

**BASIC LAW AS AN INSTRUMENT FOR LEGAL
AND SOCIO-POLITICAL TRANSFORMATIONS
(TOWARDS THE 20TH ANNIVERSARY OF THE CONSTITUTION
OF THE RUSSIAN FEDERATION)**

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This paper is devoted to a new approach to understanding the role of the Basic Law in the life of society as a tool for managing major social and economic changes. Analyzing the distinctive features of the emergence, internal structure and functioning of the current Constitution of the Russian Federation, the author substantiates the assertion that ‘the constitution is a way by which one social system gives rise to another social system.’

Key words: Constitution of the Russian Federation; state and law; constitutional law; constitutional models and processes; transformation processes; social order and social control; history of contemporary Russia.

The role of constitutions generally, and the Russian Constitution, in particular, is difficult to overestimate. A constitution provides the basis for the legitimacy of power. It is the core of legal consciousness and a pillar of civil society. The stability of the Basic Law is a guarantee of the political stability and successful development of any state. A modern constitution determines the fundamental principles underlying relationships within the individual – society – state system; it codifies the foundations of the political system, outlines the functions of the state, establishes the structure and relationships of public administration and governance bodies (the form of government), and – first and foremost – it provides the supreme legal guarantees of human and civil rights and liberties.

A constitution is not only a symbol and a supreme legal act. It is a living, operational, self-enforcing document that not only exists in a complicated and dynamic relationship with socio-political and legal reality but also directly affects the course of a country’s contemporary history, determining the unique features of the new social system and state that have emerged from the chaos of change.

Even in the late 20th century the constitution was regarded as the legal implementation of the victory of the political class or as an expression of a kind of 'social contract' that captures the current state of affairs, consolidating the existing political landscape and the consensus of elites. At the turn of the 21st century, however, scholars became increasingly skeptical about the adequacy of such views. Now, specialists working at the interface of political theory and practice tend to arrive at the conclusion that in today's world the constitution, rather than being the codification of existing public consensus, is a special mechanism necessary for the construction of a new social order. In other words, it is little more than an instrument for managing social transformations.¹

Seeing a democratic constitution as a self-enforcing act and an instrument for the management of profound social transformations is rather new to classical constitutional law. This approach, however, is effectively employed in political science, public choice theory, constitutional economics, and other humanities.

In recent years, the crisis of the so-called Washington Hypothesis² has seen a number of international projects implemented to find a correlation between the inner workings of democratic constitutions, their stability and their ability to provide the necessary conditions for the emergence and sustenance of new social orders.³ Moreover, the analysis of the normative image of the 'new world' described in constitutions, comparison of the constitutional model with the social order actually created, and studies of the causes and effects of possible gaps between the planned and the factual, enable scholars not only to revisit the role of constitutions in the life of society but also to effectively link the abundance and diversity of empirical political science and sociological data with political theories explaining these data. This approach allows us to see the Russian Constitution at work and to determine its place and role in the large-scale systemic transformations of the late 20th to early 21st century.

One of the topical research themes at the interface of constitutional law and political science is the attempt to understand why some constitutions are capable

¹ See, e.g., Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149(1) JITE 286, 289 (1993); Susan Alberts, *Why Play by the Rules? Constitutionalism and Democratic Institutionalization in Ecuador and Uruguay*, 15(5) Democratization 849, 850 (2008); Daron Acemoglu & James A. Robinson, *A Theory of Political Transitions*, 91(4) The American Economic Review 938 (2001); Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century* (American Political Science Association 2010 Annual Meeting), available at <http://papers.ssrn.com/abstract_id=1643199> (accessed March 3, 2014) etc.

² The Washington hypothesis (a kind of 'political dimension' to the standard package of macroeconomic reforms known as the Washington Consensus) is the idea that the globalization of liberal economy promotes the emergence and development of liberal democracy. For more detail, see Andrey Yanik, *История современной России: Истоки и уроки последней российской модернизации (1985–1999)* [The History of Contemporary Russia: The Origins and Lessons of the Latest Russian Modernization (1985–1999)] 214 (Contemporary History Fund – Moscow University Publishing House 2012).

