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Review Article

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Constitutional reform in Russia substance, directions and implementation

Volume 7 Issue 6 - 2019

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Received: November 09, 2019 | **Published:** November 27, 2019

Executive summary

A quarter of a century has passed since the Constitution of the Russian Federation was adopted in 1993, yet the issue of the results and the prospects for constitutional transformation has not disappeared from the political agenda. For some, the Constitution signifies an ultimate break up with the communist past and a legal foundation for the advancement of the Russian society toward democracy and the rule of law; for the others, it is exactly the Constitution that is the culprit for the authoritarian trend that has prevailed, and for the sustained stagnation in Russia's economic, social and political development.[1]

The author of this paper is in the middle of these extreme viewpoints. He believes that the Constitution has truly played a pivotal role in Russia's move toward democracy by establishing the basic principles of civil society and the rule of law, and in this respect, it remains of everlasting and paramount importance. Nevertheless, that does not mean that it should be utterly inaccessible for changes, especially given the elapsed time and the negative experience of the authoritarian transformation of the political regime, the amendments that were introduced between 2008 and 2014, and the current objectives of the democratic movement. The rationale for changes is to return to the constitutional principles, reaffirm their initial democratic meaning by rejecting the excessive concentration of the Presidential power, the results of counter-reforms and the adulteration through legislative and regulatory compliance practices.

Some of the proposed remedies aim to establish a new form of government (Presidential - Parliamentary), which would necessitate Constitutional amendments — adjustments that would regulate the separation of powers and redistribution of authority. Others seek to transform the system without changing the text of the Constitution through legislative reforms, judicial interpretation and the policy of law. Yet, the third approach prioritizes institutional reforms. Not everything in social development depends on the provisions of the law, political improvisation and practice can prove just as critical.

In their cumulative entirety such initiatives can help avoid the two extremes: that of constitutional stagnation gravitating toward the bureaucratic asphyxiation, and that of constitutional populism which has a tendency to destabilize the political system. In its practical activities to transform the political regime, the opposition ought to remember the maximum repeatedly confirmed by experience, — the further a party is from power, the more radical tend to be its constitutional proposals. Conversely, empowered groups tend to be more moderate in their initiatives.

When it comes to conducting constitutional reforms, three crucial distinctions have to be made. First of all, one has to distinguish between the notions of "amendments" in the Constitution (the text of the Basic Law proper) and the "transformation" of the Constitution, a much broader concept, signifying an actual revision of the meaning of constitutional norms without changing the text of it (by reviewing constitutional and customary legislation, judicial interpretation of the Constitution, and the application of a specific policy of law in general). Secondly, one must distinguish between the legal aspects of the reform proper and the political ones, connected with the current political regime and its activities. Thirdly, one must keep in mind the difference between the legal norm and its implementation, since the norm can be adequate, but the implementation can deviate from it, and even be contradictory to it. It, therefore, follows, that the program for constitutional reforms in Russia should assess: the Russian political and legal systems and reasons for their dysfunction; the correlation between the Constitution and the political regime; the system of government; possible constitutional amendments within the line of the separation of powers; changes, which can be made without changing the text of the Constitution; the scope and the instruments of the transformation of the constitutional system; mechanisms and targets of transformation under the conditions of the leadership change.

[1]This paper was presented initially as a part of the collective report prepared for the international expert community discussion in London (Chathem-House), Brussels (Wilfried Martens Centre for European Studies) and Berlin (Deutsche Gesellschaft für Auswärtige Politik) in the autumn of 2018. Later its main ideas were presented at various Russian conferences organized by different government and non-government institutions for the commemoration of the 25-th anniversary of the adoption of the 1993 Russian Constitution in 2018-2019 (Moscow and St.-Petersburg). Thenceforth this debate were continued in different national and international publications and provoked a partisan exchange of opinions among lawyers, political scientists and opinion leaders about the role, substance and future of the Russian constitutional reforms. Having in mind not only academic interest to this subject but also its vital political and practical importance for the future of global democracy we decided to republish this paper separately in order to continue debates, collect all opinions, stimulate new ideas and proposals as well as critical remarks on this subject. That could be very useful for the elaboration of the sustainable position of the national and international civil society, nongovernment organizations, experts and decision makers involved in debates on future role of Constitutionalism and political reforms. See more: Milov V.. Medushevsky A., Zaslavskiy I. Constitution and Economy After Putin. A Roadmap for a New Russia. Washington, Free Russia, 2018. P. 19-31. Address in Internet: http://www.4freerussia.org/constitution-and-economy-after-putin-a-roadmap-for-a-new-russia/

Russian political and legal systems

When considering transition processes throughout history, distinction can be made between the following two situations:

1. When the transition from authoritarianism to democracy is built upon preexisting democratic values and institutions temporarily suppressed by the authoritarian rule; and
2. When these institutions have not been created yet, or have been completely destroyed, and have to be established from scratch concurrently with the transformation process.

While the first situation is descriptive of East European countries during the de-communization period, the second one is typical of Russia.

The Constitution of 1993 was a true achievement of the transitional period, it symbolized the renunciation of the nominal Soviet constitutionalism and reaffirmed the internationally recognized guarantees of the human rights (in its first two chapters). However, having adopted the model of the Presidential- Parliamentary Republic, it has introduced into practice a super-centralized mechanism of power by concentrating it in the hands of the President in order to overcome the crisis, stabilize the system and shore up the shift toward market economy. Therefore, the Constitution has not predetermined an authoritarian modernization vector of development, but neither did it exclude it. This vector became dominant not so much the result of constitutional norms, but due to general societal reasons, the spontaneous reaction to the collapse of the state (for the second time in the same century), the lack of mature democratic institutions, as well as the absence of consistent institutional reforms, and, in the long run, the elite's choice in favor of authoritarian modernization.

