

## РОСІЯ І ВІЧНИЙ ПОШУК ВЕРХОВЕНСТВА ПРАВА: ЗАРОДЖЕННЯ, ВІДХИЛЕННЯ, ВІДНОВЛЕННЯ І ГЛУХИЙ КУТ

Вільям Померанц

Інститут Кеннана, Міжнародний науковий центр ім. В. Вільсона  
ORCID: 0000-0003-4402-2140

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**Анотація.** Спроби Росії провести правові реформи і розвинути верховенство права ніколи не призводили до однозначного результату. В історії країни суттєві успіхи поєднувалися з катастрофічними відкатами. Хто б не правив Росією, правова держава, здається, так і залишилась недосяжною. Ця поразка є передусім історичним питанням. Протягом своєї історії Росія не змогла прийняти ідею поділу влади та інші необхідні складові, що зазвичай асоціюються з верховенством права. Замість цього вона прагнула запровадити «єдину державу», в якій правляча сила (чи партія) контролює усі три гілки влади і загалом не підпорядковується законові. Цей пошук єдності критично важливий для збереження адміністративного контролю над неоднорідною імперією, що простягнулася на цілий континент, проте, як неодноразово було доведено, є несумісним із загально визнаними принципами верховенства права. Водночас, як демонструє ця стаття, спроби встановити єдину державу в Росії не є питаннями виключно історії, це також і питання сьогодення. Впроваджуючи зміни до Конституції РФ 2020 року, Володимир Путін знову звернувся до ідеї єдиної держави та підкреслив необхідність посилення державної влади на усіх щаблях урядування. Як наслідок, Росія знову відкотилася від (все ще) декларованої в її Конституції цілі побудови правової держави.

**Ключові слова:** верховенство права, поділ влади, вертикаль влади, єдина держава, державна влада, конституційні зміни 2020 року

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## RUSSIA'S PERENNIAL SEARCH FOR THE RULE OF LAW: ORIGINS, DETOURS, REVIVAL, IMPASSE

William Pomeranz

Kennan Institute, Woodrow Wilson Center for International Scholars  
ORCID: 0000-0003-4402-2140

**Abstract.** *Russia's pursuit of legal reform and the rule of law has never produced a definitive result. There have been notable advances coupled with catastrophic retreats, but the law-based state seemingly has remained out of reach no matter who rules Russia. This failure is first and foremost a historical issue. Russia has never embraced a notion of separation of powers or the other legal prerequisites broadly associated with the rule of law. Instead, it has pursued a "unified state" where the ruling power (or party) controls all the three branches of government and ultimately is not held accountable to the law. This search for unity is critical to maintain administrative control over a diverse, continent-wide empire, but this approach has proven to be incompatible with the generally recognized principles of the rule of law. But as this article demonstrates, the pursuit of the unified state in Russia is not just a historical issue; it is a contemporary matter as well. With the 2020 constitutional amendments, Vladimir Putin has reinvigorated the unified state as well as reinforced the need to insert state power in all levels of governance. As a result, Russia has once again retreated from its (still) stated constitutional goal to be a law-governed state.*

**Key words:** *rule of law, separation of powers, unified state, power vertical, state power, 2020 constitutional amendments*

## Introduction

Russia's sporadic but repeated attempt to transition from its traditional form of top-down legality to the rule of law now spans over 150 years and counting. The rule of law (and its continental corollary "Rechtsstaat" or the "law-based state") first entered into the Russian legal vocabulary during the tsarist period. Historians recognize the differences between these two terms, but the distinction somewhat dissipated over the second half of the twentieth century to arrive at a more common understanding:

The subordination of political power to the observance of judicial rules intended to safeguard the freedom of citizens. (Ajani 1992: 5)

Russian periodically has turned to the principle of the law-based state (*pravovoe gosudarstvo*) in times of crisis, when the necessity of legal reform (and political survival) has moved to the top of the agenda (Berman 1992). These attempts to implement the rule of law have been of various duration and intensity, but in the final analysis, none have taken root. Instead, no matter what the ideology of the regime, Russia invariably has reverted back to its core first principles of governance, which include (with varying degrees) a strict but limited definition of "legality" (*zakonnost'*) and a highly centralized, unified state (Pomeranz 2019: 7-8).

The global pursuit of the "rule of law"—as a critical variable in any transition to a more open, pluralistic society rapidly accelerated after the collapse of communism in Eastern Europe and the former Soviet Union. Many national and international organizations evaluate a country's political and economic development by measuring its progress against the ideal liberal values associated with the rule of law, i.e., the development of civil rights, property rights, the separation of powers, governmental accountability, transparency, equality, due process, etc.

Russian historians and scholars have also contributed to the expanding rule-of-law discussion. Some researchers focus on the post-Soviet introduction of an independent judiciary to gauge Russia's legal transition (Solomon & Fogelson 2000). Alternatively, other analysts examine the evolution of Russian private law and its (in)ability to limit the expansive public law powers of the state (Pomeranz 2015; Berman 1963). The politicization of the Imperial and Soviet judicial systems has long engaged western legal commentators (Kucherov 1953). Finally, contemporary scholars have turned to Russia's lower courts and the rise of "everyday law"—the seemingly common, mundane cases that crowd the court docket and indicate an increased willingness on the part of the Russian population to engage with the legal system (Hendley 2017).