³ See, e.g., Comparative Constitutions Project, <<http://www.comparativeconstitutionsproject.org>> (accessed March 3, 2014), and its Resources for Constitutional Design.

of successfully transforming social reality while others, practically perfect in form and content, remain but lifeless and barren political artifacts. From this standpoint, analysis of constitutions adopted in situations of political conflict accompanying processes of systemic transformation of the state and society is of particular interest. As is well known, it is exactly in such a situation that Russia's current constitution was adopted.

In today's world, the fact that this document has not been born of the true consensus of elites is the norm rather than the exception. In any country going through a period of major socio-economic change there is an ongoing competition between different and sometimes directly opposite visions of the objectives of transformation, of a desirable future, of adequate state machinery and social relations, backed by various political forces. Therefore it is extremely important to understand which factors most affect the ability of a constitution born in such circumstances to ensure public consent and effectively implement the plan inherent in that constitution: is it the new Basic Law's inner workings or the 'surrounding landscape' (the concrete cultural and historical context)?

On the one hand, the words comprising the self-enforcing constitution are hardly endowed with a special magic force that can change the world by reciting aloud the correct constitutional formulas. Various projects comparing the formal characteristics of modern constitutions such as the total number of words in the texts of Basic Laws, the length of preambles, the ratio between substantive and procedural norms, *etc.*,⁴ have identified some interesting facts and correlations,⁵ but can hardly provide the answer to the question of what makes some constitutions capable of ensuring the sustainability of democratic regimes while others are not. Back in 1936, Edwin Samuel Corwin, the then President of the American Political Science Association, noted that the Constitution 'is not the cause, but consequence, of personal and political freedom; it grants no rights to the people but is a creature of their power.'⁶

⁴ See Tom Ginsburg, *Constitutional Specificity, Unwritten Understandings and Constitutional Agreement* (University of Chicago Law School Public Law and Legal Theory Working Paper No. 330), available at <http://papers.ssrn.com/abstract_id=1707619> (accessed March 3, 2014).

⁵ For instance, according to Ginsburg, the shortest written constitution is the 1908 Constitution of Bhutan comprising only 165 words, and the longest is the Constitution of India, which has been amended many times and, together with its numerous amendments, is comprised of 117,820 words. The 1789 U.S. Constitution comprises 7762 words and formed the basis for a remarkably stable institutional construction, which suggests that the Americans prefer short framework constitutions. See Daniel J. Elazar, *Constitution-making: The Pre-Eminently Political Act*, in *Redesigning the State: The Politics of Constitutional Change in Industrial Nations* 232–248 (Keith G. Banting & Richard Simeon, eds.) (University of Toronto Press 1985); Christopher W. Hammons, *Was James Madison Right? Rethinking the American Preference for Short Framework Constitutions*, 93 *American Political Science Review* 837 (1999).

⁶ Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 *American Political Science Review* 1071 (1936), as cited in Ginsburg, *supra* n. 4, at 69–70.

On the other hand, if we agree that the successful implementation of ideas set forth in a constitution depends not so much on what is stated in the constitution as on what remains beyond the text – the ideas and values shared by society and its elites, established political customs and traditions, strategic and tactical agreements between the different political forces – then a question naturally arises: why do we need written constitutions in today's world?

The question of what comes first for a constitution to be effective – its design or socio-political context – is a rather rhetorical question similar to the chicken-or-egg dilemma posed by the Ancient Greek philosophers. It is obvious that both the well-designed text of Basic Law and the specific conditions for its creation and successful functioning are equally important. A 19th century iconoclastic English author Samuel Butler, however, proposed an original solution to this problem, having stated that 'a hen is only an egg's way of making another egg' (Samuel Butler, *Life and Habit* 134 (Trübner 1878)). Following this logic, it would not be a gross overstatement to say that a constitution is one social system's way of making another social system.

