



ORDINES

Per un sapere interdisciplinare sulle istituzioni europee

ISSN 2421-0730

NUMERO 1 – GIUGNO 2018

MIKHAIL BORODACH

Rationale of contemporary Russian constitutionalism and its meaning in the context of *rule of law* development in Russia

ABSTRACT- The research contains the analysis of the existential traits of contemporary Russian constitutionalism as a complicated societal and cultural phenomenon providing for a fundamentals of the legal environment of constitutional governance in Russia. Author highlights a number of specific features and factors which have a significant impact on the figure of contemporary Russian constitutionalism as well he also underlines that the most severe obstacles in the way to legal modernization of Russia are the global challenges, the distortion of the mass legal consciousness, and the excessive bureaucracy within the public authority's institutions. The research provides for the analysis of different views and approaches formulated by contemporary legal academic writers and Russian thinkers of the past in the context of the peculiarities of Russian constitutionalism.

KEYWORDS – constitutionalism, global challenges, legal nihilism, legal consciousness, political and legal culture, civil society, democracy.

Rationale of contemporary Russian constitutionalism and its meaning in the context of *rule of law* development in Russia**

SOMMARIO: 1. Introduction – 2. The general meaning of constitutionalism and its multiple-layer sense – 3. The modern challenges of Russian Constitutionalism – 4. Conclusion.

1. Introduction

Current Russian Constitution, adopted by the all-people referendum 12 December of 1993, is rather “young” one in the scope of worldwide practice of constitutionalism. At the same time, it is true to say that current Russian Constitution overcame a very complicated period of its primal probation within the two-decade period of its existence and implementation.

Nowadays, the 1993 Constitution of Russia is serving its mission rather suitably and, what is also significant, being left in its nearly primordial edition is a reliable legal, ideological and political foundation of contemporary Russian statehood, and as a consequence it provides for a set of favorable conditions for an evolutionary course of formation, creative and uninterrupted development of those processes and phenomena in Russian society, which are being encompassed by the term of “constitutionalism”.

Nonetheless, 22 years of “life” had been overcome by current Russian Constitution and undoubtedly became a period of accumulation of a critical mass of different shortcomings as well as negative factors which are inevitably going along with the Constitution and its implementation being arisen as by the Constitution itself as by the different causes incompatible

* *PhD in Law, associate professor, CEO at the Non-governmental Center for legal expertise and support of civil society institutions ‘SOCIS’ (Russia, Siberia, city of Tyumen).*

** Contributo sottoposto a valutazione anonima.

with its provisions. Having no claims to specify an exhaustive list of such shortcomings and factors, it is worthy to try to highlight several of the most probable areas where they are could become apparent:

- the issues of making laws to comply with the Constitution as well as the issues of constitutional practice, including constitutional justice;
- the issues of efficiency of implementation and protection of human rights provided for by the Constitution as well as of the rights of NGOs and other civil-society institutions;
- processes and tendencies within the framework of political system in Russia, including the area of public administration in particular;
- level of societal tolerance, including mass legal consciousness and societal expectations connected with the Constitution and constitutional values;
- general condition of contemporary legal studies and constitutional doctrine in particular.

Becoming apparent in the course of day-to-day life of Russian society and government, these shortcomings and factors due to their assemblage, or, as it was said earlier, due to their critical mass, drive the Basic Law of Russia and as a consequence the country on the whole and its multinational people to the frontier, overcoming of which is strongly connected with fundamental conversion of legal bases, or at least with searching and catching a principally new qualities of legal reality complying with the global and internal challenges of the moment.

Regarding this mainstream, theorists and politicians are being increasingly interested of the issue of optimal choice for constitutional development of Russia, because it becomes one of primary, vital importance. This tendency, if it is taken in its connection with some other non-legal factors, underlines in the best way possible the rationale and “exigencies of the moment”

concerning contemporary Russian constitutionalism due to present situation.

Revelation of rationale of contemporary Russian constitutionalism as in connection with the general meaning of the term “constitutionalism” as on the point of relevant tendencies and underlying challenges and collisions is the main aim of all reflections which are following further.

2. The meaning of constitutionalism and its multiple-layer sense.

Tuning up the “shade” of forthcoming discussion, first of all, it is worthy to refer to the general meanings of constitutionalism as a political and legal phenomenon, then as a study and a doctrinal aggregate. The usage of the term “constitutionalism” in this very sense was founded in some progressive political writings in between XVII – XIX centuries – era of bourgeois-democratic revolutions in Europe and North America, which marked the transition of civilized nations from feudal system to industrial economic. Professor V.E. Chirkin highlights regarding this fact that “Constitutionalism in its meaning of socio-political activism was founded long before the primal constitutions were adopted and in this sense it implied the demands to adopt a basic law, restricting the absolute powers of a monarch and guaranteeing human rights by legal means”¹. Modern legal doctrines also use the term “constitutionalism” as having triple meaning. For instance, purely theoretical meaning of constitutionalism implies itself a system of political and legal studies, in the other words, a doctrine that is being based on the high sense and top values of democracy provides for certain limitations of public powers by law whereas the main significance within the framework of legal system is attributed from this perspective to the

¹ V.E. CHIRKIN, *Constitutional law: the course for lecturers, doctoral and master’s students*, Norma INFRA-M Publishers, Moscow, 2013, 46 – 47.

