence, the acceptance of delegated powers by the subjects of the Russian Federation does not lead to the termination of the functions normally assigned to the subject of the Russian Federation. Formally, they continue to function as before and retain their normal attributes.

The Law also included provisions that outlined the budgetary relationships between the Russian Federation and the subjects of the Russian Federation. Mainly, however, the issues of financial provision were reflected in the changes to the Budgetary Code of the Russian Federation. They were brought in by the Federal law N 120-FZ, dated 20 August 2004, "On the introduction of changes to the Budgetary Code of the Russian Federation in regard to regulating inter-budgetary relationships".[10] In addition to delineating budget revenues between the different levels of government in accordance with the delineation of authority, the law set out the basic element underlying the entire mechanism of power delineation — "disbursement obligation". Disbursement obligations are stipulated by law, whether by a normative legal act, agreement or treaty set out by the Russian Federation, subject of the Russian Federation, or municipal authorities, that present individuals and legal entities, governmental authorities, local authorities, foreign governments, international organisations and other international subjects with funds from a corresponding budget (governmental non-budget fund, territorial governmental non-budget fund) (article 6). Article 85 of the Budgetary Code set out the parameters for disbursement obligations for the subjects of the Russian Federation. Specifically, it was established that executive authorities of the subject of the Russian Federation are not entitled to introduce and implement disbursement obligations related to the issues of federal government competency, except in instances which are set out by federal law. The authorities of the subject of the Russian Federation are entitled to introduce and implement disbursement obligations not related to the issues of federal government competency, local authorities, and issues relating to the competency of the federal government that are provided for by federal laws, under the condition that these funds are available from the budget of the subject of the Russian Federation (excluding grants, subsidies, and subventions from the federal budget) (item 6,

[10] SZ RF, 23.08.2004, N 34, st. 3535.

statute 85). In other words, if the issue at hand is in some way related to the competency of the federal government, the subject of the Russian Federation is unable to resolve this using its own budget.

Federal law N 122-FZ, dated 22 August 2004, "On the introduction of amendments to the legal acts of the Russian Federation and the acknowledgement of expiration of several legal acts of the Russian Federation in relation to the ratification of federal laws 'On the introduction of amendments to the Federal law 'On general principles of the organisation of legislative (representative) and executive authorities of governmental power of subjects of the Russian Federation' and 'On general principles of local government in the Russian Federation'"[11] was introduced at the same time. The purpose of the new law was to streamline regulation in accordance with the principles of power delineation and budgetary federalism. The law introduced changes to more than 150 legislative acts. A significant number of laws were abolished due to their declarative nature.

However, the delineation of powers didn't stop there. Firstly, during this period, legislative acts concerning power delineation were adopted on an annual basis: Federal law N 199-FZ, dated 29 December 2004, "On the introduction of amendments to the Russian Federation legislative acts related to the expansion of powers of the bodies of authority of the subjects of the Russian Federation in relation to areas of joint competency between the Russian Federation and the subjects of eh Russian Federation, as well as the expansion of the list of issues of local significance for local foundations"[12], Federal law N 199-FZ, dated 31 December 2005, "On the introduction of amendments to individual legislative acts of the Russian Federation related to the improvement of power delineation"[13], Federal law N 258-FZ, dated 29 December 2006, "On the introduction of amendments to individual legislative acts of the Russian Federation related to the improvement of power delineation"[14], Federal law N 230-FZ, dated 18 October 2007, "On the introduction of amendments to individual legislative acts of the Russian Federation related to the improvement of power delineation"[15]. These laws apply to the specific powers in question and the general principles underlying power delineation. Secondly, individual powers constantly change the ownership within existing regulations. Such changes frequently result in changes to the list of powers considered inherent to the subjects of the Russian Federation (item 2, statute 26.3, Federal law N 184-FZ, dated 6 October 1999, "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation" (as amended by Federal law N 95-FZ, dated 4 July 2003). Sometimes, these changes are conditioned by the fact that one power or another has completely disappeared from view as a result of working to delineate it. Other times, changes take place as a result of the federal centre's desire to delegate a particular power to the regions, frequently as an inherent one, which would absolve the federal government from supplying subventions.

Special attention must be given to the stipulations set out by Federal law N199-F3, dated 31 December 2005, "On the introduction of amendments to individual legislative acts

[11] SZ RF, 30.08.2004, N 35, st. 3607.

[12] SZ RF, 03.01.2005, N 1 (part 1), st. 25.

[13] SZ RF, 02.01.2006, N 1, st. 10.

[14] SZ RF, 01.01.2007, N 1 (part 1), st. 21.

[15] SZ RF, 22.10.2007, N 43, st. 5084.

of the Russian Federation related to the improvement of power delineation." First of all, this law is interesting due to the fact that it has become a focal point for lobbying activity by the subjects of the Russian Federation with high fiscal capacity, which were unsatisfied by the limitations to the list of regional powers and, specifically, by the legal construction of article 85 of the Budgetary Code. Respective regional leaders (with Moscow's mayor, Yu. Luzhkov as their leader) chose the State Council, the deliberative body comprising the heads of Russian regions with the President of the Russian Federation as its head, as the platform for their initiatives.

