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Constitutional Myths and Constitutional Illusions

About Heroic Past and Better Future

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This working paper provides insight into the essence, content and destiny of constitutional myths and illusions as "load-bearing elements" of constitutional order, government system and political regime. Special attention is paid to the analysis of individual constitutional myths and illusions, such as the doctrine of the sovereignty of the people, concept of social contract, nation-wide referendum, values of separation of powers, open government, etc., as well as examples of their embodiment in the Constitutions of Russia, China, the USA, France, Venezuela, Kazakhstan, Armenia, Ukraine, etc.

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Heavy on every sovereign head
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Save where the mighty Law is wed
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And law of Man, not Nature's hand.
Though ye above the people stand,
Eternal Law stands higher still...
The first bowed head must be your own
Beneath Law's trusty canopy
Then Peoples' life and liberty
Forevermore shall guard your throne.

("Ode to Liberty"
by Alexander Pushkin, 1817)

"...You know, Moishe's son Avrom must already be in America. If you meet him, say hello to him from me. Tell him, his father is a clever man—he died shy of Constitution! And our Motl has disappeared—nobody knows, where he might be... Many of ours disappeared like him... Some of them ran away, others were killed, and still others saunter through the snows of Siberia, working, chained to their barrows... And they don't care, driving a hard bargain—they want a Constitution! Once for all! And that's it!.. No more news. Keep well and give my very best to each of ours personally. I am not going to America. I don't like your America! A country, where a newspaper is called "paper", where Bluma becomes Jenny, and a bridegroom is found to

> be a trigamist... I am sorry to say this, but one should bung off such a country! From your letter I see that, if we had a real Constitution, as we understand it, we wouldn't need any America! We would have our own "America", even better than yours... Don't grieve, Yankel! I wish I had a piece of gold and Krushevan had a pain as great, as the Constitution that we will have, if God allows this to be so!...
>
> Your Friend Yisroel"
> Sholem Aleichem[1]
>
> "From the Tailor's New-Year Letter to His Friend in America" (1907)

Key for understanding the terms "myths" and "illusions" when used in the context of constitutional matter is the fact that they do not have any negative valence of fantasies or ungrounded hopes. Unlike their definitions typical of other areas, in the area of humanitarian knowledge they are not confined to the declarativity and fictitiousness of the phenomena that have transformed into such myths and illusions. The positive attitude towards constitutional myths and constitutional illusions is based on understanding that they do not necessarily conflict with the truth or reality. Even when social or legal scientists have to admit that such myths or illusions are groundless, they quite often point out their usefulness for the state and law. Sergei Guriev in his book "Myths of Economics—Misconceptions and Stereotypes that are Reported by the Media and Politics" uses as an epigraph the words of John F. Kennedy, *"... The great enemy of the truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic."*[2]

Unlike him, we should proceed to covering this matter from the perspective of Henry Tudor, according to whom, *"We can make a start by disposing of a widely held but misleading preconception. In common usage, the term "myth" stands for any belief that has no foundation in fact. A myth, we are told, is a fiction or illusion, the product of fantasy and wishful thinking rather than the result of any serious attempt to tackle the world in which we live; and political myths are simply fictions or illusions about*

1 Sholem Aleichem. There are no news ... Tevye the Milkman. Stories / Trans. from the Jewish. Moscow, Publishing House "Fiction". 1969. Pp.438–439.

2 President John F. Kennedy. Commencement Address At Yale University, New Haven, Connecticut, June 11, 1962//Public Papers Of The Presidents Of The United States: John F. Kennedy, 1962. P. 234. Cit. by: Guriev S. Myths of the economy: misconceptions and stereotypes that are spread by the media and politicians. Moscow, United Press, 2010. P. 19.

political matters. There is nothing wrong with using the term in this popular sense-provided that it is used as a term of abuse and with no pretensions to academic rigour."[1] [Tudor Henry, 1972. P. 13].

Narrowing the notion of a myth to a fairy tale takes us back in time to the childhood when the word "myths" would mean life stories of the Olympian gods—many generations of Soviet and Russian teenagers remember them in the classical interpretation of Nikolai Kun. Whatever fairy they may be, even the myths of Ancient Greece are historical documents, albeit presented artistically, with a fair share of exaggeration and fantasy. Becoming part of the political life the myths (should it be myths about the Storming of the Bastille or Winter Palace, the Founding Fathers of the USA or Aryan descent) can have a huge creative or destructive potential.

Among all the various political myths, a special place is held by those that appeared due to the advent of the constitutional doctrine and became disseminated due to the development of the constitutional thought as part of philosophy as well as practical constitutional and legal regulation.

Alain Marciano, a professor at the University of Montpellier, is absolutely right to explain the more or less seamless functioning of the human society by the fact that its members share the same basic idea of their roots, principles of existence, and ways to interact. Such ideas are foundational and also known as myths. These myths enable the existence of the society and are important because they create societal inertia, rather than because they are one hundred percent truthful or accurate. Among the social institutions that generate myths Constitutions occupy a non-negligible place since in a certain way they shape the society. [Marciano A., 2011. P. 1–2]

If there is anything that could justify the negation of the grandeur of constitutional myths and illusions, it is the fact that they themselves were established as such through categorical denial of the pre-constitutional system of myths and illusions. The most sublime theory of the modern constitutionalism—i. e. the theory of sovereignty of peo-

[1] However, we can make a start by disposing of a widely held but misleading preconception. In common usage, the term "myth" stands for any belief that has no foundation in fact. A myth, we are told, is a fiction or illusion, the product of fantasy and wishful thinking rather than the result of any serious attempt to tackle the world in which we live; and political myths are simply fictions or illusions about political matters. There is nothing wrong with using the term in this popular sense-provided that it is used as a term of abuse and with no pretensions to academic rigour.

ple's rule—initially pursued purely practical political purposes and discarded the centuries-old belief in the divine origin of the state power, in support of which Louis XVI and his wife were sent to the guillotine.

In the Soviet period, the study of social and political myths was predominantly boiled down to the criticism of the "bourgeois mythology", as well as to defending the Soviet ideology from the criticism of "bourgeois authors". *"The propensity to mythmaking was considered as a fixed property of the bourgeois ideology, as a way to achieve its ultimate goal—to disguise the essence of relations between classes in the "world of capital"* [Shestov N. I., 2005. P. 57]. Therefore, for the majority of researchers the main aim was to dispel bourgeois myths. At the same time, it is quite natural for the constitutional ideology of any society at any social and economic regime to feature elements of mythology.

Indeed, myths can and sometimes should be dispelled, and those cherishing illusions can and sometimes should be made to wake up to reality. However, one should be very cautious in dealing with constitutional myths and constitutional illusions. Turning into constitutional myths and constitutional illusions these phenomena become elements of social psychology and even load-bearing structures of the constitutional order, government system or political regime, undermining of which can hardly be in the interests of patriotic researchers. As argued by Carl Friedrich and Zbigniew Brzezinski, *"A myth is typically a tale concerned with past events, giving them a special meaning and significance for the present and thereby reinforcing the authority of those who are wielding power in a particular community"*[1] [C. J. Friedrich, Z. L. Brzezinski, 1961. P. 99].

Constitutional myths and constitutional illusions are produced by the political and intellectual elite. It is impossible to prove the verity of constitutional myths, let alone constitutional illusions, empirically, which brings us back to the stratagem of agnosticism. Each and every individual has to decide for himself or herself, whether to believe in their truthfulness or not. The mere impossibility to embrace their existence or content, if any, is the chief argument in favor of their elitism. Those who do not care about the inner truth are not keen to spend their time on searching for it. And only those looking down on "human hives" and "moving masses" bother to pick out certain sets of values or symbols typical of specific nations or groups. Similar to the stars from

[1] "A myth," they say, "is typically a tale concerned with past events, giving them a special meaning and significance for the present and thereby reinforcing the authority of those who are wielding power in a particular community."

the poem "Listen" by Vladimir Mayakovsky, constitutional myths exist, because there is someone who needs them.

> Listen,
> if stars are lit
> it means—there is someone who needs it.
> It means—someone wants them to be,
> that someone deems those specks of spit
> magnificent.
>
> [Mayakovsky V. V.., 2014. P. 1].

However, the elitism of constitutional myths does not remove the dangers of their divorcement from the reality of social life. On the contrary, it implies them. Exploring reasons of such divorcement from reality M. Krasnov aptly notes that *"representatives of the intellectual elite, whose priorities include providing the society with new ideas, conceptualizing those ideas, etc., fail to make sure that hoary myths are not repeated at least, most probably because they do not bother to take into consideration their historical background or simply have a dip into authentic sources…"* [Krasnov M., 2007. P. 31].

"At all times and in all cultures, mythical content has been based on hieroglyphic symbols describing a scope of knowledge that goes beyond any rational comprehension capabilities. The archetype becomes the code that makes possible the decoding of these symbols or even unfolding of the entire body of knowledge hidden by them, should there be a priestly caste (or educated political elite) that keeps the "bunch of keys", says M. V. Borisenko [Borisenko M. V., 2002], who defines the myth as a cultural code that enables better understanding of the various aspects of the state and society, and clearer explanation of the diverse political and cultural phenomena, rather than just a deceitful legend.

That is why very often constitutional illusions and myths are closely related to popular mythology. For instance, the popular concepts of "people's will" and "people's wisdom" (as good as "people's sovereignty") are very much in tune with the traditional assumptions about the "good Tsar-Martyr" and "bad boyars" (isn't it a great basis for a model of separation of powers with strong presidential authority?).

"The myths help to store and transfer paradigms, exemplary models; it is based on them that all the things are done for which the man takes responsibility", says Mircea Eliade explaining his understanding of the myth as a "sacred story" [Eliade M., 1987. P. 30].

The interrelationship between constitutional myths and constitutional illusions is quite understandable. Analyzing the myths that are spread in the society it is easy to justify the presence of illusions in them, and in practical terms to be rather successful in offering recommendations regarding the improvement of the political regime.

One of the best known and most vivid myths of the French Revolution is the legend of the taking of the Bastille. *"The siege and taking of the Bastille is one of the most formidable events in the human history. It was extremely important not only to its contemporaries, but also to the future generations. The taking of the Bastille became a symbol of any act of political liberation by way of revolution. The very word "Bastille" has become a common name,"* says outstanding Soviet historian E. A. Tarle, and we can stand by these words—throughout his description the author stays faithful to the principles of the heroic people who risked their lives to demise the tyranny. [Tarle E. V., 1959. Pp. 647–658] (the article was written in 1939 for the 150th anniversary of the taking of the Bastille).

Let meticulous fact pickers sort out the inconsistencies that are negligible in the context of the world history, such as the ramshackle state of the fortress (it was 400 years old), which had made it virtually unused, the questionable combat value of its garrison, the number of prisoners (7 people), etc. From the perspective of the human history, it is much more important that the symbol of absolute royal power was demolished, and a plaque reading *"Désormais ici dansent" ("From now on it is a dancing place.")* was installed in its place.