All of these approaches enrich the study of Russian law and its legal system but leave the fundamental question unanswered, namely: Why has Russia struggled so long and so ineffectually to advance a notion of the rule of law? As this article shows, this is a first and foremost a historical question, with deep roots in both in the tsarist and the Soviet periods. This article explores these failed transitions—from autocracy to constitutional monarchy, from Soviet legality to the socialist law-based state, from fledgling democracy to the "dictatorship of law." Moreover, these failed transitions have one overarching feature in common—the failure to overcome the historic idea of the

“unified state.” This concept also dates back to tsarist legal philosophy and was introduced to govern—and more accurately to administer—a multinational, disperse empire. This theory tolerated a degree of legal pluralism and diversity, but it primarily was introduced with one goal in mind: order. Therefore, the structural prerequisites for the rule of law—a separation of powers between the three independent branches of government, and a division of powers between the center and the region—have never overridden the demand for unity (Pomeranz 2019: 52–55).

Russia’s search for the rule of law, however, is not exclusively a historical question. Many of the above rule-of-law issues were rehashed in 2020, when President Putin introduced a series of constitutional amendments that essentially diminished the rights and freedoms of Russian citizens under the prevailing constitution while nevertheless preserving Article 1 and Russia’s stated ambition to become a “law-based state” (Pomeranz 2021: 20–22). The essential principle of separation of powers—both on a horizontal and vertical level—has also suffered as a result of the amendments. Therefore, this article takes an in-depth look at Putin’s recent changes, including the introduction of the “unified system of public power”, to demonstrate just how elusive the transition to the rule of law still remains in Russia. After two decades as president, Putin still views the vaunted power vertical and the need to control all layers of government (federal, regional, local) as the only viable means to govern the Russian Federation.

### **Maxim Vinaver and the Prerevolutionary Quest for the Law-Based State**

There are many places where one can begin the story of Russia’s fitful, elusive pursuit of the rule of law. For historical reasons, I have chosen a speech delivered by the prominent pre-revolutionary lawyer Maxim Vinaver on the 40<sup>th</sup> anniversary of the Judicial Reforms of 1864 (Vinaver 1905). Vinaver gave this address, entitled “The Legal Profession (*advokatura*) and the Law-based State,” before the distinguished St. Petersburg Juridical Society on what turned out to be the early days of the 1905 revolution. Thus, Vinaver’s speech not only straddled two eras of Russian legal history, it further outlined the basic steps theoretically required for any future transition to a law-based state.

Vinaver was eminently qualified to deliver these anniversary remarks. He was one of the foremost practitioners and experts on Russian civil law. Amongst his academic writings, he meticulously researched the foreign legal borrowings that ultimately found their way into the 1832 Russian civil code (Vinaver 1908). He also was a leading member of the liberal Constitutional Democratic Party (the “Kadets”) and a stalwart proponent of equality and civil rights throughout the Russian empire. Finally, Vinaver possessed that unique combination of insider/outsider status that highlighted both the promise and the contradictions within prerevolutionary Russian law. His outstanding legal skills and public prominence put him in the upper tier of Russian lawyers, but as a Jew, he was initially denied admission to the St. Petersburg bar and spent much of his career as a lawyer-in-training as opposed to being a full-fledged member of the legal profession.

Vinaver began his speech by outlining the historic role that lawyers had played in advancing the cause of freedom. Although the legal profession never possessed political

aims in the true sense of the word, Vinaver claimed, it aligned itself “everywhere and always with those political parties who seek to liberate the human personality from the oppression of power (*vlast*)” (Vinaver 1905: 975).

The Russian *advokatura*, of course, was the direct offspring of the Judicial Reforms of 1864, and Vinaver proceeded to describe how this landmark legislation had advanced the notion of the law-based state in tsarist Russia. He argued that prior to 1864, the Russian state combined judicial, legislative, and administrative functions. In principle, state power was “unified”. In practice, however, this power encompassed three distinct but uncoordinated groups of officials whose roles were strictly circumscribed and did not overlap. Vinaver further asserted that under such a system, the state actually stood above the law, in the sense that through its daily interactions with society, the state identified the various social relationships and legal norms that formed the basis of law.

For Vinaver, the ultimate goal of the law-based state was not an overarching system of checks and balances amongst these various state actors. Instead, the objective was to isolate (*obosoblenie*) these powers as necessary in order to realize the specific aims of each respective power. But although Vinaver’s understanding of *pravovoe gosudarstvo* differed from the Anglo-American notion of rule of law—for example, it included no appeal to natural law—significant overlap existed as well, most notably in his emphasis on the individual rights of citizens and the need for a separation of powers.