However, for a new social system to be sustainable, a self-enforcing constitution ought to be effective and stable. Therefore one of the topical problems currently occupying the minds of not only constitutional theoreticians but also political practitioners is identifying the external and internal factors on which the lifespan of self-developing constitutions is predicated. Contemporary American researchers who study problems of correlation between constitutional design and the written constitution's longevity sadly conclude that 'Most democratic constitutions fail to endure. The estimated half-life of a democratic constitution adopted between 1789 and 2005 is just sixteen years.'⁷

As is well known, in December 2013, the current Russian Constitution will celebrate its 20th anniversary. The very fact that the current Constitution of the Russian Federation is the second in longevity among all Russian constitutions⁸ indicates its effectiveness and stability, making it an exceptionally interesting object for comparative legal and political science studies.

It is of particular interest for researchers that the 1993 Russian Constitution was born in a situation of escalating political and economic crisis, the slowing of reforms, and a split among elites competing for 'command heights' in the new state and for the right to determine the strategy for the further development of society. In such a context the drafters of the Basic Law faced a difficult task. They had to find

⁷ Susan Alberts et al., *Countermajoritarian Institutions and Constitutional Stability*, <http://www.law.yale.edu/documents/pdf/LEO/LEO_Weingast.pdf>. *Editor's comment*. The source cited by these authors states that since 1789 the average constitutional lifespan has comprised of 17 years. See Thomas Ginsburg et al., *The Lifespan of Written Constitutions*, *Alumni Magazine*, Spring 2009, available at <<http://www.law.uchicago.edu/alumni/magazine/lifespan>> (accessed March 5, 2014).

⁸ Among the Russian constitutions, the 1937 Constitution of the RSFSR ranks first in longevity, having existed until 1978.

a practical answer to a question: how to design a constitution capable of facilitating the restoration of public consent and, at the same time, serve as an effective tool for the transformation of the socio-economic system – or in other words, effectively work – in a situation of societal schism?

A general conceptual approach to tackling this task was quite obvious: the new national act of supreme legal force was to become a nucleus for the crystallization of order in the chaos of an era of change. Therefore the new constitution had to be of a skeletal nature so that, when immersed in a supersaturated 'social solution,' a durable framework of key ideas and principles would provide the support required for the growth of a new structure. To ensure the durability of the new Constitution, special constructive elements were built into the body of the Basic Law to preserve its viability and stability in spite of possible fluctuations in the external environment.

To sum it up, this conceptual approach was implemented as follows.

First, a number of ideas and principles of equal importance to all citizens regardless of their political views were embedded in the new Russian Constitution: acknowledgement of the supreme value of the human being, individual rights and liberties; the political stability and territorial integrity of the country; the social and secular nature of the State; elected public authorities and local self-government; respecting the cultures and traditions of all ethnicities comprising the multiethnic people of Russia; ideological diversity and political plurality; and equal recognition and protection of all forms of ownership including private ownership. Having enshrined these and many other fundamental provisions, the Constitution had thus laid the necessary ideological foundation for public consent because it incorporated the ideas and principles equally shared by conservatives, communists and democrats.

Second, in a situation characterized by acute conflict and impossibility of achieving consensus, a special technology was employed to tackle problems, whereby instead of focusing on the points at issue, algorithms for consensus seeking were captured. These algorithms did not depend on the nature of the conflict and were essentially neutral.

On this basis, the Constitution was written as a short and a largely procedural document. As such, it is not instructional in nature and does not offer ready answers to the questions that objectively arise (and they did arise!) in the course of building a new state and policy. Rather, it describes the process and procedures that are to be used in tackling problems that arise. In particular, the Constitution contains the rules and procedures to follow in case of a conflict between the branches of power or between the federal center and the regions.

Third, and obviously most importantly, the Basic Law was designed in the image of a desirable future rather than a reflection of the situation existing at the time it was adopted. Thus, from a historical standpoint, the Constitution was not the cause of changes. It played the role of an organizing principle. On the one hand, the Constitution set boundaries for the untamed element of public creativity, having confined it within

a rigid corridor of available existing political and legal options. On the other hand, it set forth clear motion vectors and strategic objectives for the development of the state and society to be implemented through concrete legal acts, decisions and actions.

As a result, from a historical and political standpoint, rather than being an ideological declaration, the new Constitution became a cohesive and, crucially, legally-enshrined nationwide project of building the new Russia.