A shining example of using the "heroic mask" to disguise events of a national history is the depiction of the "Great October Socialist Revolution" in the Soviet art (primarily in the cinema and literature). Thus, despite the numerous inconsistencies and explicit distortion of real historic events, the feature film "October" by Sergei Eisenstein (1927) is perceived as a documentary. If in the period when the film was made such inconsistencies were considered as an "author's viewpoint" and explained by the need to use innovative and symbolic artistic devices, today, in the era of gadgets and selfies, it is almost impossible to justify the historical fact that the well-known scene, in which the rebellious sailors and workers are climbing over the main entrance gate of the Winter Palace and knocking off the crowns and double-headed Imperial Eagles, is nothing more but a symbol intended to illustrate the overthrow of the old regime.

Even proceeding from the assumption that the storming of the Winter Palace did take place (there is no unanimity of opinions on this mat-

ter among the historians), we see quite clearly that there was no need at all to climb over the main entrance gate, since next to it there is the October Staircase (previously His Majesty's Own Staircase), which opens the shortest way to the Palace Square. The explanation is different—in the opinion of Sergei Eisenstein, the October Staircase was too narrow to show the revolutionary zeal in full swing on the cinema screen. As to the double-headed eagles, they had been dismantled at the direction of A. F. Kerensky immediately after the proclamation of the Russian Republic on the 1st of September 1917.

The examples of mythologization above by no means downplay the significance of these two greatest revolutions, their achievements or illusions generated by them. Regardless of the actual state of the Bastille or true significance of the shot fired by the cruiser Aurora, these revolutions did not only reform the Constitutions (political constellation) in their respective countries, but also played the role of the "locomotive of history" [Marx K., 1962. V. 7, p. 8], changed its very course. As early as in 1905, foreseeing the first Russian revolution, not knowing and hopefully not expecting its disastrous consequences for Russia, including the awful tragedy of the Second Russian Revolution, V. I. Ulyanov (Lenin) wrote, *"Revolutions are the festivals of the oppressed and the exploited. At no other time are the masses of the people in a position to come forward so actively as creators of a new social order as at a time of revolution. At such times the people are capable of performing miracles, if judged by the narrow, philistine scale of gradual progress. But the leaders of the revolutionary parties must also make their aims more comprehensive and bold at such a time, so that their slogans shall always be in advance of the revolutionary initiative of the masses, serve as a beacon" [*Lenin V. I., 1960. P. 103].

For the wellbeing and peace of mind of the society more important is the ability of the elites to provide ideological support by choosing a set of ideas, myths and legends that will bring the people to the desired wellbeing and peace of mind, rather than the size or scope of the lies (ideological support), by means of which those intellectual elites reinforce their position of opinion leaders. Moreover, to achieve such social peace of mind it is not necessary, and sometimes counterproductive to rely on historical truth.

What we get wrong and how to get it right[1]

Throughout the course of history, social myths have played different roles. Yet another example is Plato who wrote about white lies as a way to build a well-organized and equitable society [Norchi C. H., 2008. P. 289]. As owners of the first national Constitution the representatives of the American constitutional doctrine are undisputable leaders in the creation and dissemination of constitutional myths. The mere story of the Founding Fathers is considered to be a myth. While admitting the mythical nature of many components of their constitutional doctrine they are still proud of them and even teach others how to "be wrong in a right way" when using them.

Ray Raphael in his book "Constitutional Myths. What We Get Wrong and How to Get it Right" names eight most common myths[2]: *1) The framers of the Constitution opposed a strong federal government; 2) The framers hated*

1 Ray Raphael. "Constitutional Myths: What We Get Wrong and How to Get it Right. The New Press, New York, 2013. — 488 c.

2 1) Myth: The framers of the Constitution opposed a strong federal government; 2) Myth: The framers hated taxes; 3) Myth: The framers were impartial statesmen, above interest-driven politics; 4) Myth: The framers were guided by clear principles of limited government; 5) Myth: James Madison sired the Constitution; 6) Myth: The Federalist Papers tell us what the Constitution really means; 7) Myth: The Founding Fathers gave us the Bill of Rights; 8) Myth: By discovering what the framers intended or how the founding generation understood the text, we can determine how each provision of the Constitution must be applied.

taxes; 3) The framers were impartial statesmen, above interest-driven politics; 4) The framers were guided by clear principles of limited government; 5) James Madison sired the Constitution; 6) The Federalist Papers[1] *tell us what the Constitution really means; 7) The Founding Fathers gave us the Bill of Rights; 8) By discovering what the framers intended or how the founding generation understood the text, we can determine how each provision of the Constitution must be applied.* [Ray Raphael, 2013].

The euphoria of Ray Raphael is opposed by other authors who draw attention to the fact that the American constitutional myths, being historical in nature, lead to false and dangerous illusions of the American exceptionalism. Garrett Epps stands out from the other American authors with his harsh criticism of the oiliness of the American constitutional mythology. Claiming that in doing so he makes a stand against the "flood of constitutional nonsense", Epps expands on the list of myths as follows: 1) The right is "originalist," everyone else is "idiotic"; 2) The "purpose" of the Constitution is to limit Congress; 3) Congress has stretched the commerce power beyond its proper limits; 4) The Constitution does not separate church and state; 5) Equality and self-government are "wholly foreign to the First Amendment"; 6) The Second Amendment allows citizens to threaten government; 7) The Tenth Amendment protects "states' rights" and "states' sovereignty"; 8) The Fourteenth Amendment is obsolete and irrelevant; 9) The election of senators destroys "states' rights"; 10) International law is a threat to the Constitution [Epps Garrett, 2012].

In the US legal literature, constitutional myths are usually dealt with based on an action-oriented approach. Thus, the myth about the distortion of the commercial powers by Congress is used in the context of distribution of authority between Congress and the President in the area of foreign trade regulation and imposition of sanctions against foreign states and companies. The provisions of the Fourteenth Amendment (according to which all persons born in the United States are citizens of the United States, and no person shall be deprived of any rights without due process of law) are heavily used in the debates on the Patient Protection and Affordable Care Act better known as Obamacare.

[1] The Federalist Papers is a collection of 85 articles and essays devoted to the principles of the 1787 US Constitution written by Alexander Hamilton, James Madison, and John Jay and published in New York newspapers under the pseudonym "Publius" in the period between 27 October 1787 and 2 April 1788 to promote the ratification of the United States Constitution among New Yorkers.

The skeptical attitude towards leading international organizations, such as the UN and UNESCO, which is gaining a foothold in the USA, as well as the aspiration of America to expand its court jurisdiction to other countries in combination with its pretty unconventional behavior in terms of execution of international treaties, are based on the myth that the international law threatens its constitutionally established order and, therefore, should be removed from the judicial practice. The myth that the primacy of the US Constitution releases the USA from any international obligations that may contradict the interests of America reveals itself particularly persistently in the neoconservative position. Promoting the theory of American exceptionalism, which grants the USA the right to spread American values and act without waiting for threats, the neocons have reinforced the traditional American skepticism in regard to the effectiveness of international legal acts and international institutions with the philosophy of morality of American intervention, moral hegemony and moral clarity [Hodgson Godfrey, 2009].

It is worth pointing out that the American researchers who allow themselves to analyze historical, legal or economic aspects of their country's constitutionalism with a fair share of criticism or even with a bit of humor face fierce resistance on the part of those who traditionally exalt everything that has to do with the name or text of the American Constitution. Such exaltation of this document was not typical of the Soviet legalists who made every effort to dispel the myths of American constitutionalism. The highly professional level of their criticism is proven by the fact that their arguments are mostly in line with those offered by their American peers (except for the Marxist-Leninist component, of course).

As early as in the days of the Constitutional Convention in Philadelphia and in the period of ratification of the Constitution by state ratifying conventions, it was argued that the ratification procedure was not democratic (less than 3% of the states' population were allowed to take part in the discussion of the wording of the Constitution), and that it was unacceptable that the Constitution did not have provisions on civil rights and liberties.

The Bill of Rights was included in the Constitution during the first session of the First Congress in 1789 under pressure from the state ratifying conventions (while 9 of the 13 states only pronounced for the proposal to include the Bill of Rights in the Constitution, the other 4 states insisted on it as a must). The Founding Fathers were forced to yield to their demands. One undeniable fact gives great pleasure to the critics of the American Constitution—it failed to abolish slavery. Moreover,

there was a special provision that made it impossible to prohibit trade in slaves in the next 20 years.

Of all the myths of the American constitutionalism one is particularly important—namely the myth about the degree of centralization of the Federal Government according to the Constitution of the USA. The long-held belief that the Founding Fathers stood for limiting the authority of the Federal Government is in contradiction with the logic of the establishment of the USA. One of the first resolutions passed by the Constitutional Convention denounced the Articles of Confederation[1] approved in 1777 by the Continental Congress, whose decision it had been to summon the Constitutional Convention. Having gone beyond its authority, the Constitutional Convention defied the principle of states' sovereignty, established a strong federal government, and introduced federal taxes (to enable the functioning of such strong federal government).

What made the Founding Fathers to choose from the available options the one, which formed the basis of the existing social structure? Searching for an answer to this question we end up criticizing the myth of the impartiality of the Founding Fathers and the belief that their decisions were only based on lofty constitutional matters. The theme of economic partiality of the Founding Fathers is comprehensively discussed in the works of Charles Beard[2], whose study "An Economic Interpretation of the Constitution of the United States" drew special attention of the Soviet opponents of the bourgeois constitutionalism[3]. Charles Beard as a true American thoroughly analyzed business interests of all the 55 participants of the Constitutional Convention in Philadelphia, which resulted in the signature of the American Constitution[4]. His findings brought him to the unpleasant conclusion that each of them promoted interests of one of the four groups: financial capital, owners of public debt, man-

1 The Articles of Confederation is an agreement among the 13 original states of the USA, which established a league of friendly states of North America while keeping their sovereignty and independence in the exercising of the rights, which were not explicitly delegated to the United States.

2 Beard, Charles A. «Some Economic Origins of Jeffersonian Democracy», American Historical Review (1914); An Economic Interpretation of the Constitution of the United States (1913). Economic Origins of Jeffersonian Democracy, (1915); A Century of Progress (1932); The Myth of Rugged American Individualism, (1932).

3 See, e. g.: Sogrin V. V. Adoption of the US Constitution: Myths and Reality/New and Contemporary History. 1987. № 2.

4 George Washington acted as a chairman at the Convention; two Founding Fathers—Thomas Jefferson and John Adams—did not take part in it.

ufacturers and merchants[1]. That is why the Constitution of the USA underpins a strong federal government, whose key task is to act in the interests of the financial capital and industrialists.

It would be presumptuous to deny that any government is destined to stand up for the economic and financial interests of its country's business community. At the same time, from the perspective of political stability, it is useful to address the following question: Isn't this role of the government in contradiction with the doctrine of people's sovereignty, concept of social contract, values of separation of powers, openness of government, etc.—i. e. all those things that make up the foundation of the constitutional mythology.