The logic behind the transformation of the Russian political system is made apparent by the outcomes of the Great Post-Soviet Constitutional Cycle. Within that cycle, the country has gone through three main phases:

1. De-constitutionalization— abandonment of the Soviet system, along with its expression of ideological values and standards of the nominal law (1985-1991);
2. Constitutionalization— adoption of new "rules of the game" embodied in the Constitution of 1993 (constitutional revolution of 1991-1993); and
3. Re-institutionalization —transformation (especially, beginning with the 2000s) of the constitutional principles, including a targeted correction of rules and norms in accordance with the altered social and political reality. This phase ended with a return to a situation in many aspects similar to the one, which has existed at its beginning – an illusory professed constitutionalism (not identical to a nominal one), as well as to the super-centralized model of power.[2]

The basic conditions of the Constitutional Contract of 1993, and the current Constitution as its formal preservation, have been changed three times since the establishment of the constitutional order:

1) Between 2001-2005, within the framework of the doctrine of the "dictature of law" - the subdivision of the positive law and its detailed content (phasing out of federalism, bicameralism, multiparty system and the build up of the vertical of power);
2) In 2008, within the framework of the Sovereign Democracy Doctrine (a claim for the revision of the position of the state within the context of global politics and under the premise of maintaining "security"); and
3) Currently ongoing, starting with 2014, within the framework of the Overwhelming Majority Doctrine, consequential transition to democratic Caesarism.

The contemporary regime in Russia is a plebiscitary authoritarianism. Its typical manifestations echoing the Bonapartist-Gaullist tradition include formal committal to the Constitution, double legitimacy (democratic, through elections, and authoritarian-paternalistic), anti-parliamentarism, lack of trust in political parties, non-partisan technical government, centralism, bureaucratization of the state apparatus, and the emerging cult of Strong Personality. Its final consolidation by the regime became possible by securing the mass social base, —establishment of monopolistic control by the ruling party in Federal and regional parliaments (the emergence of a qualified majority after the 2016 elections to the Duma) and, especially so after the Presidential elections of 2018, which in fact, was a plebiscite of public trust in the leader in the face of growing external challenges. Legitimizing formula of power combines three historical forms: Republican (theoretical elections of the head of state), Soviet (ideological functions of the leader) and monarchical (the scheme of the separation of powers that gives priority to the head of state). Quasi-constitutionalism becomes the political lawful expression of the trend: the factual delegation of power (and responsibility) to the leader, whose success is the single predetermining criterion of the legitimacy (electoral populism).

The emergence of this regime makes the system unstable, having depleted previous democratic resource of legitimacy, having been placed face to face with the new powerful challenges, and now turning to oppression to maximize control of the society. Transforming the quasi-constitutionalism into a genuine one without renouncing the current constitution,[3] and with a minimal alteration of its text entails

[2]The classification of constitutional regimes introduced by us by the degree of implementation of established political rights is a real, nominal and imaginary constitutionalism. In the first case, constitutional rights receive real protection (a citizen can defend them in court). In the second case - the Constitution is not implemented entirely - it is a constitution only by title (hence the name): it is a part of the ideology of the state, does not reflect the real structure of power and governance, or backs up the dictatorship, does not contain legal mechanisms for the implementation of the declared rights, in general has nothing to do with social reality, acting exclusively as an element of the political - legal legitimization of the one-party regime. In the third case, the situation is implied in which the constitution is very real, however it entails a number of restrictions on its implementation in the interests of the political regime, the supremely over-represented institution of the leader of the state (monarch or President), the subsequent interpretation of the separation of powers, the existence of a significant number of the default modes, gaps and contradictions, which are always interpreted in favor of the leader of the state, the guarantor of the Constitution. This includes the ability of the executive power to exercise pressure on the courts in important ("landmark") cases, which determine the policy of the law. Schematically, these three types of constitutionalism correspond to the political regimes of democracy, totalitarianism and authoritarianism (in various historical and modern forms). In the context of modern Russia, it means that the regime is no longer totalitarian (as it was in the Soviet period), however it has not yet become democratic, balancing in the space of limited constitutionalism with a trend to an illusion (that more or less allows control over the regime over the exercise of constitutional rights and freedoms).

[3]The refusal from the current constitution is unviable due to the following reasons: first of all, due to its symbolic significance, that on of a rupture, both coherent and fundamental, with the communist experiment and law legacy of the Soviet nominal constitutionalism; second of all, due to the

Citation: Medushevsky AN. Constitutional reform in Russia substance, directions and implementation. *Forensic Res Criminol Int J.* 2019;7(6):286–294. DOI: 10.15406/frcij.2019.07.00295

shifting the center of gravity toward legislative, institutional and political reforms.

The constitution and political regime: the current vector

Hallmark features of the contemporary Russian political and legal regime are its declaratory commitment to the Constitution (the 2008 and 2014 amendments, though important, do not amount to radical revisions), and an accentuated intent to maintain its stability (preservation of the Constitution is an important element of the legitimization of the regime) against the backdrop of content erosion of the main constitutional principles.

The overarching dynamics of constitutional deviations among most vital legal principles (pluralism, democracy, federalism, separation of powers, local self-governance, independence of the judiciary, insurance of the rights and freedoms) are the following:

1. Their growth has been registered over time (mainly from 2000s);
2. Transition from more general constitutional provisions to concrete elements (sub-principles) for each of the principles examined. As a result, the general definition of the principle remains intact, however, its structure and meaning undergo significant modifications;
3. Transition from formal practices (legislative and judicial) to less formal: institutional and informal;
4. A drastic increase in the volume of constitutional deviations occurring with the transition from the federal level of legislation to legal regulation, and, especially with legislative and regulatory compliance practices at the level of the subjects of the federation, at the regional and local level (where the phenomenon of monopolization of all types of power and control by the regional elites has been established).[4]

The system of limiting constitutional principles is a smorgasbord of built-in "shock absorbers," which block their actions at the institutional level. The principle of pluralism is distorted by a system of double standards the existence of which is based on specially "reserved zones," where the executive power has considerable discretion in determining both the meaning of relevant norms and their practical application. The principle of separation of powers is obviated by the extraordinary concentration of Presidential authority and powers, which gives the head of state not only constitutional, but also the metaconstitutional prerogatives[5] for intervening in activities