Constitution – the legal normative act (that is to say *statute*) empowered with legal supremacy and enclosing a concentrated, balanced and abstract set of basic rights, interests and duties of society, individuals and government. At the same time, the practical meaning of constitutionalism is being considered as the current political and legal regime in a certain State, which provides for relevant limitations of public powers by the Constitution based on appropriate ideas and values as well as on the designated institutions and relations. All these aforementioned could be characterized as *constitutional governance*.

From this view, professor V. E. Chirkin continues his idea, the beginning of which is mentioned before; he states, in particular, that «Nowadays this activism (constitutionalism – *by M. B.*) has another shape: demands for democratization and socialization of constitutions (and, consequently, of the societal being on the whole) to make them comply entirely with the challenges of XXI century»².

And, finally, the third meaning of constitutionalism, which seems to be encompassing the purely theoretical and practical senses of this term, is that the constitutionalism is notably complicated socio-political and legal category. In this meaning constitutionalism is the phenomenon based on the historical background of constitutional democracy, institutions of public administration and the political regime, which are in harmony with the Constitution. It is also maintained by existing and effective system of protection of the Constitution, constitutional order and top values of democracy and rights of a man and a citizen provided for by the Constitution.

From this perspective, constitutionalism has a set of key properties and substantive traits, which are the subject for further discussion.

The first one is focused on the constitutional ideas and values based on the achieved high level of democratic development: consciousness of

² *Ivi*, 47.

commonality and indissolubility of societal and governmental interests and, consequently, of necessity to maintain the relevant consensus with the matters of societal and governmental order as well as with the matters of public administration; admission of the priority of human life and human dignity within the framework of day-to-day governance; the idea of people's governance and democratic way of forming of crucial governmental institutions based on the former; supremacy of law; and some others.

It is of principal significance that these constitutional ideas and values shouldn't merely exist in the society: they should be accepted by the society, firmly entrenched in the mass legal consciousness and pass the so-called societal legitimation. In this aspect, it is worthy to pay the attention to some views expressed by notable Russian philosopher and legal theorist Ivan Il'in, who lived in the first half of XX century (he abandoned Russia after Bolsheviks' October Revolution of 1917). In particular, Ivan Il'in considered a "morally suitable", "normal" legal consciousness as a fundamental of his "State and Law" paradigm. He stated that «actually we have only "a demonstration" of Law (in its highest sense) within the borders of external societal reality whereas the sphere of pure "life" of Law is a human's heart, soul of a man, where Law becomes apparent fueled to the might of genuine value; a human's heart, soul of a man, is still the only environment where as societal being of an individual as entire "life" of the State on the whole are conceived, becoming mature and developing further»³.

It is also worthy to note that principally the idea of societal "acceptance" of the established governance and consequently its basic – constitutional – foundations were expressed much earlier, and what is a bit paradoxical it was alleged by some apologists of statist-totalitarian studies. For instance, Niccolò Machiavelli considered the need to capture hearts of people as the main challenge for a sovereign. In turn, Thomas Hobbes took a social contract as the basis of societal acceptance of the established governance.

³ I.A. IL'IN, *Nature of legal consciousness*, Rarog Publishers, Moscow, 1993, 21.

Charles Montesquieu who represented the liberal wing of political and legal studies stated in his discourse “On the Spirit of Laws” that «Legislator should comply with people’s mentality...as we do our best when we’re acting freely and due to our natural good genius»⁴

Famous Russian constitutionalist of the day – Chief Justice of Russian Constitutional Court Valeryi Zor’kin is precise in his notion that «It is possible to find a lot of statements of contemporary philosophers and sociologists underlining that Law is tend to be effective within the only scope of means which are socially accepted (Pierre Bourdieu), and that Law is ought to be in ability to prove its own legitimacy in hearts of people who have rather different views on all other matters (Jürgen Habermas), and so on. It is hard to believe that someone will dispute on that the legal system is effective if it maintains the legitimacy of law making and law execution...in hearts of the vast majority of people»⁵

The second substantive trait of constitutionalism in its contemporary complex meaning is the existence of well-developed system of statutes and sub-law legal acts based on the Constitution, in turn. The source of this characterization of constitutionalism is the democratic principle providing for the government’s obedience to Law. However, the adoption of laws manifesting with more or less consistency the commitment of Legislator to follow these ideas is not the end in itself; hence, the adoption of such laws does not imply the constitutionalism *per se*. Normative foundations of constitutionalism are strongly connected with apparent and hierarchical system of legal regulations and statutes, prescribing such regulations. From this perspective, the rules of positive law have their prior significance within the framework of this system but the same one is attributed to commonly

⁴ C.L. MONTESQUIEU, *On the Spirit of Laws*, Misl’ Publishers, Moscow, 1999, 261.