The primary reproach towards the regulation of that time was the issue that the legislation didn't just establish a list of disbursement obligations for the subjects of the Russian Federation, but also made them inflexible in a variety of ways. In other words, the subjects of the Russian Federation didn't have the opportunity to disburse funds to other areas, including those that have been established as essential for the development of the region and in no way violated the unity of the legal, economic and social space, despite their relation to the areas of joint competency, as outlined by article 72 of the Constitution. The reproach was illustrated with concrete examples, which included the prohibition of establishing regional post-secondary institutions, exclusion of regions in having authority in the areas of sanitary and epidemiological welfare of the population, safety and quality of products, and the prohibition of the subjects of the Russian Federation from claiming ownership of bodies of water, etc.).

Several amendments were introduced to Federal law N 184-FZ, dated 6 October 1999, that significantly changed the regulation of power delineation. There were changes to the regulation of powers "delegated" to the authorities of the subjects of the Russian Federation. These were the powers, which were regulated and financed at the federal level, but implemented by the governmental authorities of the subjects of the Russian Federation (item 7, article 26.3). At this time, there is a proposal to formalise this model of delegating individual joint competency powers from the Russian Federation to the executive authorities of the subjects of the Federation by means of federal legislation. The conditions of "delegating" will become stricter. Federal laws that set out the delegation of individual joint competency powers from the Russian Federation to the executive authorities of the subjects of the Russian Federation must contain stipulations that make specific provisions for previously established conditions: the rights and obligations of the head policymaker of the subject of the Russian Federation (the leader of the highest executive governmental authority of the subject of the Russian Federation) regarding the implementation of respective powers, including the right to determine the structure of the executive authority of the subject of the Russian Federation, which implements the listed powers, and the appointment of leaders for such bodies of authority. This formulation implies that the right of the region's leader to determine the structure of the governmental authority and the appointment of its leaders can be limited by the influence of federal authority on that process, if the federal law authorises the federal body to do so. Some of the provisions of Federal law N 199-FZ, dated 31 December 2005, stipulate the coordination of appointment of respective leaders of executive governmental bodies of the subjects of the Russian Federation with the respective authorised federal body of executive authority.

There is also a provision that determines the scope of reporting by the highest policymaker of the subject of the Russian Federation (the leader of the highest executive governmental authority of the subject of the Russian Federation) and the governmental authority

bodies of the subject of the Russian Federation on the subject of power implementation, including the achievement of target indicators and the application of subventions from the federal budget. These are the results which the governmental authorities of the subjects of the Russian Federation must achieve when implementing corresponding powers, which are set out by the federal bodies. Accordingly, failure to achieve these results may result in unfavourable consequences, sometimes in the form of the "removal" of these powers.

There is a provision that the governmental authorities of the subject of the Russian Federation reserve the right to additionally use their own material resources and financial means to carry out their "delegated" powers, as set out by the law of the subject of the Russian Federation.

A provision was introduced that outlined the "participation of governmental authorities of the subjects of the Russian Federation in the implementation of powers of the Russian Federation, as well as powers of joint competency". It was established that the governmental authorities of the subjects of the Russian federation have the right to take part in implementing the powers of the Russian Federation, as well as the powers of joint competency in resolving issues that are not covered by item 2, article 26.3 of the present Federal law and powers that are not delegated to them in accordance with item 7, article 26.3 of the present Federal law, with the expenses being covered from the budget of the subject of the Russian Federation (with the exception of financial funds, which are transferred from the federal budget into the budget of the subject of the Russian federation for the implementation of targeted expenses) if this participation is provided for by federal laws. The financing of these powers, as emphasised in the text of the statute, is not the responsibility of the subject of the Russian Federation, is implemented only if there is an opportunity to do so and does not serve as the basis for the provision of further financial means from the federal budget.

Article 26.3 of Federal law "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation" was amended with a new item (3.1), according to which the governmental authorities of the subject of the Russian Federation are entitled to introduce laws and other normative legal acts and regional programmes concerning issues listed in item 2 of the present statute (list of powers that are financed from the budgets of the subjects of the Russian Federation) irrespective of the presence of federal law regulations that establish said right.

At the same time, the composition of specific powers of governmental authority of the subjects of the Russian Federation had been expanded both as a result of the introduction of new inherent powers and new delegated ones. Additionally, a legal construction of "the right to implement powers" had been formulated (as a rule, the Russian legal doctrine perceives the implementation of powers as an obligation). New regional powers (or, to a large extent, powers restored after their abolition by Federal law N 122-FZ, dated August 22 2004) affected different spheres of public relations and, on the whole, expanded the scope of regional competency.

To reach particular conclusions, we must also examine how the above-listed legislative changes to the governmental authority of the subjects of the Russian Federation can lead to the delegation of powers.