"Indeed, there exist many common beliefs, myths about Constitutions that we as citizens take for granted," says A. Marciano [Marciano A., 2011. P. 2] thus challenging the idea of sovereignty of the people—a cornerstone of Constitution building. In his opinion, the mere assertion that the people of a country is the source of power is a constitutional myth, because in reality citizens are never involved in the preparation and writing of its Constitution [Marciano A., 2011. P. 4]. This assertion appears pretty marginal against the background of lofty constitutional provisions and philosophical speculations concerning the sovereignty of the people. Declaring that the principle of the popular sovereignty is common to all mankind, the Constitution of Japan says in its Preamble, *"... Sovereign power resides with the people... Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded."*

Discussions concerning the popular rule are normally centered around the rights and sovereignty of the people. The idea of popular sovereignty is a purely theoretical, philosophical and legal category embodied in a complete system of constitutional institutions and mechanisms. The people are only a sovereign ruler within the scope of their rights, and only if these rights are asserted by the people themselves, rather than imposed by other, non-representative bodies. There is neither metaphysical people, nor empirical people. There is electorate, and there are individual electors.

One can find out the will of the whole electorate or of an individual elector, however it is hardly possible to find out the will of the people.

[1] Beard Ch. A. An Economic Interpretation of the Constitution of the United States. New York, 1913, p. 324

At the same time, no group, which is part of the people, should arrogate the rights of sovereignty to itself. The electorate is just a part of the nation — politically most active part. The sovereignty of the people resides in and is implemented by a truly organic state.

Discussing the procedures related to the adoption of a Constitution we use various terms such as "nationwide adoption". But what does the term "popular will" mean? What do we really mean by saying "nationally acclaimed Constitution", "will of the people", or "popular will"? Different words are used to describe the political and legal essence of "nationwide": qualified majority, simple majority, overwhelming majority, etc. However, they all fail to address the main question: How many is "nationwide"? The common sense logically suggests that the answer should be in a simple formula — 50% + 1 vote of all those eligible to vote. But in this case, virtually all the elections and referendums should be declared invalid because of the mass absenteeism. The idea of constitutional regulation of the government is in the core of constitutional illusions. Such illusions give rise to an important constitutional myth — the principle of separation of powers, which is used as a tool of democracy designed to limit the authority of the state in order to keep freedom by means of establishing balance between the branches of power [Brewer-Carías A.R., 2007. P. 33].

It is generally accepted that the founders of the theory of separation of powers are the English philosopher John Locke and French enlightener Charles Louis Montesquieu, who developed the basic provisions of this theory in the end of the 17th century in England and middle of the 18th century in France respectively. Their different approaches to this matter gave birth to different concepts. John Locke distributed the public authority between different bodies and arranged the types of such public authority hierarchically. Dealing with the public authority he distinguished between the legislative, executive and federal authority.

Unlike John Locke, Charles Montesquieu did not break the state authority into fragments. Instead, he only distinguished in every state three structural branches of power — legislative, executive and judicial. According to Montesquieu, such separation of powers and mutual control are prerequisite for political freedom.

Locke and Montesquieu's doctrine, according to which the state power should be divided into three branches, provides that each branch is, first, relatively independent and, second, counterbalances the other two, influenced common government and legal practice a great deal. This

influence is seen quite distinctly in the 1787 Constitution of the USA, French Declaration of the Rights of the Man and of the Citizen of 1789, and other statutory documents. Thus, Article 16 of the Declaration says, *"Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution."*

Contrary to the conventional constitutional illusion, the separation of powers is not the essence of the state, but its structure or form of interaction between the elements of the state mechanism. Proceeding from this premise, it would be more correct to use the term "separation of power", rather than "separation of powers". But let us stick with the standard terminology in this research.

The modern interpretation of this principle reflects in the following: a) functioning of the legislative, executive and judicial branches of power; b) equality and mutual independence of the branches of power within a system of checks and balances; c) the judicial branch must be vested with the right of constitutional review; d) separation of powers between the legislative, executive and judicial branches at the federal level, as well as between the federal center and constituent entities of the federation.

The fact that in the US context the principle of separation of powers is a "constitutional myth" is discussed by O. Hood Phillips [cit. ex Masterman R., 2010. P. 10] and some other authors. Speaking about the USA, Friedrich August von Hayek notes, *"They never really achieved that separation of powers at which they had aimed. Instead they produced in the USA a system under which, often to the detriment of the efficiency of government, the power of organizing and directing government was divided between the chief executive and a representative assembly elected at different times and on different principles and therefore frequently at loggerheads with each other."* [Hayek F. A., 1982. P. 105–106] It should be admitted that the arguments this judgement is based on are at least reasonable and sustainable, although open to question.

Of course, it is not about abandoning the principle of separation of powers. The point at issue is its excessive canonization and presentation as the only ideal and rational way to arrange the system of government. That is to say, it is about the degree of mythologization.

For example, according to Allan R. Brewer-Carías, the principle of separation of powers established by the Constitution of Venezuela and originally intended to avoid concentration of power by any individual branch, is distorted, because in real life the Constitution allows a kind of predominance of the Legislative branch by granting it the right not

only to appoint but also to dismiss Magistrates of the Supreme Tribunal of Justice and heads of bodies representing the Citizens and Electoral branches of power in such a way that eventually it can only be done on political grounds [Brewer-Carías A. R., 2007. P. 34].

Another vivid constitutional myth is that there exist so-called "Guardians" of the Constitution, and that this role is devolved to Supreme Courts, however, as we know from experience, such courts by no means always act as independent and impartial defenders of the Constitution. [Marciano A., 2011. P. 5–6]

In the opinion of Laura Underkuffler, the declaration of some private rights of citizens, such as freedom of speech, freedom of religion, right to private property, and due process of law, is also mythology, because these rights and freedoms are natural and therefore absolute. This mythology is powerful, but it is tempered by obvious reality of social interests; the ideas of such rights are themselves essentially social concepts. [Underkuffler L. S., P. 10]

Some authors mark down as a constitutional myth the separation of religion from the state, because in modern states religion inevitably takes part in making policy, laws and legal ideology [Law and Religion, 2007. P. XII]. The same is the case for the equal treatment of all religions by the state, since in reality one can hardly give an example of a country (except North Korea), whose government does not give preference to one or several religions. [See: Ponkin I. V. 2006]

Similarly, included with mythology can be the use of the attributive "secular" to define atheism, Darwinism, humanism and other "-isms", as these phenomena have nothing to do with secularity[1].

According to Alain Marciano, one of the strongly held myths prevailing among legists, economists and political scientists is the claim that Constitutions are "social contracts". This view implies that the Constitution "belongs" to citizens, since they have consented to it thus agreeing with its provisions and accepting the rules of the social game set forth in it. The main and immediate criticism is, of course, that no individual has ever signed a social contract. Human beings have always lived in social, and therefore organized, groups. The conflictual state of their nature is just a metaphor. Therefore, no citizen has ever consented to the Constitution that frames his or her activities. [Marciano A., 2011. P. 2]

[1] See, e. g.: Ellis A. Are Capitalism, Objectivism, And Libertarianism Religions? Yes! Greenspan And Ayn Rand Debunked.—CreateSpace, 2007.— 496 p.; Ponkin I. V. A modern secular state.: constitutional-legal research./ RAGS.—M., 2004.

Randall Gregory Holcombe rightly notes that this idea is false, among other things, because in reality the actions of the government are based on coercion, rather than consent. Of course, there are social norms that can be considered as the result or expression of a social contract, and those who fail to comply may face sanctions, such as expelling from social groups, public pressure, exclusion from economic interactions, etc. These are examples of real-life behavior in a real social situation. The constitutional contract as a hypothetical social contract is a fiction, because in reality it implies legitimacy of the coercion exercised by the government. Such a hypothetical approach is not based on real-life behavior and is not in line with how the government actually operates. [Holcombe R. G., 2011. P. 22]

Laura S. Underkuffler notes, that the mythology of constitutional rights is strongest in the area in which it is the most inapposite. [*Underkuffler L.* S., P. 16] The theories of popular sovereignty and social contract have inevitably translated into reflections on the political engagement of the citizens. Initially it was about broadening the range of participants of the electoral process, primarily by means of removing electoral qualifications and limitations. During its entire history the myth about the universal right of suffrage has been bumping into hundreds of such qualifications and limitations.

When the right of suffrage was granted to the women in New Zealand and Australia (1893 and 1902 respectively), and even when the Russian Empire, one of the first in Europe, performed this experiment in The Grand Duchy of Finland, one could count on the arguments of French Prime Minister Georges Benjamin Clemenceau: *"In 1913, when one advocatess of the equality of the genders asked him, if he stood for granting the right of suffrage to the women, he answered with equanimity that in his opinion it would be much better to reach equality of rights by denying the right of suffrage to the majority of men"* [Aldanov M. A., 1921. P. 169]. However, when, after a repeated referendum in 1971, the right of suffrage was granted to women even in Switzerland (earlier, at the first referendum, which was held in 1959, the majority of Swiss citizens (men) had opposed it), it became clear that the process was unstoppable. In the 21st century, the right of suffrage was granted to women in Kuwait (2005), United Arab Emirates (2006), and Saudi Arabia (2011). Ironically, all the countries above claimed that they had guaranteed the universal right of suffrage, even when they denied this right to women.

Apparently, the men of Switzerland paid a price for their behavior during the referendum of 1959 in the form of the constitutional entrenchment of the fact that the citizens of Switzerland belong to one of the two genders — male and female (the same was stated by the previous Constitution of 1874), as well as the gentlemanly reference to the Swiss people as "women and men of Switzerland" where women go first, which is a truly innovative piece of the Swiss (and not only) constitutional law.

One of the illusions prevailing among modern democratic regimes is the discussion on the degree of openness of the government — i. e. what citizens may and may not know. The quintessence of this discussion is contained in a dialogue from the first episode of the famous BBC sitcom "Yes Minister" (1980–1984) by Jonathan Lynn and Antony Jay (later the script was transformed into prose and published as a book). The episode is entitled "Open Government" — the term, which is used as a symbol of illusions in in many countries. Here is a part of this dialogue between Arnold and Bernard, two Private Secretaries to the Minister [Lynn J., Jay A., 1989]:

> "We are calling the White Paper "Open Government", because you always dispose of the difficult bit in the title. It does less harm there than on the statute books. It is the law of Inverse Relevance: the less you intend to do about something, the more you have to keep talking about it.
>
> "Bernard asked us, 'What's wrong with Open Government?'...
>
> "Arnold pointed out, with great clarity, that Open Government is a contradiction in terms...
>
> "Bernard claims that the citizens of a democracy have a right to know. We explained that, in fact, they have a right to be ignorant. Knowledge only means complicity and guilt. Ignorance has a certain dignity.
>
> "Bernard then said: 'The Minister wants Open Government.'...
>
> I remarked that one does not just give people what they want, if it's not good for them. One does not, for instance, give whisky to an alcoholic.
>
> Arnold rightly added that if people do not know what you're doing, they don't know what you're doing wrong."