liberal values, rights and freedoms enshrined in it in their international legal understanding (Chapters 1 and 2), especially so in the recognition of the fact that in Russia "universally recognized principles and norms of international law" are "an integral part of its legal system "and are utilized in a priority order (in case they contradict with the international contracts of the Russian Federation) (item 4 of item 15); thirdly, because the current constitution paved the grounds for Russia's integration into the European legal space (accession to the Council of Europe, ratification of the ECHR and other important international documents, Russia's acceptance of the jurisdiction of the ECHR, etc., especially so, the imposition of a moratorium on the use of the death penalty executions), which have become the basis for the modernization of the entire legal system; fourthly, a radical transformation in the Constitution (not to mention its replacement with another one) would lead to the creation of a legal vacuum, the need for a colossal, long term and expensive work in order to transform all the constitutional and customary laws, including sectoral codes and regulations; fifthly, the adoption of a new constitution (or amendment of Chapters 1,2 and 9 of the current Constitution) would mandate the inclusion of the procedure for convening the Constitutional Assembly, which is possible only in accordance with the "federal constitutional law" (paragraph 2 of Article 135). However, such a law has not been passed yet, and its existing projects do not demonstrate, as a minimum, the unity of positions on the issue (in reality they indicate a potentially plausible conflict between the branches of power over the issue of which one of them will be dominant in the process); sixthly, in the conditions of a low legal culture of the society and the weakness of the liberal opposition, the beginning of a procedure for a large-scale constitutional review is hardly able to stop the uncontrolled rise of populism (both the right and the left one), which means that the result of this revision may be the failure of the constitutional reform-the loss of those provisions of the Constitution, which should be recognized as its historical achievement without a clear guarantee of real progress; seventhly, the current Constitution does not exclude the gradual transformation of the political regime and without its abolition at all, it can be done through the introduction of amendments (to Chapters 3-8, within the framework of Article 136), reforming legislation, political practices, etc., namely by fully incorporating the institutions of political democracy, competition, responsibility of the power and the change of leadership. If this will not suffice, it would be possible to provide other arguments in favor of keeping the current Constitution, however, in my opinion, these arguments are specific and sufficient enough.

[4]The mechanisms of transformation of the constitutional principles and standards without their formal revision can be explained through the following examples: as far as the principle of pluralism goes the absence in the federal laws (on the fundamental guarantees of electoral rights, political parties, public associations, the media, elections of State Duma deputies, etc.). of a clear-cut regulation of the conditions for the fair political competition, the legal status of the political opposition and, on the contrary, the inclusion of limits to exercise the rights in the purposes of protesting; practically leading towards the established dominance of one party; with respect to the principle of the freedom of conscience, such provisions in the legislation (on freedom of conscience and religious associations), which do not secure the neutrality of the state in terms to all denominations, practically stimulating the predominance of one of them; with respect to the principle of federalism - a multiple revisions of the legislation (that of the federal law on the general principles of the organization of legislative (representative) and executive authorities in the subjects of the Russian Federation, in particular),reflecting the trend towards unification and centralism in general (since there is no clear-cut definition of the limitations on the expansion of the powers of the federal legislator in resolving issues in the subjects); with respect to the principle of local self-government, the revision of legislation (of the federal law on the general principles of organizing local self-government in the Russian Federation in particular); which resulted in its nationalization, hierarchization and bureaucratization; as far as the principle of separation of powers is concerned it was the adoption of a whole set of laws resulting in the progressive expansion of the authority of the Presidential power, the introduction of new powers (there are several hundred of them), that are not directly outlined in the Constitution, and sometimes are contradicting it (their main directions are: funding, control over subjects and the judiciary power); as far as the principle of independence of the judiciary is concerned the adjustment of federal laws (on the status of the judges, on the judicial system and on the institutes of the judicial community), which is perceived as a judicial counter-reform as it creates channels for the administration to influence courts and qualification board of judges (we are referring to the innovation as the institute of president of the court of justice upon which the career of the judges factually are dependent). As far as the guarantees of political rights and personal freedoms are concerned the amendments of 2012 to a number of federal laws (on non-profit organizations, on public associations and the Criminal Code of the Russian Federation) present fundamental importance, tied to the introduction of the provision on "NGOs performing the functions of a foreign agent," namely those who receive money from a foreign state to participate in "political activities." The latter concept was deciphered by the Ministry of Justice as putting general influence on decision-making, which results in an unjustifiably broad interpretation of the range of organizations and restrictive measures (special registration procedure, reporting, unscheduled inspections and liquidation of the organization in cases when these requirements are not met). This should also include the restrictions the activities of the opposition under the law on assemblies, rallies, marches and pickets, having to do in general with the replacement of the declarative order of their conduct as permissive.

[5]The notion of the metaconstitutional prerogatives of the leader of the state

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of all three branches of government. The situation is exacerbated by the factual predetermination of the results of their activities through informal influence on their creation and the present "corrections" of the significant political topics.

Same mechanisms are at work when it comes to the principles of federalism, with the executive power vertical neutralizing their constitutional basics and severely limiting the independence of the subjects of the federation. In the field of the judiciary, the part of such a "built-in mechanism" is performed by the institute of appointed chairmen of the courts, the existence of which degrades independence and adversarial justice competition for the sake of pleasing the executive power. Finally, in the area of observance of guarantees of basic political rights and freedoms, this corrective mechanism is manifested through the expansion of administrative oversight and discretion, backed by the uncertainty of constitutional norms (the absence of an exhaustive list of administrative authoritative powers of the head of state along with the Presidential Administration), the utilization of official (legislation and by-laws), but especially the use of informal leverages of influence against civic engagement.

Based on these observations it is possible to diagnose the current situation and determine the scope of desirable changes. Contrary to what many believe, the present situation does not amount to a constitutional crisis,[6] but rather a constitutional stagnation (the concept of "deferred" or "guided" democracy and "constitutional parallelism"). Therefore, the current constitution should not be renounced, but its standards should be optimized for better efficiency. Priority vectors for corrections are the constitutional, legislative and institutional.

Form of government: the system of checks and balances

The question of the form of government is the theme of political and not legal debates, because its revision would have required some very substantial changes to the Constitution. The transition to a monistic parliamentary form of governance, or the so-called Westminster system, is not advantageous for Russia for three reasons. Firstly, it is does not match well with federalism, which has been declaratively built on the basis of the national and territorial principle (there are practically no successful examples of setting into effect a parliamentary republic in this context). Secondly, under the existing system of the imitation of the multi-party system and the absence of a stable party system its introduction would be premature. And finally, it is poorly aligned with the Russian political tradition.