⁵ V.D. ZOR’KIN, *Civilization of Law and Development of Russia*, Norma INFRA-M Publishers, Moscow, 2015, 16.

recognized and constitutionally secured natural and inalienable human rights.

The Constitution is at the top of the pyramid of legal acts forming the environment of constitutionalism, and its provisions are the bases for all other normative rules regardless to their legal branches of origin. The supremacy of the Constitution is indispensable trait of genuine constitutionalism.

It is of vital significance for real existence of constitutionalism to have relevant political and legal regime, which is presented in fact, being agreeable to the constitutional standards. This is the core of the third substantive trait of constitutionalism. However, it is worthy to say that a regime, of course, could not be considered as the constitutional one if it is based on the constitution, which is not providing for democratic principles and ideas, and does not declare and protect the known vast of natural and inalienable human rights. Concerning this trait of constitutionalism, it might exist just in cases of compliance and compatibility of democratic political and legal regime with the democratic Constitution. From this perspective, professor V.E. Chirkin notes that «Nowadays genuine constitutionalism has democratic, social, legitimate and secular nature. Of course, one may say that there is a formal or a defective constitutionalism in some countries in the world, but it is certainly not a genuine constitutionalism»⁶.

The next and last one substantive trait of constitutionalism is connected with the existence of effective mechanisms supplying protection of the Constitution itself and the constitutional order based on it. Doubtlessly, these mechanisms have their own legal origins and foundations including those of constitutional provisions, as well as relevant system of political and social institutes designated to realize aforementioned mechanisms.

⁶ V.E. CHIRKIN, *op. cit.*, 47.

Discussing the substantive trait of constitutionalism that is described above, it is important to pay attention to the fact that protection of Constitution and constitutional order should not be based on the assemblage of protective legal regulations and punitive measures of the State apparatus only. Instead of it, protection of the Constitution and key principles of constitutional order requires firstly the actual existence of effective conditions, which are rather suitable for a comprehensive fulfillment of the rules of Constitutional law within the day-to-day social practice, implementation of basic democratic values and ideals, rational and righteous interpreting of constitutional provisions, including the maintenance of their integrity and stability (in particular, by providing for a designated legal means for adoption of constitutional amendments if those means meet current societal needs and expectations).

Professor N.V. Vitruk considers constitutionalism as a multiple-element phenomenon having several different levels and layers. He highlights and explains some additional edges of this phenomenon such as constitutionality and constitutional order operating simultaneously with the legality and legal order overall. In particular, professor N.V. Vitruk states that «On the basis of the Constitution the legal being of Russia was enriched with some new phenomena and processes, which had met their manifestation by the categories of *constitutionality* and *constitutional order* [...] The constitutionality means that the requirements connected with maintenance, implementation, securing and protection of constitutional provisions are addressed to the institutes of public administration directly, as well as to the associations of individuals and their officials, who exercise public duties based on the Constitution and laws. [...] The requirement to implement the Constitution and its provisions addressed to individuals and corporate entities acting within the borders of private law is demanding to comply with the general constitutional order. A distinction between the constitutionality and constitutional order might be pointed out with such criterion as legal scale of one and another.

Implementation of the Constitution itself is the core of constitutionality whereas the constitutional order is being formed within the framework of day-to-day realization of all the constitutional prescriptions»⁷.

Finalizing general reflections on the meaning of term “constitutionalism” it seems to be of high importance to note that this phenomenon through all its senses is not a static one but dynamically changing and developing. Due to this, it is fair to conclude that every state and every nation as well as each historical era in their development have their “own”, particular constitutionalism in its unique manifestations.

From this perspective, professor N.V. Vitruk, for instance, argues that «All components of the constitutionalism are developing under pressure of social practice, different factors and real life overall, being in a state of permanent interaction between each other»⁸. Developing this idea, it is worthy to base the conclusion on the opinion of professor V.E. Chirkin, who states that «*The constitutional doctrine* is concrete, and it cannot and usually haven't a universal meaning. It can be associated with a group of quite similar countries or with a single country as well»⁹. Views of the Chief Justice of the Constitutional Court of Russia professor V.D. Zor'kin conform to aforementioned opinion: he underlines in particular that « [...] as the Constitution itself as all possible amendments and interpretations of it cannot but base on the certain specificity of the historical doom and cultural peculiarities of that society and that country, the legal foundations of which are provided for by this Constitution»¹⁰.

⁷ N.V. VITRUK (a cura di), *Constitutional law of the Russian Federation*, Norma INFRA-M Publishers, Moscow, 2010, 153 – 155.