An attempt to create an illusion of openness of the government is the first step of any government, when it needs its people's support in reforming the system of public administration. It is only natural that this myth reflects in the constitutional ideology, since the very idea of constitutionalism was born and developed for the sake of harmonized administration and movement towards justice.

Origination and Destiny of Constitutional Illusions in Russia

In the Russian political science, the notion of "constitutional illusions" is closely related to Vladimir Ulyanov-Lenin's article of the same name published in "Rabochi i Soldat" (The "Worker and Soldier" daily) 4–5 August of the revolutionary year of 1917. Later, Vladimir Lenin would quite often use the term "constitutional illusions" in his works. Moreover, he would pay attention to the fact that *"extremely large number of people entertain constitutional illusions"*, and makes a conclusion, which is hopefully relevant today. Then, criticizing the existing regimes, Vladimir Lenin, with the cynicism natural to him, would bust constitutional illusions from dreams of "better tomorrow" down to shortsightedness: *"Constitutional illusions are what we call a political error when people believe in the existence of a normal, juridical, orderly and legalized — in short, "constitutional"—system, although it does not really exist" [*Lenin V.I., 1969. P. 33].

Pursuing specific political goals, the potential leader failed to reach the same level of understanding of constitutional aspirations as Mikhail Saltykov-Shchedrin. As a result, the constitutional illusions were reduced to three objectives, which were relevant in summer 1917. If the first constitutional illusion of the summer of 1917 — namely that Russia is about to have a Constituent Assembly, and, *"therefore, everything going on now is temporary, transitory, inessential and non-decisive, and everything will soon be revised and firmly regulated by the Constituent Assembly"* — is acceptable as such, the other two appear to be surprisingly small-scale now, almost one hundred years later. It is unlikely that the significance of constitu-

tional illusions can be attached to the acknowledgement of the role of certain parties, such as the Socialist-Revolutionaries or the Mensheviks, or doubts, if the closing down of "Pravda", *"was only a passing phase, a chance occurrence, which cannot at all be regarded as something decisive"* [Lenin V.I., 1969. P. 33].

Having dispelled the constitutional illusion about the Constituent Assembly, Vladimir Ulyanov-Lenin gave rise to much more significant constitutional illusions, which were embodied in the Declaration of Rights of the Working and Exploited People (January 1918):

> 1. Russia is hereby proclaimed a Republic of Soviets of Workers', Soldiers' and Peasants' Deputies. All power, centrally and locally, is vested in these Soviets.
>
> 2. The Russian Soviet Republic is established on the principle of a free union of free nations, as a federation of Soviet national republics.
>
> 4. Expressing its firm determination to wrest mankind from the clutches of finance capital and imperialism, which have in this most criminal of wars drenched the world in blood, the Third All-Russia Congress of Soviets wholeheartedly endorses the policy pursued by Soviet power of denouncing the secret treaties, organizing most extensive fraternization with the workers and peasants of the armies in the war, and achieving at all costs, by revolutionary means, a democratic peace between the nations, without annexations and indemnities and on the basis of the free self-determination of nations.
>
> 5. With the same end in view, the Third All-Russia Congress of Soviets insists on a complete break with the barbarous policy of bourgeois civilization, which has built the prosperity of the exploiters belonging to a few chosen nations on the enslavement of hundreds of millions of working people in Asia, in the colonies in general, and in the small countries.

Along with legal provisions and institutions intended to regulate socials interactions, any Constitution always proclaims political values and establishes norms and principles, while also performing the ideological function. This function is typically assigned to the Preamble of the Constitution.

The presence of constitutional illusions in countries' constitutional laws is explained by the fact that Constitutions are designed to include program-making or goal-setting norms. These norms contain provisions on the future prospects of the country, enshrine them in the legislation, make them mandatory. Such goal-setting and program-making norms

were rather widely used in the Constitutions of socialist and some developing countries, because, as a rule, those Constitutions were focused on the building of socialism and communism. The idea of the Constitution as a document "statutorising" the vision of the country's future explains, why Constitutions entrench fictional provisions, which only describe aspirations of the state or society.

The myth about the October Revolution became constitutional later, when it was enshrined in the Preamble of the Soviet Constitution of 1977. This Preamble is a good example of a norm, which gives historical background and statutorises a long-held constitutional myth. From today's perspective, many statements made in the Preamble of the Constitution of the USSR of 1977 provoke historical discussions. The very definition "The Great October Socialist Revolution" is quite questionable—many historians, while agreeing with the scale of both positive effects and devastating consequences of this historical event, argue that at that point in time it was an attempt of a coup, rather than a revolution. It is in this way, but with the epithet "insane", that it was described by the Party of Socialist-Revolutionaries, Russia's then biggest political party. Moreover, quite questionable is the leading role of the Communist Party in the organization of that event. Finally, the history has disproved the statement that the Soviet rule removed "antagonisms between classes and strive between nationalities". If anything in the Preamble of the last Soviet Constitution cannot be called in question, it is the "immortal feat of the Soviet people and their Armed Forces in achieving their historic victory in the Great Patriotic War."

It is worth mentioning that the doubts of the Russian historians and legal scientists concerning the truthfulness of the messages contained in the Preamble of the Soviet Constitution were only voiced after the repeal of Article 70 of the Criminal Code of the RSFSR as of 1964—"Anti-Soviet Agitation and Propaganda".

This tradition of enshrining in the preamble of a Constitution of a complete vision of the nation's history along with program-making norms indicating ways of further development is kept by the Constitution of the People's Republic of China of 1982 (as amended in 2018). Despite the relative brevity of the main part of the country's Basic Law, its lengthy Preamble contains all the key points of the socialist theory, including those that elaborate Soviet constitutional myths and illusions.

In the Preamble of the Constitution of the PRC, you will find references to the Revolution of 1911 headed by Dr. Sun Yat-sen, the Great Victory of the Communist Party of China under the leadership of Mao Zedong,

which resulted in the "toppling of imperialism, feudalism and bureaucratic capitalism" in 1949, the destruction of the "exploitative classes" along with the admission of the fact that the class struggle will linger on, Marxism-Leninism, ideas of Mao Zedong and Deng Xiaoping, "socialism with Chinese characteristics", "socialist modernization", "socialist democracy", "socialist legality", "socialist market economy", struggle for the "maintenance of the national unity", which implies "opposing both the nationalism of a great nation, namely Han chauvinism, and local national chauvinism, as well as many other political and legal concepts. The constitutional illusions of the French Revolution reflect in Article 2 of the Constitution of France, which entrenches as a symbolic norm the motto of the French Republic—*Liberty, Equality and Fraternity*.

A threadbare example of reducing constitutional illusions to a constitutional myth is the anecdote that during the Decembrist Revolt of 14 December 1825 the soldiers chanted "Constantine and Constitution!" sincerely believing that Constitution (grammatically feminine in Russian) was Constantine's wife. Presuming that this anecdotal story is true, such a slogan can be explained by the desire of the future Decembrists to use this inveracity to popularize the idea of Constitution from the projects of Nikita Muravyov and "Russkaya Pravda" (Russian Truth) of Pavel Pestel.

The search for constitutional ideas throughout the history of Russia, which was stepped up with the beginning of the modern era in the Russian constitutionalism, was by no means unsuccessful: the first seedlings of constitutionalism can be found in the "cross-kissing notes" (oath-taking documents) of Vassili Shuisky and Mikhail Romanov, as well as in the "Conditions" of Anna Ioannovna (Anna of Russia) of 1730. Constitutional illusions were a sensible subject for the author of "The Minor" Dmitry Fonvizin (it is from him that we know about the projects of Nikita Panin, who reflected on fundamental state laws (circa 1783), and Count Mikhail Speransky, who authored the "Note on the Structure of Judiciary and Government Institutions in Russia", "About the Spirit of the Government" and "About the Manner of Government" (1804) [Medushevsky A.N, 2010].

In research articles and political essays, one can find amusing comments regarding the ancient roots of the Russian constitutionalism, in which they are described as an "inherent element of the life of the Russian people"—e. g. "The making of the Russian constitutionalism began in the 9th century with the advent of Kievan Rus… and was in many ways determined by the environment, in which the Russian nationhood and legal consciousness were formed" [Koretskaya T. P., 2013. P. 49–56]. To the credit of Russian constitutionalists, this approach has never been gran-

ted any significant support. In all fairness it must be said that, whilst acknowledging the undisputed achievements of the national (Russian and Soviet) constitutional doctrine, the valuable experience behind the national constitutional theory and practice, and its contribution to the global constitutional process, one must admit the undeniable fact that, during the first millennium of their history, the Russian people and state had their sunny days and rainy days, victories and defeats, gains and losses, but, coincidentally, they never had a written Constitution. The very idea to introduce constitutional arrangements to the life of the state was destined to outlast centuries of rejection, doubts and disillusionment.

In the Russian literature, the importance of which to the Russian national identity is comparable with the importance of the German philosophy to the Germans or French political thought to the French, the idea of Constitution is either not mentioned at all or is mentioned in a patronizing or satirical manner. One can hardly find any reference to the Constitution in literary works by Alexander Pushkin[1], Nikolai Gogol[2], Fyodor Dostoyevsky[3], Leo Tolstoy[4], or Anton Chekhov[5] (*personally I have never come across it—I.B.*).

1 In his "Ode to Liberty" Alexander Pushkin, speaking about the autocratic power, uses the word "Law" seven times capitalizing it each time. Probably, because the iambic tetrameter would not leave room for the word "Constitution".

2 In the writings of Nikolai Gogol, one can find a very short historical paragraph entitled "Novgorod Constitution", "Novgorod would encharge the Prince with a written Charter on parchment with a lead seal, which Charter depicted Our Lady of the Sign on one side and bore the name of the Archbishop of Novgorod on the other. The ceremony would begin with the blessing of His Grace, then the Posadnik (mayor) bowed, then the Tysyatskii (captain of the thousand), then the other high and low-ranking officials (elders); then the rest of Novgorod citizens would swear to the Prince to be his honest subjects, pay the duties religiously, and make no trouble, and would require the same from the Prince. Circa 1132, after the expulsion of Vsevolod, the citizens started to elect the Posadniks."

3 "Our Constitution is mutual love—the love of the monarch to the people and of the people to the monarch. Yes, it is the loving, rather than conquering, nature of our state (which was probably discovered by the first Slavophiles), which is the greatest thought serving as a basis for so many things. We will communicate this thought to Europe, although it can understand nothing of it." (letter to Apollon Maykov)

4 "If you ask the Russian people, what they want—czarist autocracy or Constitution, 90 percent of them will say that they are for the autocracy, i. e. the form of rule they are used to. The people are expecting that the Czar will deprive the nobility of their land the same way he deprived them of peasant serfs. While with a Constitution, they say, they will never see their land, because the power will be with cheating layers, profiteers and broke landlords." [Yasnaya Polyana Notes. V. 1. P. 85]

5 Among the great Russian writers, the biggest proponent of the constitutional idea was Anton Chekhov. Insisting that Russia is going to have a Constitution, Chekhov says, "It is as true as that Tuesday is followed by Wednesday." [F. Batiushkov.