A purely presidential form of government (based on the U.S. model) is not ideal either in the absence of an independent and self-governed judiciary (the Supreme Court), as it leads to irreconcilable conflicts between the Congress and the President. Therefore, its introduction might lead to a permanent state of incompetency of power, or a coup with the subsequent installation of an authoritarian model (in other words, the implementation of a typical Latin American scenario).

The authors of the Constitution of 1993, having given a careful consideration to international experience, had the good sense to come up with a combination (Presidential-Parliamentary) form of governance, the closest approximation of which was the Constitution of the Fifth French Republic of 1958. However, the Russian iteration at times is contradictory to the original. Historically, when mixed (semi-presidential) systems were established (for example, in the constitutions of the French Fifth Republic, the Weimar Republic, Austria, Finland, Portugal, and partially in the projects of the Russian Constituent Assembly of 1918) they included the following fundamental elements: 1) President of the Republic elected by universal vote and endowed with considerable authority; 2) Prime Minister and ministers, endowed with executive governmental authoritative power as an opposing force to the President;[7] 3) Parliamentary acquiescence

means that he has such prerogatives that do not stem from the text of the Constitution and the norms enshrined in it formally (nor do the originate solely from them) but can be introduced on the grounds of a directed political interpretation. As a matter of fact, we are talking about the prerogatives arising from the status of the head of state as the guarantor of the constitution, the representative of the nation, the political leader, the highest arbiter in providing resolution to all the acute social and international issues, conflicts among the branches of power, etc. These metaconstitutional prerogatives can rely on the constitutional norms (in case of them being ambiguous or, on the contrary, excessively transparent on the topics of the concentration of power), however their real - life implementation depends primarily on the consciousness of the public, the willingness of the society to accept such a role of the head of state. In Russia, this readiness is largely explained by the historical tradition of sacralization of power, both during the monarchy and in the Soviet era, reflecting the belief of the population in the ability of a strong leader to resist negative systemic challenges and protect the "common folks" from the tyranny of the officials in the field (perceptions actively used by the current power in order to legitimize its regime).

[6]We have already had to explain our position on this topic. If the concept of a constitutional crisis is used as a scientific term rather than a publicist one, then it stands for the following: The constitutional crisis consists of the three parameters: 1) the fundamental law loses its legitimacy in society (there is an unbridgeable conflict between the formal positive law and legitimacy); 2) different constitutional norms cannot be agreed upon by the opposing social forces on the grounds of the present fundamental law; 3) the constitution (or some portion of its norms) comes into conflict with the political reality. The classic examples of the full-blown constitutional crises (when all of the three parameters are present) are: the crisis of the Weimar Republic of 1933 (and its Constitution of 1918), or the constitutional crisis in Russia of 1993. This is represented in a narrower extent, for example by the constitutional crisis in Poland in 2015. If we were to give assessment of the current situation in Russia from these perspectives, we cannot locate a single parameter that would allow us to define it as a constitutional crisis: 1) the legitimacy of the 1993 Constitution is not being questioned by either the public, or by the authorities (as it has been confirmed by various opinion polls); 2) the conflict of opposing social forces can be resolved theoretically within the framework of the current Fundamental Law (which does not preclude the coming into power of even a non-systemic opposition and the implementation of its program of constitutional amendments from a formal point of view); 3) the Constitution is not contradiction with the existing reality in any way, and even on the contrary it promotes self-preservation (in this context the official explanations of the preservation of constitutional stability, the undesirability of constitutional revision, etc. are clear). Overall, we can state that maintaining constitutional stability is a crucial part of the legitimization of the present political regime. That is why it makes sense to talk not about the crisis in real life, but rather about the constitutional stagnation. The stagnation of legal development when the values, the principles and the standards of the Constitution cease to function adequately, and the political regime is practically forced to deviate from them further and farther in order to maintain stability. This trend can result in a political crisis, which can morph into the constitutional one (however not necessarily). And it would make sense to overcome that one (and it would be socially less costly) without the abandoning of the current Constitution through the return to the full utilization of its norms, regime transformation and, to the partial amendments of the Constitution on when needed basis

[7]In a mixed form of government of the French model, the president has the prerogative of appointing the Prime Minister from the party that won the election (or the coalition of that party), however he does not have (like the Russian president does) the constitutional right to dismiss the government or dismiss the ministers at their discretion. This option in France is only carried out if the President and the Prime Minister both rely on the majority of the same party, as it was the case with De Gaulle, for example). This way the

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as the condition for the government staying in power. The typologies of dualistic (combined, or semi-presidential) systems range from those close to Parliamentary (Parliamentary-Presidential regime) to almost Presidential (Presidential-Parliamentary regime of the "republican monarchy"). Nevertheless, all of them stipulate the presence of all three of these elements. The last element (parliamentary responsibility of the government) is factually missing in Russia, which poses a problem with defining its system of government as either an authentic "mixed" model, or a dualistic one.

The French Constitutional Reform of 2008, which gave a powerful stimulus to the factual transition from a Presidential-Parliamentary to a Parliamentary- Presidential system could serve as a model for Russian reforms. The aims of constitutional amendments could be grouped along three directions: correction of the imbalance of the separation of powers, expansion of the authority of Parliament and government, and curtailing the prerogatives of the President.

Constitutional amendments on separation of power

The main problem of the Russian political system is the weak connection between the government and the parliament, and practically a total dependence of the government on the President. From that perspective, relevant amendments will alter the general balance of power between the parliament, the government and the President in favor of the former. To that end, it is necessary to overcome contradictions of the Constitution in the resolution of the issue of government responsibility, since the Russian model design combines the elements of various systems: on the one hand, the State Duma gives its consent to the appointment of the Chairman of the government, which is an element of his parliamentary responsibility (paragraph 1, Article 111), on the other hand, it enforces the capability of the President to make a uniliteral decision on the resignation of the government, which is an element of the Presidential system (art. 117, paragraph 2). This contradiction can be resolved by adopting a formula of parliamentary accountability of the government, immanent in an authentic combined form of government.

Duplicity must be eliminated from regulation of the relationship between parliament and government. The Duma can express its lack of trust to the chairman of the government three times, nonetheless, that does not result in the automatic resignation. The President has the right to choose whether to send the government into resignation, or to dissolve the Duma itself (which is a deterrent factor of its self-preservation) (Article 111, paragraph 4). In Russia, the ministers are only accountable to the President, but not to the Parliament. The parliamentary responsibility of the government and its effective mechanism should be clearly identified in the Constitution.