To amplify this convergence, Vinaver turned to the subject of his lecture: the Judicial Reforms of 1864. Alexander II’s landmark legislation represented the first genuine attempt in Russian history to separate the branches of government by creating an independent judiciary. This was a momentous step, since it subordinated the state to the law while establishing an equal playing field whereby both citizens and the state were subject to the same laws. Citizens further received the additional right to demand that the state remain within these defined legal boundaries, and when disputes arose amongst citizens, they received the right under the Judicial Reforms to have these cases be resolved by an independent judge (Vinaver 1905: 974).

Thus, according to Vinaver, the Judicial Reforms represented the first real step in Russia’s development of a law-based state by dividing judicial and executive functions. But forty years of experience, he added, had shown that this initial step was not sufficient to implement the law-based state. For that to occur, Vinaver argued that a second step was required, namely the separation of legislative and executive power. The law-based state required the subordination of power (*vlast*) to both the law and the court, but if this second division did not occur, Vinaver argued, then nothing would stop *vlast*’ from simply writing the necessary law on the given day.

Only when this second stage was complete—when the law was taken from the people (*narod*) themselves—would Russian citizens obtain the rights and freedoms associated with the law-based state. Otherwise, the Russian state would continue its practice of issuing extraordinary decrees on an ad hoc basis that contradicted existing laws (Vinaver 1905: 990).

The emphasis on the legislature as the prime law-creating body connects Vinaver with the *Rechtsstaat* tradition. Yet in his conclusion, Vinaver returned to the *advokatura* and the determinative role it would play in any transition to the law-based state. There were two sides to the struggle, he argued: *soslovnost'* (i.e., the prevailing hierarchical social order) and bureaucracy on the one side and freedom and law (*pravo*) on the other.

And everywhere the *advokatura* is on the side of freedom and law.  
(Vinaver 1905: 990)

Imperial Russia would make two attempts at the beginning of the 20<sup>th</sup> century to complete this transition. The 1905 revolution resulted in Russia's first constitution, the establishment of an independent bicameral legislature, nascent civil liberties, and a defined hierarchy of laws. The 1917 revolution also contemplated the establishment of an independent legislative branch, although the Provisional Government delayed this reform until after the calling of the Constituent Assembly, which was to set the rules for Russia's newly declared republic.

Vinaver played a significant role in both of these seminal events and their ultimate failures. He was elected to the first Duma, but when it was hastily dissolved by the tsar, Vinaver protested and signed the 1906 Vyborg Manifesto calling amongst other things, for Russians to stop paying their taxes. As a result, Vinaver was convicted (along with other leading jurists) for distributing illegal propaganda and sentenced to three months in prison, with the added punishment of being banned from serving in the Duma (Syrykh 2017: 152–55).

Russia's elected parliament eventually would be restored, but not without significant blows to its independence. The autocracy transformed Russia's suffrage law in 1907 to create a more compliant legislature as well as passed major legislation via special procedures (Article 87), thereby circumventing the Duma's law-making powers.

Vinaver remained active in public life—especially in matters related to Jewish affairs—and later returned to national politics and prominence after the February 1917 revolution. He participated in several major legal commissions, including one that sought to restore the original intent of the Judicial Reforms of 1864. He also worked on the commission to set the electoral rules for the Constituent Assembly. Vinaver was actually elected as a delegate to the Constituent Assembly from Petrograd, but he was soon on the run and bound for exile after Lenin closed the Assembly down after one day on January 5, 1918 (Syrykh 2017: 156–64). It would not be until 1988 and the rise of Mikhail Gorbachev that Russia would rediscover (and restart) the debate on how to establish the rule of law and the law-based state (Berman 1992; Butler 2003).

## The Soviet Diversion

Lenin had first-hand experience with the Imperial Russian legal system, both as a practitioner and as a defendant. He originally matriculated to Kazan Law School in 1887, but was promptly expelled for taking part in a demonstration. Lenin was next exiled to his family estate but he later was permitted to take the law examinations as an external

student at St. Petersburg University. He passed these exams and then practiced law in Samara as an attorney-in-training, but his study of Marxism and revolution ultimately led to a permanent hostility to western legal values as bourgeois and oppressive.

Thus, when Lenin came to power in 1917, he immediately abolished the tsarist court system and launched what would be a 70 year-plus search as to what role law would play in the world's first socialist society. The evolution of Soviet law in all its incarnations and brutality remains beyond the scope of this article. The Soviet Union went through various stages—legal nihilism, the partial restoration of law under the New Economic Policy (NEP), terror, the introduction of various qualified social and civil rights, Khrushchev's restoration of socialist legality—without ever recognizing the western notion of the rule of law as an ultimate objective. Indeed, while various legal institutions emerged during the Soviet period, the Communist Party never recognized their independence or the principle of separation of powers. The 1977 Brezhnev constitution essentially retreated to the tsarist proposition of a unified state, with Article 6 declaring that the Communist Party served as the “nucleus of the political system. . . and all state organizations.” Article 113 of the 1977 constitution also blurred the concept of separation of powers by providing numerous institutions with the ability to propose legislation via the right of legislative initiative, including the legislature, Council of Ministers, union republics, the Supreme Court, the procurator-general, and public organizations (through their all-Union bodies).