⁸ *Ivi*, 153.

⁹ V.E. CHIRKIN, *op. cit.*, 47.

¹⁰ V.D. ZOR'KIN, *Issues of constitutional legal development of Russia* (to 20th Anniversary of the Constitution of the Russian Federation), in *Contemporary constitutionalism: challenges and perspectives* (the digest of International conference, devoted to 20th Anniversary of the Constitution of the Russian Federation; Saint Petersburg, 14-15 November 2013), a cura di V.D. ZOR'KIN, Norma Publishers, Moscow, 2014, 8.

It is evidently to say that former, contemporary and future Russia was not, is not and will not an exclusion in this regard.

3. The modern challenges of Russian Constitutionalism

Now, after a short overview of the general approaches to understand constitutionalism in its complex and multiple-layer sense, it is possible to commence the revising of conditions and factors, or figuratively speaking, of modern challenges, which contemporary Russian constitutionalism faces with and due to which, consequently, it is developing with its new nature and new appearance.

The first one of those challenges, which is the most urgent on its significance and the scale of impact, the forming tendencies and existing processes there in a global dimension. Russia as an inevitable and traditional participant of global processes influences on them as well as is being exposed to their effects – directly or in a “turbulence”.

In this aspect, it seems to be rational to start a discussion from the point of globalization as well as accompanying efforts and aspirations of some countries or their coalitions to obtain a privilege to provide an unacceptable and dramatic impact upon events and decisions as worldwide as in a certain regions of world or even in an independent national states in some cases. From this perspective, professor V.D. Zor’kin, foreseeing the over-speeding spiral of global contest between some states, pointed out in 2013 very accurately that «[...] the current circle of globalization is being played out in its geo-economic meaning and, moreover, is becoming increasingly failing with its socio-cultural mission».

Globalization is getting traits of such a process, which was named by English sociologist R. Robertson as *glocalization*, implying the divergence between

key tendencies of development running to poles of global and local. « [...] it is being evidently seen as strengthening of global ties and interdependence as the reversal processes of “ring closure” of some countries to the local economic unions»¹¹.

Professor V.D. Zor'kin argues that due to aforementioned conditions the humankind is faced with the blurring and destruction of socio-cultural national identities; however, the latter trying to counteract these trends are often inspiring an aggressive or even criminal behavior. He finally states that, of course, this global mainstream has inevitable and immediate impact upon Russian society having an appearance of tendency to increase “centrifugal” social forces, which could be named in turn as a “socio-cultural cleavage”¹².

However, it is worthy to note for the truth that the causes of socio-cultural cleavage in contemporary Russian society are not connected with the external impact only. There are also internal factors presented which are increasing this tendency. These factors have their roots in Russian history and national mentality of Russia's people. The events and processes that were existing in this country in the near past and exist nowadays, as well as the results of those events and processes are maintaining aforementioned factors.

From this perspective, professor V.D. Zor'kin underlines that « [...] the issue of defining of the general line of Russian socio-cultural cleavage is waiting for its exploration yet. [...] However, it is already clear now that prerequisites of this cleavage are enclosed by the shortcomings of legislation, “sins” of law execution and justice, inequality before law and court, and glaring inequality in the social well-being [...] »¹³. He also specifies some other reasons connected with the cultural, economic and social backgrounds of Russian society.

¹¹ *Ivi*, 9-10.

¹² *Ivi*, 10.

¹³ *Ivi*, 13.

Nonetheless, it demands to pay a particular attention to, that one of the most urgent factors of this growing up socio-cultural cleavage according to the views of professor V.D. Zor'kin is «actually increasing contest between, on the one hand, the moral and ethical imperatives laid down in the basis of Law and massively rooted in the legal consciousness of Russia's people, and, on the other hand, the tendencies of visible changes in Russian societal reality, being popularized and advocated actively»¹⁴. In the other words, one of the key problem is being unzipped through the meaning of 'cultivation' and "acclimatization" of different political, economic, legal, technical and other novelties in contemporary Russian society, which are learned by people as from the worldwide practices as from the native space of Russia. And, one cannot but agree with this fact.

It is undoubted that aforementioned cleavage is devastating foundations of the current Russian constitutionalism, because it destroys simultaneously as the bases and means as the prerequisites of "bringing up" of all those values and ideas, which are forming, strengthening and developing constitutionalism in today's Russia. A societal integrity is the major reason of the Statehood "running healthy".

Here, it is worthy to refer to the views of Ivan Il'in, who argued that «A State is something of a spirit and something for a soul. It is a moral, spiritual unity of people, because the spiritual ties are laid down in the basis of Statehood; these ties are designated to "live" in souls and create motives there for righteous behavior of people. [...] Due to its core idea, a State is a union of people, spiritually belonging together, of tribes and nations united for a homogeneous execution of Law in its highest sense»¹⁵. Moreover, in connection with the federated territorial structure of Russia the following thought of I.A. Il'in seems to be of the same significance: «Federation is departing from a lot of units and moving to their unity and integrity... A

¹⁴ *Ivi*, 14.