The entire history of the Russian constitutionalism is the history of self-justification of its proponents striving to prove that the constitutional thought was by no means a threat to the Russian statehood, values or traditions of the Russian people. The most influential statesmen of different eras of the Russian history, when coming up with their constitutional proposals (projects of Peter Shuvalov (1754), Nikita Panin (1762–1784), Semyon Desnitsky (1768), Alexander Bezborodko (1799), Mikhail Speransky (1804–1809), Nikolai Novosiltsev (1820), Peter Valuyev and Mikhail Loris-Melikov (1863–1881), Sergei Witte (1905)), rejected the very possibility of defining them as constitutional. So strong was the traditional fear of the symbols of the French Revolution inherited from the reign of Catherine the Great.

The deliberations on the "most humble report by Mikhail Loris-Melikov as of 6 March 1881" "On Involving People's Representatives in Quasi-legislative Activities" is yet another confirmation that even a century later the French Revolution continued to echo in the political discussion devoted to the introduction in Russia of some elements of constitutional rule [Peretz E.A., 2018. P. 143–168]. Alexander Belykh and Vladimir Mau note that, 8 March 1881, during the Cabinet Meeting[1] *"some participants of the Meeting compared the commissions proposed by Loris-Melikov with the French Estates General. It may seemingly be a historical analogy. But the participants of the Meeting understood, how ominous this comparison could be. They all remembered the history of the French Revo-*

A.P. Chekhov on the memories of him and letters.—On the monument to Chekhov, P. 26]. Recalling his meetings with Chekhov in spring 1902, Fyodor Batyushkov writes, "Anton Pavlovich is discussing the questions of the internal policy again insisting that we will inevitably have a Constitution soon. I marvel how persistent he is in his desire to demonstrate his interest in social matters." [F.D. Batiushkov. Two meetings with A.P. Chekhov.—"The Sun of Russia", 1914, June, № 228/25]. According to revolutionary journalist Vladimir Posse, who refers in his reminiscences to Maksim Gorky, Chekhov believed that "every year, then every month, then every week people will be fighting in the streets in Russia, and after some ten to fifteen years this street fighting will result in a Constitution." [V.A. Posse. My life's path. M., 1929, P. 275] Chekhov's attitude towards the Constitution manifests itself in his letter to Vladimir Ladyzhensky, in which he is describing the course of setting up his dacha (country home) in Melikhovo, "My crucian carps are in good health and mature enough, so I am considering giving them a Constitution." [Cit. ex: Gromov M.P., Dolotova L.M., Kataev V.B., Melkova A.S., Opulskaya L.D., Ornatskaya T.I., Osharova T.V., Polotskaya E.A., Chudakov A.P. Notes//Chekhov, A.P. Complete Works and Letters. Compositions: In 18 volumes/Academy of Sciences of the USSR. Institute of World Literature named after A.M. Gorky.—Moscow: Science, 1974–1982. V. 10. [Stories, novels], 1898–1903.—Moscow: Science, 1977.—P. 331–488]

[1] 1 March 1881, Emperor Alexander II was assassinated. The report was discussed on the 7th day after the regicide (!)

lution quite well. The Estates General had been convened 5 May 1789 with the only purpose of overcoming the financial crisis... 17 July, representatives of the Third Estate... declared themselves National Assembly. June 20, after the attempts of Louis XVI and the First Estate (the clergy) to prevent the meetings of the new Assembly, the hearings were out of necessity moved to the Royal ball game room, where the deputies took the famous oath and promised to keep on working, until France gets a Constitution.

Clearly, the mere word "Constitution" was unacceptable not only to the Emperor, but to all the participants of the Meeting, including Loris-Melikov himself."[1]

The beginning of the 20th century did not make "Constitution" a common word either. It is not important how much truth there is in the myth that Russia's first constitutional document was signed at gun point. The myth says that Grand Prince Nikolai Nikolaevich, uncle of Nicholas II entered the Emperor's study with the text of the Manifesto in one hand and a revolver in the other and threatened to "put the gun to his head". It is said that in this way, 17 October 1905, he made the Emperor put his signature under the Imperial Manifesto on the Improvement of Government. None of the two persons involved in the event that formed the basis for this myth has ever commented on it in memoirs. Reading of the Emperor's diary does not give the reader any added credence to this legend. But there is certainly a share of mysticism in the choice of the date for the signature of the Manifesto—seventeen years before, 17 October 1888, the Royal Family, by a miracle, had survived a train wreck near Kharkov. It is hard to say if this coincidence pleased the Emperor or made him upset, but, according to the diary [Diaries of Emperor Nicholas II, 1991. P. 285], it did draw his attention:

"Anniversary of the train wreck!

"At 10 am we went to the barracks of the Composite Guards Battalion. On the occasion of its holiday father John was holding a service in the mess hall. Nikolasha and Stana had breakfast.

"We were sitting and talking, waiting for Witte to come. At 5 pm, I signed the Manifesto. After such a day, my mind was racing—I could hardly think. Lord, help us! Save and reconcile Russia!"

1 Belykh A. A., Mau V. A. What happened in Russia on March 8, 1881. Introductory article. Peretz E. A. Named work. P. 35.

Nevertheless, the most spread is the opinion voiced by then-Chairman of the Council of Ministers Sergei Witte, *"Nicholas II would have never signed the October Manifesto, if it had not been for the insistence of Grand Prince Nikolai Nikolaevich."* The October Manifesto became the first legal document limiting the Czar's power. In combination with the previously signed Manifesto on the establishment of the State Duma of 6 August 1905 and the Manifesto on the transformation of the State Council signed later, 20 February 1906, it gives grounds to consider the Basic State Laws of the Russian Empire of 23 April 1906 as the first Constitution of Russia. This conclusion can be drawn, in the first place, from the analysis of the social relations regulated by this document, rather than just the fact that it limited the autocratic power.

Traditionally, the constitutional law covers four major categories related to social interactions—sovereignty, property, liberty, and authority. From this perspective, the Basic State Laws of the Russian Empire of 1906 regulate all the types of social interactions that are prerequisite to give them the status of a constitutional document: Sovereignty *(1.1_Chapter One. On the Essence of the Supreme Autocratic Power; 1.2_Chapter Two. On the Order of Succession to the Throne; 1.3_Chapter Three. On the Attainment of Majority by the Sovereign Emperor, on Regency and Guardianship; 1.4_Chapter Four. On Accession to the Throne and Oath of Allegiance; 1.5 Chapter Five. On the Sacred Coronation and Anointment; 1.6_Chapter Six. On the Title of His Imperial Majesty and the State Coat of Arms);* Liberties—legal status of Russian subjects (*1.7. Chapter Seven. On the Faith. 1.8. Chapter Eight. On the Rights and Obligations of Russian Subjects*); Structure of government (*1.10_Chapter Ten. On the State Council and State Duma and Their Modus Operandi. 1.11_Chapter Eleven. On the Council of Ministers, Ministers and Chief Administrators of Various Departments*).

Despite its very limited power[1], a two-chamber parliament was established in Russia, which body did not only have representative and consultative functions, but also real legislative, financial and even supervisory authority. Some of its characteristics indicated that elements of the separation of powers were introduced: having vested in the Sovereign Emperor the executive power "to be exercised throughout the entire Russian state" (Article 10), as well as to issue "decrees and directives for the organization and functioning of various departments of

[1] From the perspective of the authority of the State Duma, the October Manifesto was an obvious step back, compared to the Manifesto on the Establishment of the State Duma as of 6 August 1905.

state administration" (Article 11), and having established that "the judicial power is implemented through legally constituted courts in the name of the Sovereign Emperor" (Article 22), the Basic State Laws made it impossible to pass any new law without "approval by the State Council and State Duma"; the chambers of the parliament obtained the right to legislative initiative—i. e. they were authorized "to initiate legislative proposals in order to enact new laws and to repeal and modify existing laws, with the exception of the Fundamental State Laws that are subject to revision solely upon the initiative of the Sovereign Emperor." (Article 107).

Basic principles of the rule of law were included in Chapter Nine ("On the Law"): a) Government under law (Article 84. *"The government of the Russian Empire is established upon a firm foundation of laws that have been properly enacted."*); b) Equal protection of the law (Article 85. *"Laws are equally applicable, without exception, to all Russian subjects and foreigners residing within the Russian State."*); c) Impermissibility of retroactive laws (Article 89. *"Every law becomes effective only in the future, except in those cases when the law itself specifies that it is in force retroactively or when it exists only to confirm and clarify the meaning of a previous law."*); d) Mandatory promulgation of all laws (Article 91. *"To inform the general public, laws are promulgated by the Governing Senate according to established procedures and do not take effect before their promulgation."*); e) Any law can only be repealed by a law (Article 94. *"A law cannot be repealed otherwise than by the force of another law. Therefore, until an active law is effectively repealed by a new law, it retains its full force."*); f) Guaranteed maintenance of region-specific features of statutory regulation (Article 88. *"Laws specifically enacted for certain localities or segments of the population are not repealed by a new, general law unless precisely such a repeal is specified."*).

It would be fair to say that the Basic State Laws of the Russian Empire gave Russia an impetus for the shaping of constitutional values and constitutional mythology and gave rise to constitutional illusions among different strata of the Russian society, including tailor Yisroel, whose faith in "a real Constitution" as the only force capable of saving Russia is expressed in his letter to a friend in America[1].

[1] We have to agree with Vladimir Lenin's assessment of the situation in 1917, "In reality, the essential characteristic of the present political situation in Russia is that an extremely large number of people entertain constitutional illusions. It is impossible to understand anything about the political situation in Russia today without appreciating this. Positively no step can be taken towards a correct for-

The attitude towards the opportunities for the constitutional transformation of Russia can be clarified even more through the analysis of those political forces, which claimed being committed to constitutional ideas and, in the first place, the stance of the party of Constitutional Democrats (Kadets) established in July 1905.

Working on "The Victory of the Kadets and the Tasks of the Workers' Party" Vladimir Ulyanov-Lenin was forced to characterize the transformed political regime as "constitutional autocracy"[1], for which purpose he allegorized using terminology such as "constitutional costume of the autocracy"[2] and defined the Basic State Laws and "Kadets' Constitution" [Lenin V. I., 1973. P. 60].

> "A "constitutional autocracy", the creation and spreading of constitutional illusions, are becoming the only possible means of saving the autocracy. This is the only correct and wise policy the autocracy can pursue" [Lenin V. I., 1968. P. 306].