Firstly, let's review the inclusion of powers into the list outlined in item 2 of article 26.3 of Federal law N 184-FZ, dated 6 October 1999, "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of

the Russian Federation" (powers that must be implemented but are not financed from the budget of the subject of the Russian Federation). This particular item sets out the "basic" list of powers that must be implemented across the entire country in order to satisfy the rights and legal interests of the country's citizens. The subjects of the Russian Federation are obligated to implement powers outlined in this list. Their inclusion into the list indicates that the governmental authorities of the subjects of the Russian Federation are responsible for the provision of corresponding services to the population.

The list is frequently supplemented with new powers. Nonetheless, the existing approach is not necessarily enthusiastically accepted by the federal centre, as, firstly, the expansion of the list of "inherent" powers assumes the necessity of expanding the income for the subjects of the Russian Federation (a different approach would result in tension with regional elites) and, secondly, the opportunities for control are limited. Taking into account the fact that the given approach obligates regions to incur expenses, it results in an ambiguous assessment from the regional elites. In other words, an attempt to follow this route is most likely not to be very effective and will probably lead to conflict.

Secondly, there is the possibility of delegating powers of the Russian Federation in the areas of joint competency to be implemented by the governmental authorities of the subjects of the Russian Federation through federal legislation (item 7, article 26.3 of Federal law N 184-FZ, dated 6 October 1999, "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation").

The order and the scope of implementing these powers are minutely regulated by the Russian Federation. These powers are financed through subventions from the federal budget, which doesn't preclude further financing from the regional budget. Federal financing grants the federal authorities the right to control their implementation (the mechanisms of regulation and control of such powers are outlined in detail in item 1 of the given materials).

The regulations deriving from federal laws that outline the implementation of powers of the governmental authorities of the subjects of the Russian Federation outlined in the given item are generally enacted on an annual basis through the federal law on the federal budget for the corresponding year, if the given federal law stipulates the provision of corresponding subventions to the budgets of the subjects of the Russian Federation. On the one hand, this guarantees the rights of the regions. On the other hand, these powers may cease to exist in any given financial year.

Furthermore, in order for the federal legislator to delegate powers to governmental authorities of the subjects of the Russian Federation in this manner, the conditions for the implementation of these powers and the need for them must be fairly similar across all regions.

In accordance with item 7 of article 26.3 of Federal law N 184-FZ, dated 6 October 1999, "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation", federal laws that oversee the transfer of individual powers of the Russian Federation or the joint competency powers to the governmental authorities of subjects of the Russian Federation must contain stipulations that outline:

- the reporting procedures for the chief policymaker of the subject of the Russian Federation (the leader of the highest executive governmental authority of the subject of the Russian Federation) or the governmental authority bodies of the subject of the Russian

Federation on the subject of delegated power implementation, including the achievement of target indicators and the application of subventions from the federal budget;

- the rights and obligations of the executive branch of the federal authorities, the governmental non-budget Russian Federation funds for the implementation of listed powers by the authorities of the subjects of the Russian Federation and (or) the rights and obligations of the chief policymaker of the subject of the Russian Federation (the leader of the highest executive governmental authority of the subject of the Russian Federation) for the implementation of delegated powers, including the rights and responsibilities to appoint the heads of the executive branch of the subject of the Russian Federation or the regional governmental non-budget fund of the subject of the Russian Federation that carries out the corresponding powers;
- the rights and obligations of federal executive branch authorities and (or) the rights and obligations of the chief policymaker of the subject of the Russian Federation (the leader of the highest executive governmental authority of the subject of the Russian Federation) related to the determination of the structure of the executive authority of the subject of the Russian Federation and (or) with the authorities of the territorial governmental non-budget fund of the subject of the Russian Federation that is tasked with implementing the delegated powers;
- the powers of the executive branch of the federal authorities regarding the implementation of control and oversight of the implementation of the delegated powers by the subjects of the Russian Federation, as well as the procedures for removal of corresponding powers form the executive authorities of the subject of the Russian Federation, the reimbursement of subventions provided to the budget of the subject of the Russian Federation, the budget of the territorial governmental non-budget fund of the subject of the Russian Federation for the implementation of corresponding powers;
- the method and (or) federal standardised calculations for estimating the overall sum of the subventions coming out of the federal budget into the budgets of the subjects of the Russian Federation, or from the budget of the Federal Compulsory Medical Insurance Fund, made available to the budgets of territorial governmental non-budget funds of the subjects of the Russian Federation for the implementation of corresponding powers.

Federal laws that oversee the transfer of individual powers of the Russian Federation to the governmental authorities of the subjects of the Russian Federation may contain stipulations that outline:

- the obligations involved in the transfer of federal assets that facilitate the implementation of delegated powers to the subject of the Russian Federation;
- the obligation of the governmental authorities of the Russian Federation to use the material assets transferred to the subject of the Russian Federation that are necessary for the implementation of corresponding powers for specific purposes.