Analyzing the meaning and importance of the 1993 Constitution, it is important to take into account the dynamics of changes in how this document was seen in the context of concrete historical realities. The historical era in which the new Russian Constitution was created is receding further into the past. The details of those dramatic events that influenced the development of the conception and drafting of the text of the Basic Law are practically erased from the memory of contemporaries. At the same time, both in our country and abroad, new scientific theories were being actively developed, our practical knowledge base was expanding, and views and expert judgments were changing. From the height of the accomplishments of modern legal and political science, many of the discoveries and truly creative solutions of twenty years ago seem to be almost obvious. First and foremost, we refer to the attitude towards the Constitution as a tool for managing social change.

It is important, however, to keep in mind that twenty years ago this scientific baggage and such approaches did not exist. In the early 1990s, ideas about the design and function of Russia's Basic Law originated not from desktop research or mathematical calculations. They were the result of lively and creative legal work and political art. In a situation of profound political conflict, a unique constitutional act was created that contained, in compressed form, the models of the new social order. It was able not only to implement and deploy these models in the real world, but also to become the foundation for restoring public consent.

Constitutions capable of reshaping reality in the intended direction in spite of an absence of political consensus in the country and the temporary weakness of state institutions are now called self-enforcing constitutions.

It is also distinctive that the 1993 Constitution was the first constitutional act in the history of our country that, despite numerous initiatives, was not amended after a new leader came into presidency in 2000. As emphasized by the President of the Russian Federation, Vladimir Putin, during his meeting with RF Constitutional Court judges on Dec. 12, 2012,

Basic Law . . . is a living instrument but, at the same time, its fundamental pillars must be treated with great care. Basic Law ought to be stable. And it is this very stability that comprises a significant part of the stability of the state itself and of the basic rights and liberties of the citizens of the Russian Federation.⁹

⁹ See the speech of the President of the Russian Federation, Vladimir Putin, at the meeting with the RF Constitutional Court judges on Dec. 12, 2012, <<http://www.kremlin.ru/news/17119>> (accessed March 5, 2014).

This position has deep philosophical and, at the same time, practical implications. A necessary condition for the transition to a post-industrial society and knowledge-based economy is reawakening the people's internal motivation for the maximum realization of their creative potential. For such a mechanism of creative self-development to finally begin to work, requires special preconditions – the condition of freedom that, as noted by 1998 Nobel Prize winner in economics, Amartya Sen, must be understood as not only as the guarantees of human and civil rights but also as freedom from poverty and violence, from the scarcity of economic opportunities and systematic social deprivation; from the abandonment of public services and the intolerance or excessive intervention of repressive agencies.¹⁰

Such special conditions do not emerge all by themselves and they do not exist in a vacuum. Strong state institutions and an effective legal system are needed to create, develop and preserve such conditions. The experience of the last decades of the 20th century has convincingly demonstrated that real freedom is only possible in an effectively functioning state with a stable constitution. Today, in practically every sustainably developing (meaning constantly changing) country, the adaptability of the legal system and the creativity of political practices coexist with the stability of currently effective Basic Law.

Nevertheless, discussions over the need to revisit Basic Law, which started after the adoption of the 1993 Constitution, continue to this day. Such ideas circulate not only among political and expert communities but also among the wider public. Long-term studies conducted by the Russian Public Opinion Research Center (WCIOM) consistently produce similar results year on year: less than 1/5 of the population have read the Constitution of the Russian Federation but almost half of respondents believe that it must be changed.¹¹

Such moods create risks for both the stability of the Constitution and overall political stability since 'the dilution, the loosening of Basic Law implies a forerunner for the dilution and loosening of the state itself.'¹² Generally speaking, a propensity to think that the only way to counter the imperfections of life – from corrupt public officials to a boiler that freezes every winter – is to immediately amend the country's Constitution is indicative of adolescent black-and-white thinking rather than of Basic Law weaknesses.

In contrast to the general public, which tends to be emotionally judgmental, experts in the field substantiate their attempts to push constitutional reform with various theoretical arguments. One often hears that it is the fact that practically

¹⁰ For details, see Amartya Sen, *Development as Freedom* (Oxford University Press 1999).