The party of Constitutional Democrats, whose Central Committee comprised Russia's leading legists, the best of the best in the national legal science (Maxim Vinaver, Joseph Hessen, Fyodor Kokoshkin, Vassili Maklakov, Mikhail Mandelshtam, Sergei Muromtsev, Vladimir Nabokov, Leo Petrazhitski, Ivan Petrunkevich, Fyodor Rodichev, Peter Struve, Nikolai Teslenko and Gabriel Shershenevich), very quickly understood that for the majority of the country's population the meaning of the words "Constitution" and "Democracy" remained unclear both individually and in the word combination making the name of the party — Constitutional Democratic. Bearing this in mind, the Party, at its 2nd Congress, extended its name with purely Russian words — Party of People's Freedom.

mulation of our tactical tasks in Russia today unless we above all concentrate on systematically and ruthlessly exposing constitutional illusions, revealing all their roots and re-establishing a proper political perspective." (Lenin V. I. Omnibus edition. The fifth edition. Volume 34: July — October 1917. Moscow: Publishing House of Political Literature, 1969. — C. 33)

1 Building upon Lenin's formula, Soviet authors noted that "inevitably one of the functions of the constitutional autocracy was creation and dissemination of constitutional illusions." (See: Davidovich A. M. Autocracy in the era of imperialism. — M .: Science, 1975. — 351 p. — P. 290.)

2 Similar allegories are still in use. See e. g.: O. V. Zinchenko. The basic laws of the Russian Empire in 1906. — Constitution or a "constitutional suit" of autocracy? // Problems of legality. 2011.

We should not be misled by the success of the Constitutional Democrats at the elections to the First State Duma when they won almost 36% of the votes, established the biggest deputy faction (179 seats of 499), made their Central Committee member Sergei Muromtsev Chairperson of the Duma, and occupied virtually all the key positions—all the vice-chairpersons and chairpersons of 22 Duma Commissions were Kadets. In the Second Duma the faction of Constitutional Democrats only had 98 seats, and even fewer seats in the Third Duma—54. The best minds of Russia's legal science, founders of the national constitutional jurisprudence failed to explain their approaches and ideas to the electorate. Even under the guise of "People's Freedom", the Kadets remained a party of intellectuals and liberal nobility. Neither the party of Constitutional Democrats with their key positions in the Provisional Government, nor the idea of constitutional democracy itself managed to stand up to the pressure of Bolshevism.

Constitutional Illusions and Myths of Russia in the Period of their Dismantling

The constitutional mythology existing today in the USA and Europe appears to be pretty effective and efficient. [Ghetti P. S., P. 5] In modern Russia, the demand for constitutional myths is high too. The landscape of the Russian constitutional mythology is intrinsically linked with the basic myths of the Russian nationhood. The basic constitutional mythologemes of modern Russia date back to the collapse of the Soviet Union — the era, when "The Rules of the CPSU were the real Constitution of the USSR" [Mau V. A., 2017. P. 201] — and the period of adoption of the Constitution of the Russian Federation of 1993.

The history of the Soviet constitutional rule is full of myths, such as those about the "supposedly acknowledged and guaranteed pollical rights, or friendship between peoples, which resulted in the shaping of a new historical community — "The Soviet people", or legitimacy of the seizure of power in 1917" [See, e. g.: Krasnov M., 2007. P. 31]. However, no less mythologized was the collapse or, more precisely, dismantling of the USSR. [See, e. g.: Shakhrai S. M., 2012] Ironically, both opponents and proponents of this event contributed to this mythologization.

The entire history of the Soviet rule consists of centralization and decentralization cycles, and the very last version of the latter in combination with the lack of will of the first and last President of the USSR Mikhail Gorbachev resulted in the breakdown of the Soviet Union in 1991. Russia of the 1990-s can be described by the words that begin "A Tale of Two Cities" by Charles Dickens [Dickens Charles, 2011]:

> "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us..."

The developments of the late 1980-s and early 1990-s could not but give rise to an outbreak of constitutional illusions, first, among liberal intelligentsia, and then among wider population. The draft of the Constitution of the Union of Soviet Republics of Europe and Asia by Andrei Sakharov (14 December 1989) says in Article 2 that *"the aim of the people of the Union of Soviet Republics of Europe and Asia and its government shall be to ensure a happy and full life, material and spiritual freedom, prosperity, peace, and security for all citizens of the country and for all people on Earth, regardless of their race, nationality, sex, age, or social status",* while of all the human rights it mentions first the *"right to life, liberty, and happiness"* (Article 5).

Constitutional, in terms of content, as well as structure, was the essay "Rebuilding Russia"[1] by Alexander Solzhenitsyn[2] (July 1990).

The actual constitutional life was no less interesting. New Constitutions of the USSR and RSFSR were drafted in parallel, the same was taking place in the capital cities of Soviet Union and autonomous republics. Beyond all doubts, new constitutions were necessary. Drastic changes in the political regime and economy required brand new constitutional documents. From the perspective of constitutional design, the texts of constitutions had turned into collections of amendments,

1 First Russian versions of the essay are entitled "Rebuilding Russia" with no question mark in the title (unlike in the author's manuscript originally entitled "How Can We Rebuild Russia?" In the Complete Works of Solzhenitsyn, the original title with the question mark is used.

2 The essay, among others, includes the following chapters: "What is Russia?", "A Word to the Great Russians", "A Word to the Ukrainians and the Byelorussians", "A Word to the Smaller Nationalities and Ethnic Groups", "Land", "The Economy", "The Provinces", "Family and School", "Self-Limitation", "Is the System of Government Really the Central Issue?", "Concerning the Form of Government", "What Democracy Is and What It Is Not", "Universal and Equal Suffrage, Direct Elections, Secret Ballots", "Electoral Procedures", "Representing the People", "Political Parties", "The Democracy of Small Areas", "The Zemstvo", "Stages in the Transfer of Power", "A Combined System of Government", "Concerning the Central Authorities".

additions and modifications—one could hardly find in them an article[1], which was not changed to a certain extent.

The first Congresses of People's Deputies of the USSR (June 1989) and RSFSR (June 1990) passed resolutions to establish constitutional commissions. The Commission for the development of the All-Union Constitution was headed by Chairman of the Supreme Council of the USSR, General Secretary of the Central Committee of the CPSU Mikhail Gorbachev. Boris Yeltsin, Chairman of the Supreme Council of the RSFSR, was in charge of the Russian Constitution.

The requirement of a new Constitution was substantiated in the Resolution of the Congress of People's Deputies of the USSR "On the Priorities of the Domestic and Foreign Policy" of 9 June 1989:

> "The new Constitution should embody the principles of a humanist, democratic society, establish a social, economic and political framework for the building of a Soviet state and agreement-based, constitutional relations between the Union and its republics, promote the development of all kinds of autonomy and high status of the Soviets, guarantee inherent human rights, security and legal protection of the individual. The Congress stated that the new Constitution must epitomize a socioeconomic and government structure that would make impossible personality cult, authoritarianism or maintaining of the administrative command system."[2]

June12, 1990, passing the Declaration of the Sovereignty of the RSFSR (the document that has proved to be extremely destructive in terms of its content and consequences for the Soviet state) the First Congress of the People's Deputies of the RSFSR decided that the provisions of the Declaration must be used as basis for drafting the text of a new Constitution of the RSFSR. June 16, 1990, the Constitutional Commission was formed, and unprecedented intellectual work on the wording of the Constitution began.

1 In 1989, 25 amendments to the Constitution of the RSFSR were moved; in the period between May 1990 and October 1992, 8 laws on amendments and additions to the Constitution of the RSFSR were passed (31 May, 16 June and 15 December 1990; 24 May and 1 November 1991; 21 April, 9 December and 10 December 1992); more than three hundred amendments were moved: 53 in 1990, 29 in 1991, 177 in April 1992, about 90 in December 1992.

2 Gazette of the Congress of People's Deputies of the USSR and the Supreme Soviet of the USSR. 1989. № 3. Art. 52.

Several decades after the adoption of the Constitution of the Russian Federation of 12 December 1993, the events that had preceded the nation-wide voting were in many ways mythologized. It is alleged that the Constitution of the Russian Federation was adopted by way of Referendum, while in reality, 15 October 1993, President of the Russian Federation Boris Yeltsin signed the Decree "On Nation-wide Voting on Draft Constitution". The same Decree approved the "Procedure of Nation-wide Voting on the Draft of the Constitution of the Russian Federation of 12 December 1993", which established that the Draft Constitution would be considered approved, if the majority of voters taking part in the referendum voted for its adoption, provided that their number is bigger than one half of all those registered as eligible voters.

As a matter of fact, it was not possible to hold a referendum. In 1993, the old RSFSR Law on Referendums was still in effect, and, according to that law, the only bodies authorized to set referendum were the Congress of the People's Deputies of the Russian Federation or the Supreme Council of the Russian Federation (Article 9 of the Law on Referendums). The President of Russia did not have authority to announce a referendum. To bypass this obstacle and "legitimately" disregard the RSFSR Law, the term "nation-wide voting" was used, instead of "referendum".

In the Soviet political practice, one of the manifestations of the sovereignty of the people was the "nation-wide discussion of Constitutions". Having its origin in the very positive idea of familiarizing the population with provisions of proposed constitutional or other legislative instruments, the format of a nation-wide discussion was declared as one of the forms of direct democracy (alongside with elections and referendums). Tested for the first time on the laws on marriage, family and education in the 1920-s, in the 1980-s and during the Perestroika, nation-wide discussions were organized to "scrutinize" a wide range of draft laws.

While, according to official sources, the nation-wide discussion of the Constitution of 1936 attracted over 50 million people, and the Constitutional Commission received 154 thousand proposals, during the nation-wide discussion of the Constitution of 1977, 1.5 million public events were held, in which 140 million people took part. Quite naturally most active were organizations of the Communist Party of the Soviet Union — they organized 450 thousand open Communist Party meetings.

> "The nation-wide discussion had its effect on the content of the legislation under consideration, primarily, in the form of 340 proposed changes to be made in 118 articles of the new Constitution-in-draft. The first type of change included additions: one additional word per article — 38 proposed additions; two words per article — 10 proposed additions; three or more words per article — 29 proposed additions; one additional sentence per article — 31 proposed additions; one additional paragraph per article — 13 proposed additions. Based on one change proposal, a complete new article (Article 102)[1] was added" [Kronsky V. S., 1985. P. 43].

The Constitution of the USSR of 1977 adopted after an earnest nation-wide discussion entrenched this institution in Article 114, which says that draft laws can be brought up for nation-wide discussion by decision of the Supreme Soviet of the USSR or its Presidium.

The tradition of nation-wide discussions, which was well-established in the public conscience and political practice, proved instrumental in overcoming the political crisis of September-October 1993. The format of "national voting", which obviously traces back to the Soviet practice of "nation-wide discussion" very quickly translated into the myth that the Constitution of the Russian Federation of 1993 was adopted by a "popular referendum".

Undoubtedly, this formula carries on the traditions and practices of the Soviet constitutionalism and serves the purpose of using familiar procedures and mechanisms to legitimize political goals. This approach proved successful in overcoming the political crisis in autumn 1993. The very idea of President Boris Yeltsin to overcome the conflict between the President of the Russian Federation and the Supreme Council by adopting a new Constitution is underpinned by the great respect for the Basic Law, which was developed and maintained throughout the course of the Russian history.