Such rigidity and precision of regulation guarantees the federal authorities' control in ensuring that delegated powers are implemented by the governmental authorities of the subjects of the Russian Federation using the means from the federal budget, including them into a unified system of executive power.

The government of the Russian Federation can establish criteria to evaluate the effectiveness of the work carried out by the governmental authorities of the subject of the Russian Federation in relation to the implementation of corresponding powers, can ensure the introduction of and procedure of removing of legislative acts related to the implementation

of delegated powers ratified by the government of the subject of the Russian Federation, as well have the capacity to transfer to the subject of the Russian Federation material assets to be used in implementing corresponding powers.

Thirdly, there exists the possibility of signing agreements that would delegate power implementation. According to article 26.8 of Federal law N 184-FZ, dated October 6 1999, "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation", the executive branch of the federal authorities, in coordination with the executive branch of governmental authorities of the subject of the Russian Federation, can partially transfer their powers if this action does not contradict the Constitution of the Russian Federation, the present federal law or other federal laws. The specified agreements are reached in the instance when a portion of the powers cannot be transferred to the executive branch of the government of the subject of the Russian Federation in equal measure by means of federal law. As such, instances when an agreement can be reached in theory are limited by the norms of the Federal law. At the same time, an instance where "the implementation of a portion of the powers cannot be transferred to the executive branch of the government of the subject of the Russian Federation in equal measure by means of federal law" has wide scope for interpretation. Such instances can include the existence of a specific organisational or cadre infrastructure of a particular subject of the Russian Federation that are not present in the majority of the other subjects of the Russian Federation and which can be used in the interests of a more effective implementation of corresponding powers.

That said, in drawing up the agreement it is essential to closely follow the formulations set out in Federal law N 184-FZ, dated October 6 1999, "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation". In other words, the subject of the agreement of the agreement should not be cooperation or collaboration, but namely the transfer of power implementation to the executive branch of the government of the subject of the Russian Federation.

The Russian Federation government's resolution N 117, dated 1 March 2004, "On the procedures for preparing, coordinating and affirming agreements between the executive branch of the federal authorities and the executive branch of governmental authorities of the subjects of the Russian federation, on the transfer between the two of portions of their powers for implementation, as well as on the introduction of amendments into such agreements" confirms the rules for the preparation and affirmation of agreements between the federal executive branch and the executive branches of the governments of the subjects of the Russian Federation in relation to the transfer of powers between the two, as well as the introduction of changes into such agreements. Specifically, these agreements stipulate that project preparation is carried out by both sides of the agreement, namely, the executive branch of the federal authorities and the executive branch of the governmental authorities of the subject of the Russian Federation, in accordance with the requirements listed in part 2 of article 26.8 of Federal law N 184-FZ, dated October 6 1999, "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation". In other words, there must be an agreement with a main federal authority at this point already. Following this stage, the agreement project, alongside the corresponding federal government resolution regarding its confirmation, is sent to the Russian Federation Ministry of Economic Development and Trade, the

Russian Federation Ministry of Finance, the Russian Federation Ministry of Justice, and other relevant federal bodies for confirmation of its particular form. Based on the available information, it appears that the negative position of the Russian Federation Ministry of Economic Development and Trade and the Russian Federation Ministry of Finance most frequently impedes the conclusion of such agreements, even with the previous agreement from a main federal body. As such, the justification for the ministries' disagreement is not often very clear.

Federal law N 199-FZ, dated 31 December 2005, amends article 26.8 of Federal law N 184-FZ, dated October 6 1999, to include measures that expedite the conclusion of power implementation agreements between the federal executive branch authorities and the executive authorities of the subject of the Russian Federation. According to these innovations, the agreement is brought to the corresponding executive federal body or the highest executive governmental authority of the subject of the Russian Federation and is considered within a month of receipt. The federal government resolution confirming the agreement's confirmation is brought by an executive federal body to the government of the Russian Federation within a week following the confirmation of the agreement and is adopted by the Russian Federation government within three weeks of its receipt. In the instance that the agreement is not approved by both sides in the two-week period following the one-month deadline, as set out by the present item in reviewing the agreement project, the party that initiated the conclusion of the agreement applies to the governmental commission overseeing relationships between federal bodies and executive branches of subjects of the Russian Federation for consideration of the differences or informs the other party of the rejection to continue the procedures for concluding the agreement. At the insistence of one of the parties, the governmental commission must make a decision regarding sending the documents for review to one of the sessions of the Russian Federation government, which must reach a decision on the basis of the provided documents within one month.

At first glance, this approach appears to favour the subjects of the Russian Federation, which, for a long time, could not obtain an answer to the proposal of concluding an agreement. On the other hand, this mechanism simply speeds up the decision process, without necessarily taking into account the interests of the subjects of the Russian Federation. Sometimes, in order to reach a decision (to convince the federal authorities that concluding an agreement is an acceptable decision) more time is required, which is outlined in the given normative act. Having received an official rejection, it becomes harder to attain the desired outcome in the future.