It makes sense to introduce certainty in the correlation of the legal and political responsibility of the government to the President in accordance with the following parameters: whether this responsibility of the government should be viewed as a single one, or rather as two different types of responsibility (before the Parliament and the President); one should speak about the collective responsibility of the government, or the individual responsibility of ministers (in the form of the resignation of the cabinet as a whole, or the resignation of its individual members); how should the constructive or destructive vote of confidence look like (constructive or destructive) should look, and finally, to what extent should the position of the government and the Prime Minister be viewed as one (does the resignation of the Prime Minister mean the resignation of the government as a whole)?

The topic of the mechanism of the governmental legal responsibility to the President needs to be clarified: what would be the course of action if the government makes a decision to resign and the President turns it down? Whether we are talking about the collective responsibility of the government, or about an individual responsibility of each of the members of the government (consequently, what we are talking about is the automatic resignation of the whole cabinet, or of its individual ministers). In order to solve the issue of the mechanism of implementation of the collective responsibility of the government in the event the issue of the responsibility of the government to the Duma is raised, the Chairman of the government (part 4, article 117) has to determine whether he expresses the collective will of the government, or that one of his own, and how the situation ought to develop if the government should take a reverse decision by a majority vote.

It is important to articulate in greater detail the responsibility of the government under the conditions of the transition of the Presidential power, specifically how this responsibility is to be enforced by the government, which is mandated (Article 116) to resign before the newly elected President takes office, if the latter has not yet taken it.

Providing concrete detailing of Art. 71 and 72 makes sense in the field of federalism, establishing subjects of joint jurisdiction by taking into account the limits of the powers of the federal legislator in order to regulate issues in the subjects to overcome the unitarist vector.

It is advisable to think through the issue of delegating to the Constitutional Court the function of the guarantor of the Constitution (as it is in the majority of countries of the continental legal family), after having deprived the President of the corresponding function (endowed in Article 80). In this context, it will be necessary to revise the law on the Constitutional Court in the sense of expansion of its prerogatives, by the parity of reasoning with the relevant institutions for monitoring the constitutionality of the Western countries.

Consequently, the question arises about the adequacy of the official interpretation of the formula on the separation of powers (articles 10-11), which is essentially putting the President above all the major branches (there could be only three branches of power, not four, the definition of the President as a special "body of state authority and power" is the continuation of the monarchical tradition).[8]

principle of parliamentary responsibility of the government and bicephalism (the two-headed nature) of executive power (divided between the President and the Prime Minister) is implemented. The question of whether the President could oust the Prime Minister was initially interpreted positively (it was believed that the authority to appoint also includes and the power to dismiss). For a long period of time this issue remained uncertain in the theory, however it was resolved in practical use. The key part was in the presence or the absence of a parliamentary majority at the Presidential disposal (the situation changed during the emergence of a "coexistence" regime between the two parties, one represented by the President and the other by the Prime Minister). In a result, the real responsibility of the Prime Minister towards the Presidents who had the parliamentary majority of that kind was replaced (after 1986) by the formal responsibility of the government to the National Assembly. In the future (especially beginning in the 1990s with the adoption of vital constitutional amendments), the entire system has evolved towards parliamentarism. The expansion of the authoritative powers of the Prime Minister at the expense of the corresponding weakening of the powers of the President. This trend was continued and established formally in France by a large-scale of the new series of constitutional amendments in 2008. The possibility of such vector of the evolution in Russia is blocked by Art. 117 of the Constitution of the RF.

[8]The sequence of aligning these 10 positions is identified by the degree of necessary intervention by reformers in the text of the Constitution for its transformation. The first ones are related to the introduction of amendments or clarifications of a number of articles, the subsequent ones with a proposal to consider a number of provisions (since that entails the discussion), the

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To resolve the issue of the future destiny of the parallel quasi-constitutional institutions (such as the Public Chamber) by abolishing them, or by reflecting their authoritative powers in the Constitution.

Constitutional amendments pertaining to the restriction of the presidential prerogatives

1. Revision of the norm, according to which the President unliterally "determines the main trends of the domestic and foreign policy of the state" (art. 80, para. 3), and he is also "the Guarantor of the Constitution of the Russian Federation, human and civil rights and freedoms of a citizen" (Article 80, part 2);

2. Restricting the number of mandates for the stay of the same person in this position by two terms (without the word "in a row", clause 3 of article 81), and the prolongation of the mandate (a discussion is possible in here);

3. Introduction of a mechanism for legally binding consultations of the President and the Prime Minister in putting into effect the most crucially important decisions. By the parity of reasoning with the French model, where this institution assists in achieving a consensus between the President, the Prime Minister, the Chairmen of the chambers of Parliament, and in some cases with the Constitutional Council in adopting crucial legislative decisions (referendum issues, dissolution of the National Assembly, emergency authority and powers, etc.);

4. The introduction of the counter-signature institute (the most important acts of the President are confirmed by the Prime Minister, and, if it is necessary by the ministers in charge), so that the President could not impose upon the Parliament the laws he discards and exercise his legislative prerogatives (with the inclusion of the legal right) without the consent of the majority of the Parliament;

5. The clear-cut implementation of the principle of dual responsibility of the government: before the Parliament and to the President (and not just before the President), which opens the possibility of evolution of the political system from a more Presidential one, to that closer to Parliamentary. To implement the principle of double responsibility of the government, it is necessary to abolish the right of the Russian President to send the government into resignation at his own discretion (clause 2, article 117);

6. Putting into effect a clear-cut delineation between the two sectors of responsibility and the administrative competence of the President and the Prime Minister, the demarcation of the number of issues depending on to whom (the President or the Prime Minister) the supreme power of decision-making belongs to; the revision of the status and authority and powers of the Presidential Administration, and avoiding such a situation which makes the government an exclusively "technical" tool of the President;

7. It is advisable to endorse constitutionally the institution of coordinating the transfer of the entire scope of the exclusive powers to the President, namely, in the situations (circumstances, procedures and deadlines) when the President consolidates all the entirety of state authority and powers and becomes the Supreme, and the one and only administrative power;