¹⁵ I.A. IL'IN, *Nature of legal consciousness*, cit., 106, 110.

federation does not disjoint (differentiate, divide, or fragment) but does join (integrates, unites and grows together)¹⁶».

Thus, the issue of counteraction to the devastating effects of the so-called “centrifugal” social forces and processes in contemporary Russian society, and the task to restore and protect the integrity of the latter are of constitutional significance evidently. And these issues and tasks can be settled successfully at the fundamental stages of Russian constitutional model only.

From this perspective, it is worthy to refer again to the views of professor V.D. Zor’kin, who highlights that «The Constitution – is *formalized social contract*, providing for the principles of Statehood and social order. However, it should be necessary based on the *real social contract*, established by the main social stratum and groups of our society. The key problem is that the fundamentals of real social contract are disappearing within the riven society, and consequently there is arising that, what is called as *factual Constitution*. Here, the relevant fundamental could be the only social concord [...] Moreover, the main thing for social concord to be, is not a formal “yes” of citizens and different social groups, but *social trust*, which is encouraging them to demonstrate their genuine and rational will, a trust between people, social groups and institutions, society and the government overall»¹⁷.

It should be noted in particular, that the issue of social trust to the government, which is in this meaning being as one of the major factors of social integrity, principally, is not a new one for the political and legal environment of Russia and for the Russian legal doctrine as well. It is truly evident that the role of social science and humanities on the whole, as the significance of legal studies particularly, are of crucial importance with settling aforementioned social distrust. And, that’s why responsibilities are

¹⁶ I.A. IL'IN, *What's the federation? (Our Tasks: pamphlets of 1948 – 1954, Vol. I)*, Iris-Press, Moscow, 2008, 228.

¹⁷ V.D. ZOR'KIN, *Issues of constitutional*, cit., 17-18.

beyond. Hence, referring to modern Russian legal writings, we may state some major tasks to restore the pure meaning of constitutionalism in Russia today; they are generalized as follows:

- to perform complex interdisciplinary investigations on *Russian civilizational and historical backgrounds* in comparison with worldwide practices of political and legal development;
- to elaborate *contemporary concept of Russian constitutionalism*, which is adequate to Russian civilizational and historical peculiarities;
- to develop *a modern dogma of Russian law* on these grounds, which would be able to emphasize the constitutional principles and provisions duly, making them real within the law-creation and law-execution practices in Russia.

Due to these aspects, the Chief Justice of the Constitutional Court of Russia professor V.D. Zor'kin, for instance, stresses especially that «Legal theorists, not only constitutionalists but all others, have no as an opportunity as a moral right to limit themselves to their single normative “split plot”. They should make their inventions taking into account all known risks and the necessity of persistent and well-weighed legal risk-management. This notion is equally applicable as to the issues of constitutional amendments as to the renewal of laws, and, of course, to the issues of law execution as well, and to the systemic legal evaluations of risks, which are arising inevitably in the context of elaboration and realization of strategic political decisions in any social area, whatever it is [...] »¹⁸

From this perspective, it seems to be necessary to refer also to the respectful opinion of professor S.A. Avakian (he is the Head of the Chair of Constitutional and Municipal Law at Lomonosov Moscow State University). Like professor V.D. Zor'kin, he pays his attention to that «During the last period the degree of social trust to the government is dramatically decreased

¹⁸ V.D. ZOR'KIN, *Issues of constitutional*, cit., 17-18.

amongst the vast of Russian people»¹⁹. As for the causes of that, widely known thinker marks tactfully a “not quite satisfactory” fulfilment by the government of its missions and tasks, an increase of bureaucratization of government institutions and an existing actual danger of the so-called “privatization” of the Statehood (when public powers are used to serve the personal interests of officials and their organized clans).

In his reflections, professor S.A. Avakian proposes some possible variants to restore social trust to the government; in particular, several of the ways are as follows:

- settling betweenness of society and the government;
- re-development of civil society institutions. Civil society in Russia should become truly self-organizing (or self-organized). In the other words, it has to have its own missions along with the common tasks of society and the government; it should also be co-organized within its different groups and should be self-governed by them; and, finally, it should be thought over the creation of some guiding center for the society on the whole;
- immediate and maximized increase of the role of an individual in the framework of constitutional order due to two aspects of his or her real life: as an employee, and as a habitant.

Professor S.A. Avakian also pays his specific attention to the aspect of constitutional background of a feedback, which should come from an individual to society and the government. In particular, academic writer alleges that «Our constitutional foundations do not reflect one yet important component at all – everyone’s duty to this country, society and environment»²⁰. In this context professor S.A. Avakian means, that category of a “duty” shall be deemed to be «An essence of not only legal but rather general civilizational requirements to an individual. Hence, the category of a “duty” is much broader (than a “responsibility” or an “obligation” in their

¹⁹ *Ivi*, 17.