Fourthly, let's consider the use of the phrase ""participation of governmental authorities of the subjects of the Russian Federation in the implementation of powers of the Russian Federation, as well as powers of joint competency".

Article 26.3-1 of Federal law N 184-FZ, dated October 6 1999, "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation", brought in by Federal law N 199-FZ, dated 31 December 2005, establishes that the executive authorities of the subject of the Russian Federation have the right to take part in implementing the powers under the competency of the Russian Federation , as well as powers of joint competency, which are not described in item 2 of article 263 of the present federal law, and powers not delegated to them in accordance with item 7 of article 263 of the present federal law, related to expenditures undertaken by the budget of the subject of the Russian Federation (with the exception

of financial funds, which are delegated from the federal budget to the subject of the Russian Federation to carry out targeted expenditures) and if this participation is provided for by federal laws.

When discussing participation, it is important to note the following. Firstly, taking part in implementing powers outlined in the law is allowed only when such participation is directly set out in existing federal legislation. Only supplementary measures of social assistance and social support for different categories of citizens can be executed irrespective of the presence of federal legislative resolutions that establish the indicated power. Secondly, the actual formulation of the participation in implementing powers (in other words, powers that have already been established) does not grant the subjects of the Russian Federation the right to establish new powers in the area of joint competency (in other words, introducing new forms for solving actual problems).

Additionally, the model of participation in implementing powers does not have clear boundaries and criteria. This can lead to difficulties in practice. Clearly, if the formulation of "participation" is introduced as a uniform norm, then it becomes something different than a simple implementation of powers by the governmental authorities of the subjects of the Russian Federation. This means, that there is also the issue of coordinating organisation with corresponding federal bodies. This is confirmed by a norm, according to which federal laws that outline participation can (but are not obliged to) contain resolutions that set out:

- the procedures for coordinating the participation of the executive authorities of the subjects of the Russian Federation in the implementation of identified powers, as well as the specificities of such participation;
- the possibility and the boundaries of legal regulation of the specified powers by the executive authorities of the Russian Federation. It must be noted that the boundaries of legal regulation in relation to these issues are not discussed within the scope of the legislation of the subjects of the Russian Federation. Clearly, it is assumed that the availability of such a possibility is directly determined by the resolutions in federal laws, which determine the right to take part in implementing powers.

As such, the problem of the participation model's ambiguity can be resolved through the expansion of the regulatory participation of the governmental authorities of the subjects of the Russian Federation in implementing powers under the competency of the Russian Federation, as well as joint competency powers. Specifically, the following elements can be stipulated: the governmental authorities of the subjects of the Russian Federation informing the corresponding branches of the federal authorities about their intention to participate in implementing the corresponding powers. Accordingly, if such implementation duplicates the functions of federal bodies, then within this aspect, the corresponding executive powers of the territory of the subject of the Russian Federation are transformed into regulating ones; the establishment of target, prognostic indicators and criteria for evaluating the effectiveness of the work of federal bodies of the Russian Federation that cover participation in implementing of powers by the regional branches of executive authorities; the introduction of an accountability mechanism (in addition to financial accountability) analogous to the mechanism described in item 7of 26.3 of Federal law N 184-FZ, dated October 6 1999, "On the general principles of organisation of legislative (representative) and executive bodies of governmental power of the subjects of the Russian Federation". If, under these conditions, the subject of the Russian Federation agrees to take part in the

implementation of powers, it becomes its right. Nonetheless, such legal innovations are not introduced into the legislation.

Fifthly, there is the possibility of establishing the rights of the governmental authorities of the subjects of the Russian Federation to implement one or another power (and not just take part in implementing it). As was already mentioned, article 85 of the Budgetary Code of the Russian Federation prohibits the subjects of the Russian Federation from carrying out disbursement obligations related to the resolution of problems that deal with the competency of the federal authorities, with the exception of instances which had been established by federal laws. Because the boundary between issues that do and do not relate to the competency of the federal authorities is difficult to delineate, the given resolution, that oversees the right of the subjects of the Russian Federation to implement powers and finance specific spheres, is, within the scope of article 85 of the Budgetary Code, a fairly acceptable solution. At the same time, the federal legislator is not active in awarding the subjects of the Russian Federation with powers, since this dilutes the principles of clear demarcation of financial obligations between the levels of public power. Specifically, the consolidation of such rights for the regions had famously resulted in stiff opposition at the federal level during the work on Federal law N 199-FZ, dated 31 December 2005, which had introduced this formulation.

As such, the problem of sufficiency of powers for the subjects of the Russian Federation remains. In reality, however, this only has implications for a small number of regions with a high level of fiscal capacity. For other regions, the existing regulatory system serves as a guarantee against dispersion of funds on tasks that do not directly deal with regional prerogatives.