8. To narrow down the interpretation of the arbitration of the President in the line of coordinating the activities of the branches of power. The corresponding powers of the Russian President to "resolve differences between the bodies of state authorities" (Article 81) do not have explicit restrictions and exclude the possibility of the expansion of the powers of the Prime Minister in this area, at the expense of a corresponding weakening of the Presidential powers;

9. To restrict the decree and emergency powers of the President (as was the case in a number of combination systems of the French model). In Russia, the President can introduce military or state of emergency situation all over Russia, or in some of its regions, with the subsequent approval by the upper chamber (articles 56, 87-88), however human rights and freedoms can be limited by the federal law and without its formal introduction (part 3, Article 55), and the subsequent measures were introduced by the decrees and executive orders of the President, which are "mandatory for execution throughout the entire territory of the Russian Federation" (Article 90);

10. To constitutionally restrict the possibility of expanding the prerogatives of the President, provided to him by legislation inside the constitution, as well as outside of it. The subsequent expansion of the Presidential powers can be traced in such vital fields as fiscal control (giving the President the right to introduce the Chairman of the Accounting Chamber and its auditors), power wielding agencies (all locked in around the President), the judiciary system (giving the President the power to introduce to the Federation Council candidatures for the posts of Supreme and Constitutional Courts, their chairs and deputies), regional governance (multiple changes in the procedure of empowerment of the heads of regions);

11. To return the functions to initiate and discuss bills back to the Parliament with the appropriate restriction placed on (cancellation?) of the Presidential legislative initiative; expanding the accountability of the President and the Prime Minister to the Parliament, ensuring the control authority and powers of the Parliament. In order to do that, it makes sense to increase the control prerogatives of the Parliament (the expansion of the scope of competences of the parliamentary commissions in the investigation inquiry); the introduction of the norms on the activities of parliamentary groups of deputies, while ensuring the rights of the opposition groups and groups, which are representing minority rights; the resolution of the issue of the discipline of parliamentary voting, and inner-party discipline within factions (these norms can be specified by the State Duma's Regulating Rules);

final ones with a change in the policy of the law, particularly in the official interpretation of the principle of separation of powers. It does not come out directly from the texts of Art. 10 and 11 that the President is placed above them. Art. 10 simply states that the state power "is carried out on based of the separation into legislative, executive and judicial branches of power." Art. 11 states that the state power is exercised by the President, the Federal Assembly, the government and the courts, and in the constituent subjects of the Russian Federation it is carried out by the state power institutions that they form. Based on the literal reading of these articles, the Presidential predominance over the three branches of power does not stem from it. In this case, we are talking about the interpretation of these provisions by the Constitutional Court (as well as a number of the other ones) and by the official doctrine which defined the President as a special body of the state power in general. That provided a very broad interpretation of his powers "on resolving the disagreements between the state power institutions" in art. 85 (as a matter of fact, they are reduced to their subordination) and recognition of the fact that he has some implied (hidden) authoritative powers to issue decrees on those topics which are not directly regulated by the Constitution, provided that this law-making activity does not spill beyond the general constitutional framework. There is no doubt of course that the practice of absolute domination of the Presidential power also contributes to this official interpretation.

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12. The revision of the position of the Constitutional Court on the existence of the so-called hidden (or intended) powers of the President as a "guarantor" to issue decrees on topics that are not directly regulated by the Constitution, in those cases when they do not go beyond the general constitutional framework.

Constitutional transformations possible without changing the text of the constitution

The transformations targeted at overcoming constitutional and institutional deviations are important parts of the constitutional reform. It stipulates the following:

First of all, to comprehend the constitutional setbacks not as an aggregate set of phenomena, but as a systemic problem of the Russian constitutionalism; to alter the legal policy towards the authentic guarantee of constitutional principles functioning; to cancel the results of the modern times counter-reforms, that are responsible for the dysfunction of the institutions and administrative procedures.

Second of all, to bridge the growing gap between formal and informal practices, in particular to take into consideration the role of the latter in the magnitude of constitutional deviations in all of the principles; to differentiate the informal practices proper, having eliminated, first and foremost their dangerous anti-constitutional substrate.

Thirdly, to overcome the ever-growing deeply rooted logic of double standards for the comprehension of the constitutional principle of pluralism - the priority of the interests of the executive power, the abolishment of the surreptitious existence of the special zones that are free from the constitutional oversight (and excessively broad interpretation of the delegated powers of the administration).

Fourthly, to reconsider the predominant interpretation of the principle of separation of powers, which connects the operations of the branches of power with the activities of the super arbitrator – the President, enabling presidential power to exercise unconstitutional (extra-constitutional) influence on the elections, the legislative process, and to influence the judiciary when there are politically significant decisions being taken.

Fifthly, to reconsider the existing interpretation of the principle of federalism, which had practically led to the triumph of unitarist tendencies: to revise the standards of the federal legislation, which have factually replaced the Constitution of the Russian Federation, and the constitutions and the charters of the regions, in terms of identifying the status of subjects of the Russian Federation, separating powers in subjects of joint jurisdiction; in order to overcome excessive administrative centralization in the subjects in the line of regional budgetary powers, institutions and their functions.

Sixthly, to adjust the system of bicameralism in the terms of altering the order of formation of the Federation Council. However, the widespread thesis on the direct elections of the members of the upper house does not seem uncontestable, both in the context of the world experience and the Russian situation. The creation of two chambers, which have the same elective legitimacy leads to undesirable consequences: it endows the existing (and in many aspects inefficient) model of federalism; it leads to a possible conflict between the chambers, which get their equal legitimacy; the conflict proves difficult to be resolved under the circumstances of the contemplated weakening of the Presidential power of an external arbitrator. Seventhly, to overcome the excessive deviations from the principle of separation of powers in the regions, which enable the heads of subjects of the Federation to cajole the local parliaments and courts into submission of their influence, despite the fact, that the latter have formal federal status, except for magistrates and constitutional (statutory) courts.

Eighthly, to re-examine the extremely stern unification in the municipal field in the area of local self-government, to provide the subjects of the Russian Federation with the opportunity to choose one out of several models for their territorial organization of the local self-government; increase their financial capacity to redistribute income and set up local fees; to overcome the practice of redistributing public property between state and municipal entities without taking into consideration the opinions of the latter; to ensure the rights to get compensated for expenses incurred in the result of decisions made by the public authorities; to harmonize the mechanism of coordination of legislative decisions making between the subjects and the municipalities that are affecting the interests of the local self-governance.