¹¹ See, e.g., Russian Public Opinion Research Center (WCIOM), Конституция России: менять или не менять? [The Constitution of Russia: To Change or Not to Change?], Press-release No. 2186 (Dec. 2012), <<http://wciom.ru/index.php?id=459&uid=113463>> (accessed March 5, 2014).

¹² See the speech of the President of the Russian Federation, Vladimir Putin, at the meeting with the RF Constitutional Court judges on Dec. 12, 2012.

any modern reality can fit within the framework of the current Constitution that comprises its main weakness. That there is too much 'space' in the text of Basic Law, *i.e.* too much latitude, too much freedom for political improvisation.

You can never have 'too much' freedom. In fact, attempts to turn the Constitution into a bureaucratic instruction that would regulate in detail every step to the left or to the right are only indicative of the immaturity of the ruling class and civil society. In an advanced democracy, mature elites can comply with principles and laws regardless of how severe the sanctions for non-compliance are.

There are other circumstances that from time to time provoke modern elites and society to call for a revisiting of currently active constitutions on the pretext that it is necessary to make them more specific and less ideologized.

One such circumstance is the global spread of information technologies and the cultural paradigm of scientific rationality typical of the Western world. According to Max Weber, a classic of German sociology, it is the formal rationality inherent in this civilization that could be one of causes of the emergence of science, advanced legal systems, bureaucratic organization and capitalism in the West.¹³

George Ritzer, an American sociologist, has thus formulated the main features of formal rationality in the West:

- (1) emphasis on quantification;
- (2) propensity for effectiveness;
- (3) search for predictability;
- (4) tendency towards replacing humans with machines; and
- (5) seeking control over uncertainty.¹⁴

Thus, the spread of fashion for effective management and the desire to prevent uncertainty and control every possible risk including those associated with lively socio-political creativity provokes the bureaucracy's desire to make the current Constitution 'more specific.'

Another, no less important circumstance is society's desire to protect itself with the letter of the Constitution from those bureaucratic actions that are inconsistent with the constitutional spirit (which returns us to the argument that mature elites are capable of adhering to principles and agreements regardless of legal sanction).

The practical implementation of the basic liberal democratic principle that 'everything which is not forbidden is allowed' led to unanticipated consequences, which dictated the need for special mechanisms to limit potential 'excesses of freedom.' This greatly extended the scope of application of risk management technologies while the degree of detail in agreements, contracts and legal acts began to tend towards infinity.

¹³ Max Weber, *Протестантская этика и дух капитализма* [*The Protestant Ethic and the Spirit of Capitalism*], in Max Weber, *Selected Works*: Translated from German (Yury Davydov, ed., Piama Gaidenko, foreword) (Progress 1990).

¹⁴ George Ritzer, *Sociological Theory* 139 (McGraw-Hill 1992).

Thus, in 1995, the text of the federal law on the election procedure for the Council of Federation of the Federal Assembly of the Russian Federation comprised 700 characters only, while the currently effective law (the edition as of April 2, 2013) amounts to more than 25 thousand characters. While in 1995 legislators used little more than 17 thousand words (17,290) to regulate the State Duma election procedure, the current federal law comprises almost 58 thousand words (about half a million characters).¹⁵ At the same time, this is not to say that the number of criticisms or complaints about the elections has declined.

Aside from this, the fashion for libertarian ideas that from time to time emerges in Russian public discourse (particularly, the view of the constitution as a social contract) also provokes the general public to advocate for more detailed regulation of relationships with the state in an updated constitutional act.