* * *

In wrapping up the topic of demarcation of powers between the Russian Federation and its subjects during the first decade of the 21st century, it is impossible not to mention Russian Federation Presidential Decree N 425-rp, dated 27 June 2011, "On the preparation of proposals for the redistribution of powers between the federal executive authorities and the executive authorities of the subjects of the Russian Federation and local authorities".[16] The decree proposed the formation of a working group on legal questions of redistributing powers between the federal authorities and the executive authorities of the subjects of the Russian Federation and local authorities and the formation of a working group to deal with financial and taxation issues, as well as inter-budgetary relationships.

There is a ten-year gap between the previously mentioned Decree, dated 21 June 2001, and the new Decree. Does the target setting of new issues in the sphere of power demarcation by the head of the government imply an admission of failure in the previous execution of power demarcation? It seems that that is not the case (and it is telling that the former working group is headed by D.N. Kozak, who headed the commission created in 2001). In fact, it is probably the opposite. All levels of public power have realised that the benefit doesn't necessarily lie in an expanded number of powers, but rather in the sound coordination of financial resources and obligations related to financial powers (previously, the federal centre was unquestionably in charge of these aspects, with regions fighting to expand their powers).

[16] SZ RF, 04.07.2011, N 27, st.3932.

There exists another issue for regional and local authorities — the level of activity in searching for and accepting progressive administrative and social technologies is fairly low (it is slightly higher at the regional level). The predominating approach relies on the "status quo", rather than "efficiency and results". Additionally, the financing is applied to the infrastructure, rather than the result. Of course, another important problem is the lack of financing at the regional and local level (generally, across the entire country), but this largely rests on the fact that the authorities are not prepared to streamline the funds. As such, it can be expected that future work of demarcating responsibilities and related proposals will be related to the streamlining of administration. But that is another topic.

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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.

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The Modern English Legal Doctrine: The Constitutional State at a Glance

"Constitutionalism" and "constitutional state" are concepts that remain the focus of attention of many researchers across the world. The constitutional-legal doctrine is currently in the midst of a significant process of transformation: it is becoming more intertwined with other public disciplines — philosophy, political science, and social psychology. This process represents one of the consequences of both the steady complication of issues facing institutions of public rights across the world, and the evolution of those institutions.

The evaluation of ongoing changes is reflected in constitutional-legal doctrine. The book by Nicholas Barber, Fellow in Law of Trinity College, University of Oxford, which was recently published as part of the "Oxford Constitutional Theory" series, supplements the vast bibliography of modern constitutionalism. Barber's book comprises ten sections and is designed using the problem-oriented principle. Chronologically, the book covers the period from the mid-19th century to today.

Pleasantly, the author of the book is a strong supporter of the complex system approach to reality, an approach that has received a great amount of attention and is considered a very important means of understanding the growing contradictory reality. He writes, "I have approached constitutional theory as a subject that spans the social sciences." He further posits that "a satisfying account of social institutions as the state, citizenship, and, indeed, the law, cannot be provided from a narrow legal perspective... legalistic accounts are sometimes more misleading than illuminating. If the book contains an intellectual manifesto, it is this: a commitment to the value of, and the need for, interdisciplinary study. Such engagement—though risky—is crucial for the development of both constitutional and legal theory" (pp. xi — xii).

The academic authorities whose legacy is used by the author to build his own arguments belong to various branches of public thought. These are legal scholars who are considered pillars of constitutional law in English-speaking countries (W. Bagehot, W. Blackstone, A. Dicey, A. Jennings, J. Marshall, T. Marshall, J. Rawls, O. Phillips) and other significant philosophers, sociologists and political scientists from various Western countries. The latter cohort features German scholars: M. Weber, E. Durkheim, and K. Schmidt,

[1] Book review of *Barber N.W.* The Constitutional State. Oxford: Oxford University Press, 2010. XIII, 199 p.

English-speaking scholars, starting with T. Hobbes and finishing with K. Popper, H. Hart, and E. Hobsbawm.[2]

The introduction of methodological improvement by one of the representatives of the British academia is clear. It is difficult to argue against the author's position, especially when you feel strongly attracted to it in any case.

The problem-oriented approach is one of the strongest aspects of the reviewed work. Barber skillfully identifies and analyses factual material that allows him the opportunity to concisely and insightfully work out a number of key problems. As can be seen in the book, the nature of government, civil society, and the institutions of the European Union (and their place and role in the legal tradition, judicial power and judicial precedent) are identified by the author as key issues. The book's prevailing idea is the continuity of the development of institutions and their interactions.[3]

Barber's thoughts on continuity in public and state development are compelling. Of further interest are his conclusions on the degree of accountability of those governments that have "radically altered the institutions of power", in other words, those governments that have recently completed the transition from a totalitarian means of governing to a constitutional democratic government. These governments represent different countries from Eastern and Southern Europe, Asia, Africa, Latin America, comprising in total around half of the world's population. This juridically and politically complex, and legally underdeveloped, subject area should possibly be viewed from a global comparative perspective. The author touches on this subject matter in two sections of the reviewed book — "The Responsibility of the State" and "The Mentality of the State".