The Presidential Decree of the Russian Federation "On Phased Constitutional Reform in the Russian Federation" of 21 September 1993, quite controversial, in terms of its conformance with the Constitution of the RSFSR of 1978, which was in effect then[2], read:

1 "Article 102. Electors give mandates to their Deputies: The appropriate Soviets of People's Deputies shall examine electors' mandates, take them into account in drafting economic and social development plans and in drawing up the budget, organize implementation of the mandates, and inform citizens about it."

2 21 September 1993, the Constitutional Court of the Russian Federation ruled that the Presidential Decree of the Russian Federation #1400 "On Phased Constitutional Reform in the Russian Federation" signed by President Boris Yeltsin 21 September

> "The Supreme Council is blocking the decisions of the Congress of People's Deputies of the Russian Federation concerning the adoption of a new Constitution.
>
> The procedures of the Supreme Council, as well as its rules of preparation and making of decisions, are obstructed on a regular basis. It has become standard practice to vote for missing deputies, which, de facto, eliminates representation of the people.
>
> This destroys the very foundations of the constitutional order in the Russian Federation—popular sovereignty, separation of the powers and federalism, brings into discredit the very principle of parliamentarism, which has just taken roots in the Russian Federation and is still immature."

The main instruction included in the Decree was as follows:

> "The Constitutional Commission and Constitutional Assembly shall submit a single agreed draft of the Constitution of the Russian Federation as per recommendations of the Constitutional Commission Working Group by 12 December 1993."

The simple question "Do you agree with the Constitution of the Russian Federation?" requiring "yea" or "nay" as an answer was intended to address the collective consciousness of those who were used to celebrate the Constitution Day as one of the most important national holidays of the country, which still had sites decorated with turkey-red banners reading "Soviet Constitution is the Basic Law of our Life!" or "Long Live Constitution of the Country of Socialism!" The words "Respect the Soviet Constitution!" were the slogan of the first rally of the Soviet human rights group, which took place in Moscow's Pushkinskaya Square 5 December 1965. Its leader Alexander Yesenin-Volpin, one of the sons of the poet Sergei Yesenin, was quickly and efficiently taken in by the law enforcement to be released in several hours, and the slogan, although slightly reworded and transformed into "Respect Your

1993, as well as his "Address to the People of the Russian Federation" of 21 September 1993, were incompliant with Article 1 (Part 2), Article 2 (Part 2), Article 3, Article 4 (Part 2), Article 104 (Parts 1 and 3), (Article 121^{5} Part 3 of Paragraph 11), Article 121^{6}, (Article 121^{8}, Part 2), and Articles 165^{1} and 177 of the Constitution of the Russian Federation. The Constitutional Court made the conclusion that the actions of President Boris Yeltsin gave grounds for his impeachment or triggering other special mechanisms of bringing him to responsibility in accordance with Article 121^{10} or Article 121^{6} of the Constitution of the Russian Federation.

Constitution", became the slogan of the Soviet dissidents. The hope for the mystical power of constitutional provisions in dealing with both constitutional and non-constitutional matters was pointed out by Sergei Shakhrai, *"The propensity to believe that the only way to solve pressing issues—from fighting corruption to repairing a boiler—is to introduce immediate changes in the Constitution is a symptom of "youthful exuberance" of the society, rather than a sign of imperfection of the Basic Law"* [Shakhray S.M., 2013. P. 15–16].

It is this perception of the Constitution, this Soviet illusion of its mystical power that guided President Boris Yeltsin, when he suggested it as a way to prevent a civil war after the first armed clashes occurred at Krasnopresnenskaya Embankment 3–4 October 1993.

The voting took place 12 December 1993: 58.43% of the voters gave their votes for the Constitution, 41.57% voted against it. The new Constitution was adopted and became effective on the date of promulgation—25 December 1993.

True statecraft was demonstrated in April 1994 by Nikolai Ryabov, the then-Chairman of the Central Electoral Commission[1], who sent a telegram with the instruction to destroy the ballots of the nation-wide voting[2]. His decision made it impossible to recount the votes and relieved the misguided political forces of the temptation to call in question the outcome of the event that was crucial for the modern Russian state. After all, in the life of any country, any society, any family, or any individual, there may be events (legal circumstances), which are not subject to appeal, ensure stability and preclude the agonies of having to make a historical choice. The institutions above must have values that are taken for granted, undeniable and indisputable.

It is evident that the importance of the Constitution of the Russian Federation of 1993 to the Russian state and society is not limited to the role of the country's Basic Law. The time that has passed since its adop-

1 See: Rumyantsev O.G. To the history of the creation of the Constitution of the Russian Federation. On the work of the Constitutional Commission (1990–1993). Part eight. July-December 1993: From the history of the creation of the Constitution of the Russian Federation. The Constitutional Commission: transcripts, materials, documents (1990–1993): 6 tons. Vol. 4. 4. 1993. The third book (July—December, 1993) M., 2009. P. 78.

2 In November 1994, the "Bulletin of the Central Electoral Commission" stated, "In April of this year, the Regional (parent) Electoral Commissions completed the destruction of the voting ballots of the elections to the Federation Council and State Duma, as well as the ballots of the voting on the Draft Constitution of the Russian Federation, which had taken place 12 December 1993..."

tion is sufficient to look back and take stock of achievements and mistakes. But even today, we quite often hear that the procedure of adoption of this Constitution was not democratic enough.

President of the French Republic (1981–1995) François Mitterrand allegedly said, *"Referendum is a great and very democratic thing, but the problem is that you ask the French people one question, and they answer another."* Apparently, it is not only typical of the French. It is unlikely that the majority of those, who backed the adoption of the Constitution in December 1993, had read it attentively before. It appears that they were backing a certain line of policy, victory of one political force over the other. Therefore, the outcome of the nation-wide voting—i. e. Referendum of 1993—confirms the accuracy of the classical definition of Constitution by Ferdinand Lassalle and Vladimir Lenin as pinning of a political constellation.

However controversial the story of preparation, setting and holding of the referendum on the adoption of the Constitution of the Russian Federation in the second half of 1993 may be, it is this legal instrument that enshrined in the legislation the dismantling of the Soviet system and the victory of the political forces that were destined to shape new state, political and economic institutions. In this sense, the new Constitution has met expectations in full.

Post-Soviet Constitutional Mythology

After the dismantling of the Soviet Union, the process of constitutional mythmaking stepped up in the "New Independent States" established in the former Soviet republics. The emergence of legends of post-Soviet countries' own constitutional history is an intrinsic part of a broader trend—i. e. search for elements of the nations' century-old or better thousand-year statehoods. Motives and reasons for such mythmaking are quite obvious and easy to explain. Nevertheless, very few of the new post-Soviet independent states have escaped the temptation to position themselves alongside the classical trio "Ancient Egypt, Ancient Greece, Ancient Rome" and thus transform it into a quartet of ancient states. This propensity, a bit amusing in its naivety, is only worth amiability. But only if such glorification of a country's statehood is not achieved through perversion of other, in most cased neighboring countries' history.

In the days when such a new vision of history and processes related to the establishment of state institutions was developing, only one state that emerged on the ruins of the Soviet Union, was in no position to put the blame for all the difficulties and problems on external forces. It was Russia. All the other former Soviet countries, each with its own political interests and current political situation in mind, yielded to the temptation of shifting the blame. As a result, a bunch of new definitions characterizing the former Soviet political system appeared such as "occupational", "totalitarian", "communist", "Kremlin-led", "imperialist", etc. In the most extreme cases, the

blame for all is collectively put on Russia and the Russians. Quite often, those accusing engage in issue-hopping and misrepresent the nature and implied sense of real historical events using terminology such as "genocide", "Holodomor", "occupation", or "annexation".

It is becoming common practice to attach global historical significance to local or regional events or to package as constitutional documents collections of local customs, philosophical essays or projects authored by local or regional intellectuals or politicians. These approaches reflect in constitutional, political and legal documents, legislations and historiography, expert reports and social studies. Ironically, such approaches are not only employed by the countries that openly pursue hostile policy towards Russia, but also by those, who are considered as allies and share with Russia membership in various integrational associations.

One of the basic concepts of constitutional state building is the theory of "centuries-old history of nationhood". This theory underpins, although with different degrees of political rationale, the Constitutions of Azerbaijan, Belarus, Georgia, Lithuania and Ukraine.

Quite special is the case of the Constitution of Armenia of 1995—despite the country's true centuries-old nationhood, in the Preamble of its Constitution Armenia confines itself to a short reference to "fulfilling the sacred message of its freedom loving ancestors". Besides, the authors of the Armenian Constitution refrained from positioning as "beginnings of the Armenian constitutionalism" of the "Provisions on the Armenian Nation" adopted by the Armenian National Assembly in Constantinople in 1860 and ratified in 1863. One of the most interesting principles enshrined in the Constitution of Armenia is that each and every citizen of the country must fulfil his/her duties to the Armenian nation, while the Armenian nation must fulfill its duties to each and every citizen.

Some of the Constitutions refer to historical sources. For example, Latvia returned to its Constitution of 15 February 1922. The Preamble of the Constitution of Lithuania of 1992 implies that the legal foundations of the Lithuanian nationhood date back to the Statutes of Lithuania, as well as Constitutions of the Lithuanian Republic[1].

[1] Statutes of Lithuania are codified laws of the Grand Duchy of Lithuania of the second half of the 16th century (1529, 1566, 1588). They comprised the norms of customary law, written law, local judicial and administrative practice. Many historians of law consider the Statutes of Lithuania to be "a sort of feudal Constitution of the Grand Duchy of Lithuania". The Statute of Lithuania of 1588 was in effect in

A. Nurmagambetov, a member of the Constitutional Council of the Republic of Kazakhstan, regrets that many of his country's "codified rules have failed to stand the test of time in full". However, he finds "elements of constitutionalism dating back to early periods of the Kazakh nationhood"[1]. Thus, the "Жеті жарғы" (Seven Codes of Law) contain norms that regulate property rights to grazing lands and waterbodies, family relations, property and personal rights of widows and orphans, and other provisions that contributed a great deal to the development of the nomadic economy and helped to protect the rights of fellow tribesmen, especially, the least socially protected members of the society"[2].

"The Statute of the Land of the Kazakhs" — «Қазақ елінің Уставы» — of 1911 was declared the first Draft Constitution of Kazakhstan. The program of the party Alash (1917), which covered ten topics (government system, local independence, basic rights, religion, power and justice, protection of the people, taxation, workers' question, development of science and education, and agrarian question) was also found meeting constitutional criteria. The brevity of the program that fitted the space of just one issue of "The Kazakh" weekly did not prevent President of Kazakhstan Nursultan Nazarbayev from saying that "it was more constitutional than all the Soviet-style constitutions" [Mataeva T. H. 2018].

The process of mythmaking is extremely intensive in Ukraine due to the efforts of all the parties to Ukraine's endless "political hand-to-hand combat"[3]. Ukraine obtained its status of the leader in searching for roots of the national statehood, when it stated that "the first Ukrainian Constitution — Constitution of Pylyp Orlyk of 1710"[4] was also the first Constitution of Europe.

some Russian governorates after their incorporation in the Russian Empire (Vitebsk, Mogilev, Vilna, Grodno, Minsk) until the middle of the 19th century.