Indeed, comparative analysis of more than 300 written constitutions conducted by American researchers suggests that the closer to the present day we get, the longer and more detailed the constitutions become.¹⁶

Paradoxical as it may seem, however, the constant elaboration and improvement of constitutional acts makes them increasingly more unstable. In their large-scale comparative study, Thomas Ginsburg, Zachary Elkins, and James Melton found that before World War I the average constitutional lifespan comprised 21 years and that after the War this had decreased to only 12 years.¹⁷

The problem may possibly be that reality can pose more unexpected and creative challenges than the most sophisticated experts could ever foresee. It was noted by the aforementioned G. Ritzer that one of the objective consequences of the triumph

¹⁵ Federal Law, О выборах депутатов Государственной Думы Федерального Собрания Российской Федерации [On the Election of Deputies to the State Duma of the Federal Assembly of the Russian Federation], May 18 2005, No. 51-FZ, 2005(90/91) Парламентская газета [Parliamentary Gazette]; Federal Law, О внесении изменений в отдельные законодательные акты Российской Федерации в связи с повышением представительства избирателей в Государственной Думе Федерального Собрания Российской Федерации [On Making Amendments in Certain Legislative Acts of the Russian Federation in Connection with Increased Voter Representation in the State Duma of the Federal Assembly of the Russian Federation], 2009(25) Парламентская газета [Parliamentary Gazette].

¹⁶ See Ginsburg et al., *supra* n. 7.

¹⁷ *Id.* Authors also state:

Interpreted as the probability of survival at a certain age, the estimates show that one-half of constitutions are likely to be dead by age 18, and by age 50 only 19 percent will remain. Infant mortality is quite high – a large percentage, approximately 7 percent, do not even make it to their second birthday. Also, we see noticeable variation across generations and across regions. For example, Latin American and African countries fit the joke of the French-constitution-as-periodical much better than does France itself. Our current analysis suggests that the mean lifespan in Latin America . . . and Africa is 12.4 and 10.2 years, respectively, with 15 percent of constitutions from these regions perishing in their first year of existence. Constitutions in Western Europe and Asia, on the other hand, typically endure 32 and 19 years, respectively . . . Finally, unlike the trend of improving human health, the life expectancy of constitutions does not seem to be increasing over the last 200 years.

of formal rationality is the constant emergence of irrational and unforeseen effects. The modern expansion of over-regulation and political risk management therefore begets its own opposite – the emergence of unanticipated challenges for which political elites may find themselves unprepared, especially if they have lost their ability to adequately act in crisis situations in line with the challenges and adhering to principles rather than complying with regulations only.

It is believed that, with the advancement of science and the adoption of innovative technologies, public administration becomes increasingly effective all by itself. Experience has shown that this assertion is rather debatable. On the one hand, many new social instruments, technologies, and approaches have indeed appeared that allow for an improvement in both our 'informational armament' and our understanding of current socio-political and economic processes. On the other hand, one of the decision-making paradoxes is the fact that one can only be 100% sure of the success or failure of a chosen strategy only after this strategy has been implemented.

Therefore, in spite of any preliminary debate, discussion and consideration regarding which alternative might be the most successful, a final decision is always a voluntary choice made in a situation of incomplete information (indeed, the 1993 Russian Constitution was nothing but such a voluntary choice). Moreover, the very idea that, with the growth of information about the external world, such voluntary choices can become increasingly 'objective' contains an inherent trap.

Neither an elaborate constitution, nor detailed regulations, nor large information systems can create for a decision-making leader a comfortable situation of Aristotelian logic where one has to choose between true and false – in other words, between right and wrong – and the experts and procedures are on hand to help one to do so. On the contrary, in a modern, complicated world one has to choose from several alternatives which, with a certain degree of probability, can be right (successful) under one frame of reference and, with a certain degree of probability, wrong (unsuccessful) under another frame of reference. In such situations, choice always implies risk. This is why the underside of any political or economic decision is the acknowledgement by the politician or the expert of their personal responsibility both for their choice and for its consequences.¹⁸

The experience of constitution building during Russia's era of change is interesting not only from the standpoint of history or theory. It demonstrates how certain decisions concerning the design of the new Russian Constitution and, hence, the model of a desirable future and strategy for the further development of our country were made – that is, in what historical context and what circumstances were taken into account. This experience is extremely topical for contemporary practices of social

¹⁸ For more details, see Svetlana Popova et al., *Измерения прогресса [The Dimensions of Progress]* 272 (Nauka 2010).

change management, both during periods of stability and in the times of crisis and upheaval.

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