The foundations of Soviet law were soon to be fatally undercut, however, when in the aftermath of *glasnost* and *perestroika*, Mikhail Gorbachev moved to dismantle the Communist Party's monopoly on power while transitioning the Soviet Union to a “socialist law-based state.” This catchphrase—with one foot in Soviet law and the other in the still discredited western legal tradition—itself raised questions as to what Gorbachev ultimately wanted to achieve (Huskey 1992: 33–39). Anatoly Lukyanov, one of Gorbachev's closest aides, insisted that this concept was grounded in “the socialist choice and no other,” and that this fact gave this term “a distinctive stamp on the whole political system” (Huskey 1992: 34). But what did this mean in practice? To arrive at an answer, Gorbachev (amongst other things) downgraded the Party, revamped the legislature, called for open and multi-party elections, and assumed (by parliamentary assent, not direct election) the title of president of the Soviet Union.

Such changes—while extensive—ultimately did not lead to the transition to a genuine separation of powers and the rule of law. Events were happening too fast, central control was collapsing, and individual republics used this legal vacuum to assert their own sovereignty and independence. Gorbachev ended up ruling by decree—a far cry from the socialist rule-of-law system that he had envisioned but never implemented. In the end, all it took was an ill-timed putsch for the whole façade to come crashing down and for a new president to revive the search for the rule of law and the law-based state, but without the Communist Party.

### **Russia's Legal Stalemate (1991–93)**

The first two years of post-Soviet rule showed just how difficult the transition to the rule of law—and a genuine separation of powers—would be. Russia inherited the 1978 constitution of the Russian Soviet Federative Socialist Republic (RSFSR) that was much amended but had never been envisioned to serve as the highest law of an independent country. It did in principle contain three branches of government, but two of these branches had recently undergone a dramatic transformation. A nationally elected president had only become head of the Russia's executive branch in 1991. Moreover, the Soviet Union introduced a limited system of constitutional review in 1989 with the creation of the Soviet Committee of Constitutional Supervision. A full-fledged Russian Constitutional Court only came into existence in October 1991.

Thus, the three core branches of Russian government were themselves in transition at the time of the USSR's collapse, yet by retaining the RSFSR constitution, the Russian Federation failed to make a clean break with the discredited Soviet legal tradition. For example, instead of referring to the rule of law, Article 4 continued to proclaim that Russia's state institutions acted on the basis of "legality" a term that historically fell well short of the rule of law. Article 3 also stated that the Russian system of "state power" was based on the division of powers between the executive, legislative, and judicial branches, although from a historical perspective, Russian state power had only been partially and imperfectly divided under tsarist rule and quickly returned after 1917 to a unified state under the absolute control of the Communist Party.

Terminology may not necessarily be destiny, but it turns out that outside the Baltic States, 11 out of the 12 post-Soviet constitutions recognized state power as the mandatory precondition for their respective declarations of a separation of powers (Pomeranz 2016). Although this formulation left no place for the Communist Party and its historic claim on power, it has not proven overly receptive to basic rule-of-law principles. Ukraine, for example, has made important strides in advancing democracy, civil society, the decentralization of power and the promotion of independent local self-government. Nevertheless, according to the Ukrainian political scientist Natalia Pelagesha, the 1996 Ukrainian constitution borrowed extensively from the previous Soviet legal vocabulary (especially the notion of state power), and that these terms were fundamentally incompatible with democracy. In fact, according to Pelagesha, the current Ukrainian constitution rested on the pro-statist tendencies and positions that dominated the 1936 and 1977 Soviet Constitutions. It was shocking, Pelagesha concluded, that almost thirty years after the fall of the Soviet Union, Ukraine continued to speak its totalitarian language and, as a consequence, "continued to see the world through [Soviet] eyes" (Pelagesha 2020).

Ukraine may still be struggling to reconcile the notion of state power with its democratic aspirations, but it was in Russia—in the immediate aftermath of the collapse of the Soviet Union—that the battle for state power turned violent. The newly renamed Russian Federation was soon overwhelmed by the residual powers assigned to the legislative branch (the Congress of People's Deputies and, when the latter was not in session, the Supreme Soviet) under the prevailing RSFSR constitution. President Yeltsin



initially introduced his economic reforms via decree—an indirect acknowledgement of established Russian legal tradition of ruling by personal edict (*ukaz*) and not formal law (*zakon*)—but when the Congress of Deputies chose not to renew this authority in 1992, Russia devolved into a naked struggle for power, with the legislature holding the major cards. Historians will debate whether a parliamentary system was possible under the 1978 constitution. President Yeltsin resolved that question on October 4, 1993, when he fired on the Russian White House, dissolved the legislature, suspended the Constitutional Court, and called for the adoption of a new constitution.