²⁰ S.A. AVAKIAN, *Russian constitutionalism: several notes about immediate tasks*, in *Legal World journal*, 2/2015, 23.

legal meanings. – *M.B.*), and it presupposes, of course, a certain behavior of an individual, but (unlike “responsibilities” or “obligations”. – *M.B.*) it cannot be limited to a set of several precise rules»²¹.

As a consequence, professor S.A. Avakian concludes that «It was always of crucial importance and it is today – in these difficult times, – that *ideas of responsible individual's behavior and Russian patriotism* should run through the whole Russian society»²².

In connection with this statement, it is fair to note that there is one more challenge, which contemporary Russian constitutionalism is being faced to, – a crisis of civil consciousness overall and, particularly, legal mentality of Russian people.

Consistent devastation of Soviet ideology and the system of societal values based on the former, which was being performed through the era of “Perestroika” (it commenced in the Soviet Union about 30 years ago) as well as through the consequent periods of reforms, due to the absence of a worthy ideological alternative was resulted in a total disorientation of Russian society, in its inability to choose the way for further development and for the augment of existing achievements of former era as well as resulted in its failure to move consistently through the chosen path. In circumstances of such “vacuum” the current Constitution of Russia, adopted by the all-people referendum in 1993, including all the democratic and humanistic values and ideals enclosed in it, has the only perspective to be devalued due to the mere absence of an adequate grounds for fruitful cultivation of aforementioned values and ideals in modern Russian society. It is true to say, that legal mentality and legal consciousness in today’s Russia practically in any of their dimensions – from common to professional, and from an ordinary man to a representative of the “governing elite” – are suffering the urgent extremums of their distortion

²¹ *Ivi*, 28-29.

²² S.A. AVAKIAN, *Constitutional Law of Russia*, II, amended, Norma INFRA-M Publishers, Moscow, 2014, 659.

such as legal idealism and legal nihilism. From this perspective, professor N.I. Matuzov absolutely fairly notes that «Both these phenomena (legal idealism and legal nihilism. – *M.B.*) seem to be different and incompatible but “live peacefully” along with each other, forming a common dismal picture of uncultured legality»²³.

It is worthy to underline specifically that mentioned phenomena of legal nihilism and legal idealism have their deep roots in Russian history, and due to this, they seem to be a specific curve of our legal being, an inherent element of Russian people’s mentality. Ideas and values of Law were not true effective for the mass people’s mentality through the Tsarist era, then were maltreated by Soviet leadership, and finally, were distorted excessively through the era of “Perestroika” (before the dissolution of USSR). Namely, it is worthy to remember one ancient Russian proverb here, which sounds precisely as follows: «A law is like a pole of wagon – it points wherever you turn it to» (Italian analog is «*Fatta la legge, trovato l’inganno*»). This proverb depending on its semantic inflection could express equally as nihilistic, as idealistic edges of one’s distorted legal consciousness. That’s why there was said a very long time ago that Russia has never been governed by Law but by the persons always.

In discussing different issues of contemporary Russian constitutionalism, it is appropriate to refer to some thoughts of professor V.D. Zor’kin again, which are, in particular, as follows: «Here, in Russia [...] the process of “life under law”, if we talk about the historical scales, has yet been commenced»²⁴. That’s why the significance of social regulations (not only legal rules) is increasing permanently due to the reflection of those within the social consciousness. The Constitution of Russia, being highly abstract with its provisions unlike the prescriptions of certain branches of Law, is much more absorbing and, consequently, manifesting the established

²³ S.A. AVAKIAN, *Russian constitutionalism*, cit., 29.

²⁴ N.I. MATUZOV, *Legal nihilism and legal idealism*, in *General Theory of State and Law: Legal Theory, An academic study*, II, Zertsalo Publishers, Moscow, 1998, 400 ss.

societal system of moral values. Hence, namely the Constitution of Russia should be an inevitable legal mean, which is tightening the whole system of axiological-enriched normative regulation of social relations. In turn, this approach creates the opportunity to make Law and mass people's consciousness bound naturally.

It seems to be the most danger thing, that those defects of mass legal consciousness – legal nihilism and/or legal idealism, – are deeply rooted in views of public officials and other representatives of State apparatus in Russia. However, it was yet stated by Alexander Herzen in XIX century that «A Russian, whoever he is – an ordinary man or a nobleman, – breaks a law always when he feels it to be unpunished; the government does the same»²⁵. In turn, our contemporary philosopher L.M. Belkin argues, that legal nihilism is «Naturally belonging to the bearers of public powers and duties, it arises from the State apparatus core and is objectively generated by the bureaucratic nature of public administration, because a negation of Law is the way of its existence»²⁶.