Ninthly, to de-bureaucratize the judicial system, by excluding legislative norms and institutional conditions, that are assisting in the establishment of a special judicial bureaucracy (appointed chairmen of the courts), in practice, putting the adoption of key decisions in the judiciary community under the strict control. To develop a doctrine of legitimizing judicial decisions in the area of Constitutional Justice by applying an appropriate interpretation of constitutional principles, criteria and tests, as well as any deviations stemming from them.

Tenthly, to take the legislative reforms that can restore a real multi-party system and respect for the rights and freedoms of citizens the rights of citizens to legitimate disagreement with the policy of state power in the form of meetings, rallies and demonstrations. The implementation of electoral legislation and control over the democratic practice of elections, ensuring equality of public associations before the law and guarantees of the activities of the political opposition remain relevant.

All these transformations can be implemented without the changes in the text of the Constitution, within the framework of legislative, administrative and judicial reforms, however, they stipulate a change in the general policy of the law.

The magnitude and the leverages of the constitutional system transformation

The scope of constitutional review would be determined by the mechanisms described in Chapter 9.

A radical version of the reform (or a complete revision of the Constitution) with the amendments of Chapters 1, 2 and 9 stipulates the convocation of the Constituent - the Constitutional Assembly (Article 135). Theoretically this version is justified in the conditions of the constitutional revolution, on the wave of expectations placed by the society upon the Constitution under a well demonstrated presence of a strong democratic consensus and the existence of the parliamentary forces, which are capable of leading and implementing this initiative step by step. Otherwise there will be a constitutional crisis with some rather unpredictable consequences.[9]

[9]In this case of developing events (a complete revision of the current Constitution), the fate of the Constitutional Court is theoretically decided upon by the Constitutional Assembly, which is called in accord with the federal constitutional law (which has not been adopted). The law itself (if it is adopted) may just as well be considered by the Constitutional Court for compliance

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Another version is to introduce separate constitutional amendments into Chapters 3-8 (in accordance with Article 136). It looks less radical as it does not put into question the constitutional system, as a whole (in theory, some of the amendments can be canceled out by the others). This version of changing the Constitution stipulates the availability of qualified (or close to it) majority in the chambers of the Federal Assembly for the reformers.

The third version appears when the proposed amendments to Chapters 3-8 spill beyond their boundaries and result in the transformation of the foundations of the constitutional system. It then brings us back to the square number one. At present moment there has been a strategy for a radical revision of the Constitution proposed under the guise of separate amendments. It has been proposed to incorporate them through the Preamble to the Constitution by the introduction of new chapters, or additions made to the final clauses. Nonetheless, a question of holding a repeated national vote would arise in this case, at the very minimum, similar in analogy to that one instance that occurred on December 12, 1993 (and as a result it demands a predictable wide social support for these initiatives).

It depends whichever version might be in demand on the content of the changes, the standards applied to the revision of the constitution, the arrangement of political forces and the objectives of the initiators of change. The version of the Constituent Assembly (Constitutional Assembly) for the adoption of a new constitution is not an obvious priority, neither from a legal, nor from a political point of view. First of all, the launch of this mechanism generates a wave of populistic expectations and, as a consequence, the threat of unprofessional decisions being made to appease the current emotional sentiments; second of all, the law on the Constitutional Assembly has not been adopted and the existing projects demonstrate a drastic conflict between the branches of power and the political parties on the issue of what its provisions could be; thirdly, there is an evident threat of the situation getting out of control, and the loss of the liberal standards of the current Fundamental Constitutional Law (it is not for nothing that the extreme right forces have been vouching for this option of the political spectrum).

The strategy of the majority among the modern democratic states is more acceptable: they are reserved in their attitude towards the creation of the omnipotent and autonomous bodies of constituent power, rather opting in favor of the temporary provision of parliaments with limited constitutional functions for carrying out constitutional reforms (that was the exact practice of successful transitional processes in Southern and Eastern Europe at the end of the 20th century) for them. The experience demonstrates that the best constitutions (and amendments) turned out to be those ones, that have been designed in a closed mode and involved professional experts, that were subsequently approved in their finalized versions at a referendum and have not been not the results of convocation of the Constituant,[10] and in the public quest for compromises for the political forces.

It is apparent, in the light of all the arguments presented, that in the long run one should strive to avoid both extremes: the constitutional stagnation and the full-scale revision of constitutional provisions (even more so, in the conditions of the transition period). In real life

with the current Constitution. However, the Constitutional Assembly, either confirms further down the line the inalterability of the Constitution or accepts the draft of a new one (in case the necessary majority of votes is obtained) or takes it out for a popular vote (clause 3 of Article 135). Nonetheless, the Constitutional Court, cannot determine the constitutionality of decisions taken by the Assembly. First of all, due to the fact that the resolution of these issues is delegated to the Assembly by the Constitution itself. Second of all, due to the fact that in the event of the termination of the previous Basic Law, the legal basis for judgments about constitutionality disappears. Thirdly, due to the limited competence of the Constitutional Court in the matters of reviewing even the existing constitution. On the grounds of the law on it and the adopted doctrine, the Constitutional Court of the Russian Federation (unlike the German one, for example), as it itself has explained (in 2008), cannot make decisions on the constitutionality of legal drafts on amendments to the current Constitution before the get adopted (because they have not yet become a law) and, even more so, after their adoption (because they have already turned into a part of the Constitution, and the Court is not entitled to rule on the constitutionality of the provisions of the Constitution). Therefore, in the case of the Constitution being revised completely, there is a need for a new law on the Constitutional Court with the definition of its competences, composition and the order of formation. Nevertheless, as the experience of transitional processes in different countries has demonstrated, from the political viewpoint the Constitutional Court can play a very different role in them (in case political parties agree to it in the constituent assembly) from the guarantor of the entire transitional process (determining the standards for established principles of the democratic system, for instance) all the way up to being the passive observer and registrar of these changes or their victims (in a number of post-Soviet countries, the constitutional revolutions in the history of the modern world resulted in a radical transformation of the Constitutional courts, or even their abolishment based on the incriminating charges of collaboration with the regime overthrown).