### **New Beginnings, Old Paradigms**

The subsequent 1993 Constitution represented a philosophical break from the preceding Soviet constitutions. Article 1 announced that henceforth the Russian Federation would be a democratic, federal, law-based state with a republican form of government. Article 3(1) further proclaimed that the multinational people of the Russian Federation would serve as the bearers of sovereignty and the sole source of power in the country. The constitution proceeded to expound upon the rights and freedoms for Russian citizens, including freedom of speech, assembly, and the press, as well as universally recognized due process requirements. On paper (and in practice) the articulation of these rights—which were unqualified and inviolable—represented a decisive step toward the law-based state.

When drafting the provision of the separation of powers, however, the 1993 constitution started where the revised 1978 RSFSR constitution left off. Specifically, Article 10 repeated the formula that state power was to be exercised on the basis of the separation of the legislative, executive, and judicial branches, adding that each branch was to be autonomous. This seemingly straightforward separation of powers was problematic in a variety of ways. The term “state power” carried a lot of historic baggage. It was traditionally linked with the unchecked rule of the sovereign, with an added inference of unlimited force. It was only at the very end of the Soviet period that state power briefly was associated with the western concept of the separation of powers.

The meaning of Article 10 was thrown under more confusion by the subsequent provision outlining those bodies that exercised state power under the new constitution. According to Article 11, the first state institution assigned state power was the president, despite the fact that the president was not included in the Article 10’s separation of powers (the government technically headed up the executive branch under the 1993 constitution). Article 104 also continued the Soviet tradition of endowing several institutions with the right of legislative initiative (the president, the high courts, the federal legislature, government, and the legislative bodies of the subjects of the Russian Federation), further obscuring the system of separation of powers under Russian law.

The president received some general authority under Article 85(1) to use mediation procedures to settle differences between the various levels and organs of state power. Nevertheless, the constitution contained a poison pill in case of a prolonged disagreement between the president and Duma. Specifically, Article 111(4) stated that if

the Duma rejected the president's choice for head of government three times, it was the legislature that suffered the political consequences and had to be dissolved.

Concomitant with the question of separation of powers under the 1993 constitution was the issue of the division of powers between Moscow and Russia's (then) 89 regions. The constitution identified various issues that were under federal control, joint federal-regional jurisdiction, and finally a catch-all article designating all other remaining powers under regional control. The Kremlin was too weak, however, to force its will on the regions, so an asymmetrical system evolved based on the 1992 Federal Treaty and over 40 bilateral (and unequal) agreements between Moscow and regions. This improvised system produced many legal irregularities, but it seemed the only way to keep the nation from further splintering in the 1990s.

The 1993 constitution would long be criticized as super-presidential (Fish 2005), but although much power was concentrated in the presidency, Boris Yeltsin often faced an organized and real opposition to his policies both in the Duma and in the regions. He struggled to pass major economic and commercial legislation, such as a new land code. Moreover, Moscow Mayor Yuri Luzhkov essentially banished the federal government from overseeing the privatization process in the city (Fossato 1997).

But while Yeltsin was pulled in multiple directions, it turns out that his administration was first and foremost concerned with rehabilitating the state. Thirty years after the dissolution of the Soviet Union, Anatoly Chubais—one of the leading architects of privatization—identified state collapse as the number one problem for the reformers. According to Chubais, by the end of 1991, the Russian state, which had presided over an expanding empire for centuries, simply ceased to exist. There was no constitution, no borders, no system of customs controls. And without a state, Chubais concluded, gradual economic reform, such as had occurred in China, remained out of the question (Chubais 2021).

So while the 1993 constitution would often be described as super-presidential, it also was conspicuously pro-statist. The notions of state integrity and national unity featured prominently in the document. More importantly, the constitution proclaimed (without providing a definition) that Russia would be governed by a unified system of state power as well as a unified system of executive power amongst the regions. These provisions lost their significance in the ensuing years as Yeltsin struggled to keep the country together. It would only be with the assumption of Vladimir Putin that these principles would be re-discovered and updated to serve a revived Russian Federation.

### **Putin's Revival of the Unified State**

Almost immediately after he appeared on the national scene, Putin emphasized the need for a strong state. In his Millennium message delivered just before his assumption of the presidency in January 2000, Putin stated:

For Russians a strong state is not an anomaly that should be got rid of. Quite the contrary, they see it as a source and guarantor of order and the initiator and main driving source for change. (Putin 1999)

Thus, with his first actions, Putin tapped in to the centuries-long tradition of the unified state, with profound consequences for the rule of law (Hill & Gaddy 2013: 56–62).

Putin started his reforms with the division of powers between the center and the regions. Five days after taking office, Putin introduced a system of seven regional envoys that served as a means to bypass elected governors and local governments and transmit central commands directly to the regions. Putin further reinforced the power vertical in 2000 when he began the process of excluding Russian governors from their automatic appointments to the Federation Council (Russia's upper house of parliament). This ability to wear two hats enabled Russia's regional leaders to play an outsized role in early post-Soviet national politics. But the final blow against the regions occurred in 2004, when in the aftermath of the Beslan tragedy, Putin abolished direct elections of governors and instead proposed that the president appoint local leaders and have them be confirmed by the regional legislature.