According to Barber, the institutions of a constitutional state bear responsibility for the investigation of the actions of the previous regime, for the elimination of benefits and preferences available to a part of the population (even if legally) during the previous regime and for the compensation of victims of the previous regime (pp. 127, 143). The author's emphases are correct. However, it is unfortunate that the review of the problem is so brief. Additionally, the author barely reflects on the given subject matter in relation to the examples of the adoption and development of constitutional democratic states, like Germany, Italy and Japan. Meanwhile, these examples are incredibly instructive. They represent the most fertile ground for conducting a comparative juridical and historic-political analysis.

I am certain that any reader of this book will distinctly perceive the author's aspiration and ability to logically examine a contested issue from a point of view of different branches of juridical science — constitutional law and international law, constitutional and administrative law.

Some facts used by Barber are revealing without any authorial commentary. For instance, the book informs us that the existing UK Ministerial code, published in 1992, in many ways reflects the rules for ministerial behaviour created by the Labour cabinet in 1945 (p. 99). It appears that the post-war setting required that the executive, the parliament

[2] It is important to note that only one Russian source is mentioned: V.I. Lenin's "State and Revolution" (p. 7), and then it is only mentioned once. This fact forces one to reflect on the state of the Russian academy in the field of constitutional law and other humanities disciplines and their place in the world of modern global scholarship.

[3] Barber does not consider traditional institutions of constitutional law, such as the means for adopting and amending the constitution, forms of government, the electoral process, the institutions of direct democracy, and the branches of power. This distinguishes his book from classical multi-edition works of *Lakeman J., Lambert W., Wade O., Weir K., Phillips O.* and other English-speaking academics.

and the community concentrated exclusively on the "restoration of the national economy that had been destroyed by the war". Britain's losses from air raids and the naval blockade were extensive. However, the British constitutional state found it reasonable to simultaneously improve what we know as the "selection and placing of personnel" and "accounting and control", which, I would say, benefited the concepts of the supremacy of the law and democracy, as well as the restoration of the economy.

The author's constructive approach merits further commendation. He has no answer ready for every question. He doesn't just offer platitudes, but rather offers discussion of contested subjects. His numerous references to the work of others, including those who do not agree with his point of view, are gratifying. In a number of instances, Barber aggregates the contradicting views and analyses of several other academics, compares them and then offers the most optimal evaluations (pp. 75-78, 148-156, etc.) The author selects examples for the most discussed issues. Similar unbiased methods of evaluating legal and political-philosophical material and reporting of results of scholarly analysis to third parties are inherent in social thinking of rule-of-law democratic states. Such methodological premises train the readers to consider and substantiate conclusions using a system of arguments.

Quite rightly, the author of the book points to the preserved ambiguities in the subject of constitutional theory and the goals of that discipline, as well as the deepening discordance in its fundamental terminology.[4] "Constitutional law suffers from an identity crisis," he notes (p. 1), albeit without a prediction that the given science will soon disappear or be subsumed by other branches of knowledge.

Here are a few recommendations to the author. Barber clearly perceives (and demonstrates to us) the evolution of constitutionalism as a component of modern civilization. At the same time, he does not use all research possibilities available to him. The analysis of the successes and difficulties in founding a constitutional state in Russia at the turn of the century would have enriched the work both factually and analytically, making it even more topical.

The book also does not analyse (with the exception of a few lines on p. 119) the "failures" involved in building constitutional and democratic states during the previous century, specifically in Germany, Spain, Italy, Chile, China, Japan, Egypt and Mexico. As such, it appears as if the author, who assigns great importance to the continuity of public development, in large part underestimates the difficulties involved in the progress towards full-blown constitutionalism, as well as the dangers for countries that approach constitutionalism only nominally.

Barber's light and natural style must be commended.[5]

The compact, but substantive, book by an Oxford researcher is a marked contribution to the evaluation of multidimensional problems that faced and continue to face constitutional theory and, more importantly, the modern constitutional democratic state. The only thing remaining is to wish the author further successes in his work in this field.

[4] According to his calculations, there are around 150 definitions of the concept of "state" across the humanities disciplines.

[5] In examining cases, the author frequently uses humorous anecdotes from modern TV comedies. For instance, in the "Responsibility" section, Barber examines the questions of responsibility of the central character of a famous Hollywood TV series "Alf" for the material damage that resulted from his sudden arrival from space (p. 125).

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Commentary on the Constitution of the Russian Federation[1]

It is reasonable and appropriate to consider the reviewed book not only as a compilation of theoretical reflections on constitutional norms, but also as a digest of the legal positions of the Constitutional Court, which reveal and interpret the meaning of identified norms. The sources of these positions are, foremost, the resolutions adopted by the Court in relation to inquiries regarding the interpretation of specific statutes of the Constitution. At the same time, the authors of the Commentary invoke other decisions of the Court, and also provide a spectrum of normative material. The specificity of the given book derives in large part from the fact that the majority of its authors work for the secretariat of the Constitutional Court. Their work rests on the synthesis and analysis of seventeen years of practice of the Court, including the last six years, up to 1 August 2008 (when the book was submitted for publication).[1]

The Commentary features positions that are the result of the official and the doctrinal interpretations of the Constitution. The latter reveal the specific dynamic of Russian constitutional-legal thought, making them significant from theoretical and practical points of view.