[10]The constituant is the legislative assembly in the general sense, endowed with the constituent (constitutive) power, which is convened specifically to discuss, draft and adopt the Constitution. In history, There is a whole gallery of constituents – of the constituent assemblies, which differ by the order of their creation (on the grounds of the current constitution or contrary to its norms); by the real volume of their established powers (all power or the restriction of its scope by the constitution or by a specific legislative act); by the order of formation (elective, self-proclaimed, appointed, combining these principles, etc.); by the order of their formation (elective, self-proclaimed, appointed, combining all these principles, etc.); by the system of organizations in the period of transition (the principles of relationships with the government and the other institutions of power); by the circle of the issues discussed (they are identified by the assembly itself or by the corresponding law on its convocation); by the order of approval of the results of their activities (the issue of whether the final word or the draft of the constitution belongs to them is referred to a referendum). Finally, by the nature of the results of their activities whether they succeeded in adopting a consolidated draft of the constitution, or they did not achieve that goal (they turned out to be dissolved before it was adopted), or whether during the discussion they revised the very purpose itself (they "dissolved" or, on the contrary, usurped power for their own benefit for instance). It stipulates a very scrupulous legal and political preparation, and, in case of its nature being inadequate (or due to the irreducibility of the political differences) there is a risk of going beyond the control of the law and ending up with the destabilization of the political system, or the of putting an authoritarian regime in power. This is what the discussion in Russia about whether it is necessary to pass a law on the Constitutional Assembly in general (for the mere fact that its emergence can provoke a constitutional crisis) is connected with in particular. That is why modern democratic regimes exercise restrain towards convening omnipotent constituants (in some of the modern history constitutions, their complete revision is not at all stipulated, or the so-called "eternal norms" have been taken out) in favor of the temporary empowerment of the Parliament with the functions of the executive power with a clearly defined authority range on the issues of constitutional revision, re-examination period and approval procedures to them. Th historical examples of the constituant entities in Russia are the All-Russian Constituent Assembly, which was dissolved by the Bolsheviks in 1918, and, with certain reservations, the Constitutional Consultation which drafted the Constitution of 1993... The modern era Russian analogue of the Constituant is the Constitutional Assembly (Article 135). For more details see: A.N. Medushevsky, "Political History of the Russian Revolution: Norms, Institutions, Forms of Social Mobilization in the Twentieth Century M.-St.Pet.: Center for Humanitarian Initiatives, 2017.

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we should talk about targeted amendments to the Constitution, aimed at the revision of the legislation, and most importantly, at the legal transformation of the political regime. Constitutional reform is not a task for the street mob, but rather for the professional lawyers and politicians.

Mechanisms and subjects of constitutional transformation under the conditions of leadership change

There are three possible scenarios of development for constitutional, legal and political systems:

1. Continuation of stagnation— reproduction in the new forms of the system of imaginary presumed constitutionalism (the probability is great; however, it is not indisputable);
2. Collapse of the system under the influence of internal and external factors (a negative version tied to the possible triumph of populism and potential reproduction of authoritarianism in other forms, including the parliamentary one);
3. Internal reformation of the system caused by the increased alienation of society and power, which puts the continued control of the current elite in jeopardy (a theoretically possible version). The latter version seems to be the least burdensome for the society, but it implies some strenuous work for the elite consciousness, its flexibility and pragmatism in its thinking.

Under the conditions of apathy of the civil society and the conservatism of the elite, the most viable option is a gradual shift from the authoritarianism to the "elite democracy," namely, the introduction of such a system of restricted pluralism, which stipulates the expansion of political competition within the ruling class, the creation of clear cut rules of the game, as well as political and legal conventions being in line with the balance of the ruling party and the parliamentary opposition.

The instruments for maintaining this contract for the elites (following the steps of the international and especially the European experience of transitional processes) could be - the division of the ruling party into two (tentatively speaking into the "conservatives" and "progressives"). The introduction of limited political competition, followed by a subsequent creation of conditions for the transition from the imitation of the multi-party system to the real one; the organization of the "round tables" with the legally binding contracts (with the possible involvement of the extra-parliamentary opposition); preservation of the agreements reached by the external arbiter (by the Constitutional court for example); in the final reckoning, overcoming the alienation between the power and the society along the lines of the common goals of the program of change. In principle, this evolution could look like a transition from the regime of plebiscitary authoritarianism to the modern form of a combined Presidential-Parliamentary (or Parliamentary-Presidential) Republic: the head of the state turns from Caesar into Princeps (number one among his equals), the arbitrator in the disputes among the branches of power, but not the dominant one.

As comparative analysis of the transition processes indicates there are three possible:

1. The head of state embraces these reforms in the face of the growing political system crisis in order to reserve the support of a part of the elite (and of the opposition) against conservative opponents;
2. The current leader stimulates the introduction of new "rules of the game" before leaving power (to maintain predictability of the course, and to preserve personal security guarantees against political or legal prosecution);
3. A new leader establishes these rules under the conditions of awareness of the fragility of the support that was provided by the elite (in order to contradistinguish one party against the other). The very fact of the realization of this dilemma by the leader provides the opportunity to prepare the corresponding reforms and train personnel in the depths of the old regime.

A major advantage of such reform is that it avoids a full-blown constitutional crisis with the risk of destabilization of the political system. It maintains positions for the elite based on new "rules of the game," and keeps the situation under control through the transition period. The acceptance of the model of the liberal-authoritarian consensus makes it possible to transform the acting (authoritarian) system without a conflict, to implement a constitutional change in a non-public dialogue mode, and to resolve convoluted disputes throughout the inside circle of the elite agreements, to create a system of formal and informal standards, which ensure the evolutionary liberalization of the regime.

The role of the liberal opposition in a similar critical situation (the change of the leadership) is extremely important, and it is comprised of the following: presenting the society with a full-bodied project of constitutional reforms; opposing the conservative restoration tendencies of the political system; advancement of the liberal agenda of the constitutional reforms in the society; building a dialogue up with that part of the political elite, which stands for the transformations (the union of the public and the enlightened bureaucracy); preparation of a publicly trusted and professional counter-elite-a "non-ruling elite" (or "the government of the national popular trust"), which just might in the course of time become the nucleus of a new ruling elite.

Acknowledgments

None.

Conflicts of interest

The author declares there are no conflicts of interest.

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