This decision was ultimately appealed to the Russian Constitutional Court, which ruled in 2005 to uphold Putin's actions. Even more importantly, however, the Court breathed new life into the unified state. The Court found that the abolishment of direct elections came under joint federal-regional jurisdiction and the enumerated right of the federal legislature to establish the "general organizing principles of the system of state power." The majority opinion also referred to Article(s) 5(3) and 77(2) to justify their ruling. The former talked about a unified system of state power, while the latter stated that the "federal organs of executive power and the organs of executive power of the subjects of the Russian Federation shall form a unified system of executive power in the Russian Federation." (Pomeranz 2009). With the Court's decision, the unified state once again acquired an extensive foothold under Russian law.

President Medvedev would restore direct elections of governors in 2012 (albeit with some major registration hurdles), prompting the Constitutional Court to revisit its 2005 decision (*Postanovlenie Konstitutsionnogo suda* 2012). The Court ultimately upheld this new legislation, but without overturning its previous ruling. Instead, it emphasized the need to preserve Russia's historically formed state unity and further found a constitutional requirement to guarantee the realization of "public power" in its various forms across the Russian Federation (this phrase would conspicuously reappear with the 2020 constitutional amendments). The Court also ruled that the legislature could substitute different means of selecting high officials without running afoul of Article 32 and the right of citizens to elect, and be elected to, organs of state power. Finally, the Court determined that the president's power under Article 80(2) to ensure the coordinated function and interaction of state institutions allowed him to consult directly with political parties and potential candidates for regional office without violating Russia's highest law.

The election of governors occasionally has produced surprise results and subsequently some harsh reprisals. In 2018, for example, Sergei Furgal from the Liberal Democratic Party was elected governor of Khabarovsk. Furgal proved quite popular, but in 2020, he was indicted on dubious murder charges that allegedly had occurred more than a decade ago. Furgal's arrest sparked a wave of daily protests in Khabarovsk—a true

test of the power vertical—but they eventually petered out. Meanwhile, Furgal remains in preliminary detention in Moscow and subsequently contracted the Covid-19 in jail.

The Furgal case showed that Putin would go to any extreme to retain his grip on the power vertical and center-regional relations. Putin has shown similar resolve in his pursuit of the unified state. A 2004 presidential decree formally established the latest incarnation of the presidential administration (*Ukaz Prezidenta* 2004). Its internal operations are veiled in secrecy, but it exercises considerable formal and informal power, and its leaders are recognized as being amongst the most powerful state actors. Moreover, with the Duma's transformation into a rubber stamp, the presidential administration increasingly has become the go-to institution to formulate national policy and coordinate its execution (Galleotti 2020).

The rise of the presidential administration—which has been described as the “nerve center” of Russian politics—has upset Russia's nascent separation of powers. For example, under Russia's expanded notion of legislative initiative, it often produces the draft laws that the president ultimately proposes to the Duma (Pertsev 2020). The evolution of Russia's third branch of government has been more nuanced. Lower court commercial (*arbitrazh*) and district judges have regularly ruled against the state especially when adjudicating non-controversial decisions. The Constitutional Court also has occasionally asserted its independence, if not in the actual ruling, then in the dissenting special opinions. However, in criminal matters, and especially in prominent political cases, the judiciary has almost always followed the longstanding bias against criminal defendants and convicted the accused.

There was one additional significant blow against judicial independence. In 2010 the Higher Commercial Court—one of the three high courts established under the 1993 constitution—began to assert the power of precedent under Russian law. Whereas the law-creating powers of the judiciary have become an integral part of the common law system, the civil law tradition frowns on this practice and instead assigns the legislature with the primary responsibility to draft laws. Therefore, many Russian legal commentators viewed the higher commercial court's assertion as a highly provocative act and in conflict with Russia's basic civil law principles (Gutbrod & Pomeranz 2012). President Putin evidently agreed, and in 2014, he introduced sweeping constitutional changes, abolishing the higher commercial court and putting the lower commercial courts under the jurisdiction of the Supreme Court.

### **The 2020 Constitutional Amendments**

As the above indicates, Russia's system of separation of powers—and transition to the law-based state—had been under significant pressure during Putin's two decades of rule. He upgraded the presidency, diminished the legislature, and fundamentally altered the judiciary, all the while cracking down on Russia's civil liberties. With the 2020 constitutional amendments, however, what had been to date a relatively gradual process rapidly accelerated and within the span of six months resulted in fundamental reformulation of the separation of powers under Russia's highest law.

The irony of this rewriting of the constitution was that the first two chapters of the 1993 Russian constitution—the ones defining Russia’s system of governance and civil liberties—were theoretically inviolable and could only be amended by holding a constitutional convention. Putin wasted no time on such legal niceties, and instead scattered substantial revisions over the rest of the constitution. So while Article 10 remains unchanged, the net result of the 2020 amendments was the rewriting of the concept of separation of powers under Russian law. No longer, for example is the executive branch “autonomous.” Instead, the government is now explicitly under the “general leadership” of the president who appoints the heads of the major ministries with the consent of the Federation Council (Pomeranz 2021: 16).