For instance, let's consider an issue that affects our public life in multiple ways: *the implementation of the principle of separation of powers*. The author of the commentary on article 10, which formulates this principle, posits that "the two-patterned contradiction in Russia — 'for' and 'against' the separation of powers, alongside the opposing tendencies of federalism and unitarism, centralisation and decentralisation, democracy and bureaucracy — in some way, explains the imprecise, compromising character of statute 10 of the Russian Federation Constitution. It sets out that 'governmental authority is implemented...' (as such, in accordance with article 3, authority is implemented by the people of the Russian Federation, and not any body of government). [...] However, deviations from the principle of separation of powers have been occurring more frequently in recent years, gradually forming a system of constitutional law that, at times, does not correspond with the existing fundamental principles and important resolutions of the Constitution, and does not adhere to the conciliatory procedures set out by the Constitution (for instance, see p. 1, st. 85), nor to the addition of changes to constitutional amendments, nor the revision of the Constitution itself" (pp. 70–73).

And then there is the commentary on article 102, which consolidates the competency of the Federation Council. Paragraph "j" of part 1 of this statute sets out that the Federation Council appoints and dismisses the deputy Chairman of the Accounts Chamber and half of its auditors. Amendments to the federal law on the Accounts Chamber, added in

[1] Review of "Commentary on the Constitution of the Russian Federation" (edited by *Lazarev L.V.*, 3rd edition, Moscow, Prospect, 2009).

2004 and 2007, set out that the appointment of all the above-mentioned posts (not dissimilar from the appointment of the Chairman of the Accounts Chamber and the other half of the auditors by the State Duma) are implemented *upon the recommendation of the head of state*. The commentary is written cautiously; however, the author's position is clear: "Previously, the Regulations of the Federation Council provided that candidates for the position of the deputy Chairman of the Accounts Chamber and half its auditors were proposed by the committees and commissions of the Federation Council. The Federation Council Commission on Coordination with the Accounts Chamber offered an opinion on each nominee, formulated the list of nominees and presented it to the Federation Council. This procedure, in our opinion, answered the purpose of the Accounts Chamber as a body representing the Federation Council, which is responsible for exercising control in implementing the federal budget. The federal budget is implemented under the supervision of the Government of the Russian Federation, which is headed by the President of the Russian Federation, and the control of the Accounts Chamber as a Federal Council agency should in no way be dependent on the personnel decisions of the President" (p. 601).

The commentary on article 14 of the Constitution, which sets out the secular character of the Russian state, also merits attention. This section specifically takes into account the decisions of the European Court of Human Rights. It is easy to agree with the statement that "if constitutional equality of rights of religious citizens and religions is observed, then the fact that one or another religion is quantitatively predominant should not conflict with the rights and freedoms of the individual in this sphere" (p. 90). Most importantly, the commentary on article 14 continues, no one church should aspire "to create for itself a favourable legal position on a federal or regional scale, using the centuries-old tradition of part of the population and semi-official support from the governmental authorities" (Ibid.).

We emphasise these sections because their subjects represent Russia's constitutionalism's most unhealthy issues today. First of all, this concerns the problem of the separation of powers and the function of the checks and balances mechanism. The fundamental point of any real constitution is its ability truly to restrain political power. Nonetheless, we believe that Russian constitutionalism still maintains solid development potential.

The sections of the Commentary that are dedicated to statutes that set out the foundation of the judicial system of the Russian Federation merit special interest, from our point of view, due to their characterisation of the conditions (formulated by the Plenum of Russia's Supreme Court) of direct application of constitutional norms.

In identifying sections of the work that could be deemed controversial, we draw attention to the commentary on p. 3 on article 80, which sets out the function of the head of state in setting out the direction of internal and foreign policies. The commentary on this constitutional norm posits that "due to the special position of the head of state, elected by the people, his official policy views must be acknowledged as general conceptions of lawmaking" (p. 498). This begs the question: for whom and in what sense are "the official policy views of the President" necessary? The answer to this question results in some difficulties, foremost, due to the various peculiarities of the construction of the norm itself, which was the subject of serious discussions in October 1993, when this project was developed by the Constitutional Council.

It must be noted that the Commentary on the Constitution is not only analytical in nature, but is also an information and reference publication. Within the scope of the com-

mentaries on the statutes of the Constitution, it is also appropriate to include a precise list of the subjects of the Federation, which have become participants in the universalisation processes. It is also appropriate that the commentary on article 11 of the Constitution mentions the functioning agreements on division of powers and functions between the bodies of government of the Federation and some of its subjects.

Thus, it appears that Russian lawmakers will be able to find a variety of topical subjects related to the Constitution for further consideration in the reviewed work, while practicing jurists will have at their hands a well-structured tome of normative material. Every one of the identified aspects of the Commentary on the Constitution is interesting and important.

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