Underlined by different thinkers and academic writers during the last two centuries, the neglect to Law as well as to its principles and values, arising from public authorities in Russia, which is the true meaning of legal nihilism associated with governing elites, is being aggravated now by such tendencies as lobbyism and complication of laws with their legal technique and structure; as a result, laws are being deprived of their direct implementation intentionally, and, consequently, they could be realized through the vast of sub-laws only. Moreover, there are rather often cases of adoption “laws for show”. In the other words, some laws had never been planned to regulate the relevant social relations really, but these were adopted to pursue some other purposes, for instance, like creation of mass feeling that political

²⁵ V.D. ZOR'KIN, *Issues of constitutional*, cit., 8.

²⁶ A.I. HERZEN, *Collected Works*, VII, Moscow, 1956, 251.

promises alleged through election process are being fulfilled. In these cases, one can talk about the legal idealism.

As a dramatic result, legal nihilism and legal idealism being deeply rooted in Russian society due to their mutual influence of one to another, – from the government to people, and from people to the government, – attain a trait of self-reproducing phenomenon, that is highlighted by M.O. Khazamov quite precisely: «The government through the names of governing elites is neglecting the interests and rights of individuals and their associations in a purely nihilistic manner, whereas individuals and their associations attain the skills to ignore the legal demands of the government in the same nihilistic manner»²⁷.

Trying to reflect aforementioned situation in Russia, the inevitable conclusion is that the distorted legal consciousness of ordinary people is a kind of survival for the Russian bureaucracy. The lack of mass legal culture amongst Russian people and negation of legal rules by one part of populace as well as making legal provisions a fetish by others devalue the necessity of effective implementation of laws, and it consequently gives to elites much more opportunities to enjoy their own interests, which could be rather distant from real needs of ordinary people. Considering this aspect, professor N.I. Matuzov expressed the following: «Now, we are witnesses of *legal cynicism* of governmental institutions as well as of legal nihilism of those dependent on governance»²⁸.

Due to the aforementioned background, the vital requirement is to perform some extraordinary measures to revive the mass legal consciousness of Russian people, including the measures designated to minimize the

²⁷ L.M. BELKIN, *Genesis of legal nihilism in the context of bureaucracy doctrine*, in *State and Law journal*, 10/2013, 19.

²⁸ M.O. KHAZAMOV, *Legal nihilism as a danger for social security in Russia. Dissertation of the PhD in Legal Philosophy*, Krasnodar, 2006, available at URL: <http://www.lib/ua-ru/net/diss/cont/218007.html>.

manifestations of legal nihilism and legal idealism. Otherwise, the ideas and values defining the nature of Russian constitutionalism will remain unachievable ideals in the near future and, consequently, will lose their meaning after a time and become devaluated in their majority, or will be completely rejected by the society.

The issues of establishing of an optimal balance of triple helix “individual – society – government”, highlighted above, as well as the issues of creation of the atmosphere of mutual trust between the government and people, and of overcoming the crisis of mass legal consciousness in Russia – all these encourage to pay a focused attention to one more process, which exists in the framework of Russian political system and has an immediate impact upon the real traits of constitutionalism: we should talk about permanent bureaucratization of public powers in Russia.

The bureaucratic system and people, as professor S.A. Avakian states, are immediate participants of the “competition” between formally recognized constitutional principles and ideas, on the one hand, and the effects of their real implementation on the “sub-constitutional level of legislation”, on the other hand. He also argues that «What would be great are constitutional ideas, the MPs and officials came to power will establish their own “constitutionalism”. Its general manifestations would be intended to fill in the parliament with MPs, who may become obedient after a short time [...] and the State apparatus to be reinforced with the individuals, who are like those in office already, and a candidacy for an office (yet in a stage of hiring) to be ready to become a part of corporate bureaucratic community, whose interests are in priority instead of the needs of ordinary people [...] then, finally, for both these groups – MPs and officials, – would be quite nice, if the judges to be weak with their proficiency»²⁹.

Of course, the officialdom and bureaucratism are inalienable characteristics of any State. The dialectical relations of these phenomena with the

²⁹ N.I. MATUZOV, *Legal nihilism as a life-style*, in *Law and Politics journal*, 12/2012, 2086.

Statehood and, finally, with the society excludes an opportunity of their separate existence or of eradication of one by another. Hence, in today's Russia the key constitutional task is to save the State apparatus from extremal forms of bureaucratism, which have just commenced to become real.

At the beginning of this discussion, it was highlighted that legal means providing for and maintaining the efficacy of constitutional provisions, protection of the Constitution and its stability are an important component of the nature of constitutionalism. Due to this, it is worthy to pay the attention to the current increase of revisionist claims in Russian political and legal writings. One can hear from academic writers and politicians various calls to change the Constitution of Russia more and more often, and what is significant, they call to change it dramatically, by *tabula rasa* principle.