The Duma was given some new powers as a result of the amendments, notably in the selection of the prime minister. The president however, also received some additional leverage vis-à-vis the Duma in case the legislature cannot form a government. According to revised Article 112(4), if the Duma fails to confirm one-third of the government three times, then the president may (but is not required) to dissolve the Duma. The president now receives lifetime immunity and, as an added bonus, a permanent seat in the Federation Council when he/she leaves office. And of course, the current occupant obtains a personal exemption that allows him to avoid the constitution’s two-term limitation and theoretically serve until 2036.

The 2020 amendments also substantially transformed the judiciary. On one level, the changes noticeably enhance the power of the Constitutional Court by enabling it to review all foreign tribunal decisions to determine their compatibility with the Russian highest law. Previously, the Court was assigned via legislation jurisdiction over decisions by the European Court of Human Rights, but not all interstate and international arbitration bodies. So the Court’s scope and purview have clearly increased. But with this added responsibility comes a distinct loss of judicial autonomy. Under the amendments, the president now receives the right to initiate the process of removing a high court and appellate justice (to be confirmed by the Federation Council) if the president finds that the judge has somehow violated the honor and the dignity of the court (Pomeranz 2020: 18–20). Subsequent legislation has prohibited the publication of dissenting special opinions made by Constitutional Court justices (Glikin 2020).

Putin’s 2020 amendments undermine the separation of powers in other significant ways as well. According to the new Article 107, if the Duma and Federation Council override a presidential veto of legislation, the president can now temporarily block the implementation of the law and ask the Constitutional Court to opine on its constitutionality. In other words, the president now gets a second bite of the apple to override any piece of disputed legislation.

One final reform, however, connected Putin’s 2020 amendments to Vinaver’s speech over 100 years ago. Simply put, after many attempts to introduce a viable system of separation of powers—and to move towards a law-based state—Russia has once again turned inward to the well-established idea of the unified state. And in order to accomplish this task, Putin reached back over 200 years to re-discover an appropriate institution: the State Council.

## Upgrading the State Council

There was much speculation when Putin started the amendment process in January 2020 as to whether he would step down as president but find an alternative perch in which to retain power indirectly. A revised State Council seemed like the logical alternative, especially since Kazakhstan's President Nursultan Nazarbayev had just followed a similar strategy and appointed himself chairman for life of the Kazakh Security Council in 2018. Putin originally established the State Council by decree in 2000 (*Ukaz Prezidenta* 2000), but for its first 20 years, it had largely been an institution in search of a mission. All this changed with the 2020 constitutional amendments. A new Article 83(f)(5) was inserted into the constitution that expanded the jurisdiction of the State Council and elevated it to a "constitutional state organ" (a designation that has yet to be legally defined). At the heart of the resuscitated State Council's new powers is coordination. It has been assigned the task of ensuring the functioning and interaction of bodies of public authority, defining the basic direction of internal and foreign policy, and prioritizing the direction of social and economic policies of the state.

However, it was only with the passage of the subsequent law on the State Council in December 2020 that its connection to the unified state became clear (*Federal'nyi zakon* 2020). According to this legislation, the State Council, under the direct leadership of the Russian president, henceforth would oversee a "unified system of public power," to include organs of state power, organs of state power of subjects of the Russian Federation, different state organs, and organs of local self-government. The inclusion of the latter seemed in obvious contradiction to the existing constitution, since even after all the amendments, Article 12, guaranteeing the autonomy of local self-government, remained unchanged (Noble & Petrov 2021: 146).

The State Council's membership further suggested an expanding future role in the governance of Russia. Comprised of over 100 members, it includes governors and heads of regions, the prime minister, the speaker of the Duma, head of the Federation Council, the head and deputy head of the presidential administration, and the leaders of the political parties represented in the Duma. Moreover, the State Council created 18 commissions that seemingly expanded its constitutional mandate and covered such areas as science, healthcare, education, social policies, youth policies, and much more (Vorontsova & Latukhina 2020). Overall, the newly enhanced State Council looked like an attempt to work around the Russian legislature. To alleviate such concerns, some analysts emphasized that the State Council specifically was denied the right of legislative initiative. In reality, however, this was largely a specious argument, since several members of the Council (most notably the president) could still exercise this privilege in their other official capacities (Veretennikova et al. 2020).

Critics claimed the new State Council most closely resembled the former Central Committee of the Communist Party—or the original State Council formed in 1810 by Tsar Aleksandr I (Makhutina 2021; Vorontsova & Latukhina 2020). Yet almost immediately after its elevation, the prospective influence of the State Council seemed to diminish. To begin with, its duties were both duplicative and redundant. The president already

possessed the constitutional authority to mediate differences between various state institutions. The State Council also performed many of the same coordinating functions as the presidential administration (which itself received constitutional status as a result of the amendments) (Vinokurov & Rozhkova 2020). Finally, for its first assignment, the State Council was given the thankless job of overseeing Russia's various national projects. This ambitious \$400 billion spending program covering such areas as healthcare, infrastructure, and education, was introduced in 2018 but is already running behind schedule and facing additional budget cuts (Vorontsova 2020).