Apologists of this idea argue that constitutional changes are the only way to modernize Russia comprehensively. However, at the same time, it is evident that the dramatic and comprehensive change of the Constitution of Russia is unable itself to settle the issues of modernization and development of society and the government. For that, a complex of political, economic, socio-cultural and, finally, namely legal means is needed. A try to replace the "bad" Constitution by a "good" one is nothing but the manifestation of the same legal idealism in a gross way, when we could talk about the distortion of fundamentals of Russian societal public order by the idealistic legal consciousness. That's why those calls to change the Constitution of Russia dramatically do not deserve even to be considered as a half measure indeed.

A very often and almost ubiquitous lack of intentions and actual measures to implement into real life the current Constitution is the reason of evident distinctions between the constitutional provisions and actual legal reality in Russia today. From this perspective, one cannot but agrees with the opinion of professor V.D. Zor'kin, who criticizing revisionist views upon the current

Constitution argues that « [...] Having no experience to live with a “bad” Constitution, you can't learn to live under any Constitution at all»³⁰. Furthermore, he underlines also that «Sooner or later we ought to restore the Rule-of-Law. And namely, in a common civilizational sense. Hence, when we will return to the idea of Law as a vital foundation of pure human being, we ought to raise a necessary question of whether the “*tabula rasa*” principle is or not a cornerstone of the current lawlessness and whether it is based or not on a horrible doctrinal fake, which resulted in the degeneration of contemporary societies? Or, at least, was it helpful for this degeneration?»³¹.

Sustainability and stability of a constitution, which is the foundation of a national legal system of a country as well as of social and governmental institutions existing there, is, in turn, a reliable guarantee of the stability of all these mentioned above, and a significant factor of social integrity and progressive development on the whole.

Due to this aspect, it is worthy to refer to one more expression of professor V.D. Zor'kin, who stresses that «A sustainable Basic Law of a country, to which lawyers as well as politicians and ordinary people are addressed permanently, become step-by-step one of the key symbols of legal identity of this nation [...] Namely due to this reason, nations exercise an overall changes of their constitutions in those cases only, when such changes are being dictated urgently by a new social reality. In all other cases nations make minimal “local” amendments only or merely clarify the interpretations of some relevant basic constitutional provisions to adapt them to the changing social needs. [...] The Constitution of Russia contains a set of provisions, which provide for quite enough potential to maintain the progressive legal development in this country. The Constitution provides for several simultaneous opportunities as to make certain clarifications of the

³⁰ S.A. AVAKIAN, *Constitutionalism and bureaucratization of public authority*, in *Lomonosov Moscow State University's Herald*, Series 11 Law, 1/2014, 64.

³¹ V.D. ZOR'KIN, *Civilization of Law and Development of Russia*, cit., 55.

“clauses” of social contract as to realize appropriate amendments, which develop our society and the government to become closer to the highest worldwide achievements attained in the fields of politics and Law»³².

That’s why a comprehensive implementation of legal potential of the current «Constitution mostly depends on whether *the balance between stabilizing and renovating functions of it* would be found in right or wrong proportions. Finally, it is a question of reasonable and effective limitations, manifestations and legal means of adaptation of commonly recognized patterns of contemporary constitutionalism to highly complicated reality of our Russian day-to-day life»³³.

Thus, it is impossible to see any other way for legal renovation of today’s Russia, then the way of evolutionary and scrupulous reasonable development of society and the government on the basis of the current 1993 Constitution.

4. Conclusion

In conclusion, it should be noted that picture of today’s Russian constitutionalism, which was “painted” above, has inevitable and natural impact upon the legal system of Russia overall. It is a doubtless fact, that Russian laws being based upon the constitutional fundamentals and thus forming a natural monolithic integrity should overcome the contemporary challenges, mentioned above, on their sub-constitutional level as well. In this context, the frontier task is to provide more comprehensive implementation of constitutional provisions within the different branches of Russian Law and to decrease a break between the Constitution of Russia and statutes, sub-law acts and acts of law execution, because this distance became recently too oppressive and dramatic in many cases.

³² *Ivi*, 188.

³³ V.D. ZOR’KIN, *Issues of constitutional*, cit., 6-8.

It is also undoubted that the leading role in these processes is on the institutions of constitutional justice. Moreover, this role is not limited to adoption of judgments on the issues of constitutional compliance only; it implies also the powers to elaborate the constitutional interpretations of laws in question. Besides, there is almost inexhaustible potential to make branches of Russian Law and law execution practices closer to each other, by widening the opportunities for direct use of the constitutional provisions in day-to-day legal practice. It would undoubtedly reflect the urgently needed positive effects as on the level of mass legal consciousness in Russia, as upon other current tendencies in our society.

However, we, Russians, should do yet the great steps in this direction. And these steps should be done by not only lawyers, theorists or politicians but also the institutions of civil society as well as ordinary citizens, because it is a frontier challenge of legal modernization of Russia, and today, this constitutional civil duty is laid upon each Russian citizen – without any exceptions.