### **Re-configuring the Russian Federation**

It seems that everyone in Russia is getting into the coordination business. Prime Minister Mishustin announced on February 22, 2021, that he was establishing a coordination center within the Cabinet of Ministers to perform mediation services between federal organs of power and the regions (Latukhina 2021). With all this inter-governmental communication and top-down management, it appears that Putin has now tamed the issue of federalism that so bedeviled the Yeltsin regime. Yet one more amendment holds out the possibility—albeit on a very limited basis—of disrupting Putin's power vertical and the resurgent unified state: the introduction of federal territories.

Article 67(1) introduced this new subcategory of local organization, with the general designation as a state/private partnership (Milivskaia 2021). These federal territories will be carved out of existing regions and will receive an individual charter.

The actual structure of these enclaves, however, only become apparent with the naming of Sirius (formerly a part of Sochi) as the first federal territory (*Law on Sirius* 2020). Sirius only has a population of 12,500 people, but sits on some important real estate built for the 2014 Winter Olympics.

Sirius poses a new, and potentially disruptive, wrinkle in the inner workings of Russia's federal system. Although the territory technically is not a part of the "unified" system of public power (and therefore receives no federal representation or grant of legislative initiative (Zamakhina 2020a), Sirius nevertheless will still be intimately connected to the power vertical (*Law on Sirius* 2020). The head of Sirius is put forward by the president and then confirmed by the town council (*soviet*). The citizens of Sirius directly elect 9 of 17 deputies to the soviet. In addition, both the Russian president and Russian government appoint 3 members to the council. The governor of the Krasnodar *krai* appoints one member of the council and the final member will serve as the head of administration (Noble 2021).

The stated long-term objective is to convert Sirius into a local hub for education and innovation, itself a questionable goal since Sirius presently does not even have the minimum infrastructure and resources for such an ambitious project (Perova 2020). Nevertheless, Sirius will receive significant autonomy as a result of its new status—over budgets, state taxes, customs, and property (*Vedomosti* 2020). It still is a puzzle, however, as to why Putin wants to reopen the experiment with the country's internal composition, if only on a small scale. The 1990s—and all of those bilateral treaties—demonstrated just

how fragile Russia's national unity actually was. Supporters insisted that direct access to the president and Russian government would enable the federal territories to overcome bureaucratic pressure (Glikin 2021a). Whether such an overlapping combination of municipal, regional, and federal oversight advances good governance and the rule of law, however, remains doubtful (Butrin 2020).

## Conclusion

It appears that Putin is not done revising Russia's internal borders and power structures. Reports are circulating that he will soon make another push to unite adjacent regions and decrease the number of subjects of the Russian Federation (Inozemtsev 2021; Glikin 2021b). Proposed legislation further clarifies how Putin envisions the future construction of unified public power on a regional level (Veretennikova & Prakh 2021). A September 2021 draft law would allow the president to fire any governor with whom he has lost faith or confidence. The title "governor" itself will be retired from the political lexicon, to be replaced by the more muted and lackluster category of "head of region." The federal ministries would approve the appointment of several local ministers, in such key areas as education, finance, health, housing and construction. Finally, the power of legislative initiative would be expanded to include representatives of local self-government and regional procurators, further marginalizing the standing and independence of regional legislative bodies (*Proekt Zakona* 2021).

Thus, Putin is still putting the finishing touches on his 21<sup>st</sup> century version of the unified state—and in the process watering down such founding principles as federalism and the separation of powers. Such actions have their enthusiasts. Pavel Krashenninikov, the chair of the Duma's committee on state construction and legislation (and co-author of the new draft law on public power), previously praised the latest incarnation of the State Council, proclaiming that as a constitutional state organ, it could unite all levels of power and more effectively react to the needs of the population (Zamakhina 2020b). But as Maxim Vinaver warned more than a century ago, the unified state—combining executive, legislative and administrative power—still represents one of the fundamental obstacles to Russia's transition to a law-based state. Such a concentration of power invariably discourages citizen feedback and real accountability on Russia's political leaders, to the clear detriment of Russian law.

Vinaver has been proven prescient in another matter as well. In his 1905 anniversary speech before the St. Petersburg Juridical Society, he twined the advancement of the law-based state with the development of the Russian legal profession. According to Vinaver, it was the prerevolutionary *advokatura* that promoted such ideas as freedom, equality, and the rule of law against the capricious actions of the tsarist state.

Today, Russia's diverse group of legal practitioners and scholars—which consist of members of the bar, jurists, law professors, and other human rights activists and NGOs—uphold similar values and risk similar punishment for their outspoken defense of civil liberties and the rule of law. This post-Soviet generation of lawyers serve as the worthy



successors of Maxim Vinaver and the prerevolutionary legal profession. Nevertheless, like their forerunners from more than a century ago, they have yet to vanquish the unified state and establish a viable system of separation of powers so integral for the law-based state. The recent addition of a new legal principle—the unified system of public power—in combination with other constitutional amendments and pending laws represent just another in a long series of attempts to emphasize state unity over the rule of law in Russia.

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