1 This role was played by the codes of steppe laws of the beginning of the 16th century — «Қасым ханның қасқа жолы» (Kasym-khan Path of Light) and «Жеті жарғы" (Seven Codes of Law).

2 Истоки казахстанского конституционализма. Казахстанская правда. — 25.08.2015.

3 See, e. g.: Zubchenko A. Constitutional mythology // <http://www.versii.com/news/215856/>. — 04.10.2010; Shapoval V. Phenomenon of the Constitution in the Context of Domestic Political and Legal "Mythology"// <http://gazeta.zn.ua/POLITICS/fenomen_konstitutsii_v_kontekste_otechestvennoy_politiko-pravovoy_mifologii.html>. — 08.08.2008.

4 See. e. g.: Holovaty S. Ukraine's constitutionalism in the context of the constitutional heritage of Europe // The constitutional heritage of Europe : Proceedengs

However, the supporters of this assertion disregard an obvious logical inconsistency: recognizing this document as a Constitution will mean that it is the first Constitution in the world, rather than just Europe, because the Constitution of the USA of 1787, which is commonly agreed to be the first, was adopted 77 years later than the Ukrainian document, however, this is hardly allowable from the standpoint of geopolitical correctness. On the other hand, lowering the criteria applied to the primary sources claiming to be Europe's first Constitution, it will be necessary to sort out the issue of San-Marino, which is laying similar claims with The Statutes of 1600.

The drollness of this situation is amplified by the fact that this document, written in two languages (West Russian and Latin) in a style typical of the Petrine period and intended to serve a simple practical purpose—to separate powers between Pylyp Orlyk elected by fugitive fellows-in-arms of Ivan Mazepa "Hetman of Ukraine" and prosperous Zaporozhian Cossacks,—has a very traditional title: "*Treaty and covenant of laws and liberties of the Zaporozhian Host, agreed upon between his highness Pylyp Orlyk, the newly elected Hetman of the Zaporozhian Host, and the generals, colonels, and also the said Zaporozhian Host, duly promulgated by both sides and affirmed by a formal oath in a free election by the said Hetman at Bendery on the fifth day of April, in the year of Our Lord 1710...*" And only the Latin version of the title—*"Pacta et Constitutiones Legum Libertatumque Exercitus Zaporoviensis"*—contains the term in question, which actually gave grounds to translate the title of the document into Ukrainian as *«Пакти й конституції законів і вольностей Війська Запорозького» (Treaties and Constitutions...)*.

President of Ukraine Peter Poroshenko offers an absolutely different version:

"5 April 1710, Hetman Pylyp Orlyk signed "Treaties and Constitutions of Rights and Liberties of the Zaporozhian Host"—the symbol of Cossack

of the UniDem seminar organized in Montpellier (France) on 22 and 23 November 1996 in co-operation with the Centre d'études et recherches comparatives constitutioinnelles et politiques (CERCOP), Faculty of Law, University of Montpellier.—Printed in Germany: Council of Europe Publishing F-67075 Strasbourg Cedex, 1997.—December.—P. 130–131.—(Science and technique of democracy, № 18); Pritsak Omeljan. The First Constitution of Ukraine (5 April 1710) // Harvard Ukrainian Studies.—Vol. 22: Cultures and Nations of Central and Eastern Europe (1998).—Published by Harvard Ukrainian Research Institute.— PP. 471–496; Shishkin V. Constitution: ahead of time (on the legal act of Pilip Orlik in 1710). Day.— 2007. 14 September.

statehood and democracy. It was one of the first European statutes, which laid the foundation of the republican form of government. The ideas and mechanisms of checks and balances enshrined by this document are key to many European democracies, and in particular the democratic form of government of modern Ukraine."

The "Ukrainian History Book for the 8th Grade" canonizes this document as "the first Ukrainian Constitution":

"...This document is considered the first Constitution of Ukraine... Its introduction summarized the history of Ukraine, explained, why Ukraine had broken its relations with Russia and agreed to become a protectorate of the Swedish King. In the first place, it was proclaimed that "on both sides of the Dnieper Ukraine must be free from alien rule".

"The Constitution of Pylyp Orlyk provided for measures limiting the authority of the Hetman and ruling out monarchical system of government... Important financial questions could only be addressed by the General Rada...

The rights and liberties of the Zaporozhian Cossacks were guaranteed, and their special status was defined.

"Eastern Orthodox Christianity was declared established religion, and Kiev Archeparchy was to get out of control of Moscow Patriarchate.

"Thus, in addition to the declaration of Ukrainian independence, the Constitution of Pylyp Orlyk enshrined the then-most progressive ideas of statehood... This document laid the foundation for the separation of powers between the legislative, executive and judicial branches and introduced the appointment of officials on an elective basis" [Vlasov V. S., 2016. P. 192].

There is no point in commenting on this extract. It is only included in this study as an example of politically motivated archeological digging and archive search[1], literary and philosophical research that gives rise

[1] Thus, a Czech coin minted approximately in the first half of the 10th century and found in 1997 together with pre-Mongolian Bulgarian pottery, contributed a great deal to the estimated age of Kazan, the capital city of the Republic of Tatarstan. In 1977, the city was planning to celebrate its 800th Anniversary based on the dates mentioned in the "History of Kazan", which was working well from the standpoint of Soviet political correctness (Kazan was 30 years younger than Moscow). Nevertheless, the festivities were cancelled based on a decision made in Moscow. Given the "Parade of Sovereignties", the Czech coin could not have come at a better time, although, according Czech researchers, it could have been simply "dropped"

to new political myths and legends. Those, who ordered and authored this history book, have enriched the historical discourse of the modern Ukrainian policy with concepts, such as "the unity of both sides of the Dnieper", "the need to separate Kiev Archeparchy from the Russian Orthodox Church", or "the authority of Verkhovna Rada" (Ukrainian Parliament). For greater show, roots of modern political and legal ideas are found in various historical sources. Apparently, the fact that "De l'esprit des lois" ("The Spirit of the Laws") was written 38 years later than the Constitution of Pylyp Orlyk gives Ukrainian legists good reasons to accuse Charles Montesquieu of plagiarism. What else can explain the stance assumed by Victor Shishkin, a judge of the Constitutional Court of Ukraine? [Shishkin V., 2007]

> "The civilized world found ideal the configuration of state power attributed to Montesquieu, which consists of several autonomous functional institutions—the parliament, the government and the court. But were Montesquieu's ideas truly original? And again, we look at the Constitution adopted in 1710 by a representative assembly of Ukrainian Cossacks. Montesquieu cannot be given priority, if only because he was born in 1689—i. e. in 1710 he was only 21 and in the very beginning of his lawyer's career after graduation from a law school. His philosophical writings, in which he spelled out the idea of separation of powers, were published later ("Persian Letters" in 1721, "Considerations on the Causes of the Greatness of the Romans and their Decline" in 1734, and "The Spirit of the Law" in 1748). Therefore, the ideas of Montesquieu could not influence upon the views of Pylyp Orlyk concerning the structure of the legislative, executive and judicial branches of power. On the contrary, it is conceivable that it was Montesquieu who had an opportunity to familiarize himself with the works and documents of Pylyp Orlyk written in Latin. Moreover, the great Voltaire was only sixteen in 1710. The other outstanding French philosophers and enlighteners, as well as the Founding Fathers of the American Constitution, had not been born by that time either. Therefore, it appears quite logical that the idea of separation of powers could have been given rise to by Pylyp Orlyk; as far as its political and legal implementation is concerned, with no doubt the Ukrainian Hetman had the upper hand."

on the territory of Kazan by "two envoys of the Czech Principality, who had volunteered to deliver the message of Cordovan dignitary Hasdai Ibn Shafrut to Khazar Kagan Joseph". However, this did not prevent Kazan from celebrating its 1000th Anniversary. But all doubts fade away given the undeniable fact that the Anniversary was a great pretext to invest big money in the infrastructure of the city.

Obviously, giving the status of a Constitution to a document separating the powers of military commanders without having it considered or adopted by any power structures, a document, which has never been made effective, however modest its intended purpose might have been, is a spectacular example of a constitutional myth designed for domestic consumption. All such claims for primacy in the generation of the doctrine of separation of powers can be included in the long list of myths and legends used by political and intellectual circles of Ukraine to shape Ukrainian national identity.

There are proposals to constitutionalize the political course of the leaders of modern Ukraine aimed at making the country part of the European Union and NATO. Discussion are underway concerning the idea to entrench these ideas in the country's existing Constitution (most likely, by changing Article 18, which in its today's version reads, *"The foreign political activity of Ukraine is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law."*) The illusiveness of such a constitutional norm is well understood by its initiators, who are using it as a way to demonstrate their geopolitical choice.

Constitutional Myths Are Left Behind! Have Constitutional Illusions Ceased to Exist?

It is not easy to clearly distinguish between constitutional myths and constitutional illusions. The former and the latter interact changing roles, switching from one condition to the other and all the way around, intermingling and correlating with each other in most sophisticated ways.

The constitutional myths are different from the constitutional illusions in that, unlike the latter, they are created purposefully to be used as "pillars" of a constitutional ideology, its integral parts, paradigmatic, teleological and deontological elements, while constitutional illusions are aberrations, misplaced and disappointed hopes, including the hopes that are delusory by default, although the society may not know about it.

One important difference between the myths and illusions is in their opposite temporal orientation: the myths come from the past, are determined by the past and offer versions of past events, while the illusions are primarily future-oriented—they characterize current sentiments and hopes of those who cherish them. Thus, seeking to characterize illusions typical of a certain historical period, we always look at the expectations related to them and the extent, to which those expectations are met, rather than what brought them to life.

At the same time, myths and illusions go together well in influencing the social consciousness: while the myths portray legendary and honorable past, the illusions promise better tomorrow. One of the reasons for constitutional myths to be given rise to may be the de-

sire to justify constitutional illusions post factum, make them look having come true in the course of time, at least in the context of the existing government system or political regime.

In fact, we are dealing with a cycle, in which constitutional illusions give birth to constitutional myths, which, in turn, are intended to justify past historical events, produce the impression that those events took place for the sake of achieving more noble and idealistic goals. Referring to the assumption made by Karl Marx, Henry Tudor writes, *"Marx, as we have just seen, suggests that the men of the French Revolution dressed their actions in a heroic disguise in order to conceal the true nature of their enterprise. Had they frankly confessed to themselves and to their followers that their real purpose was to create the conditions in which bourgeois trade and industry might flourish, they would never have been able to act with the zeal and enthusiasm which the task demanded."* [Tudor Henry, 1972. P. 133][1]

To establish presence or absence of constitutional illusions in some present-day societies, it may be interesting to analyze slogans of modern revolutions, predominantly defined as "velvet" or "color-coded". Those who, answering the call of the heart or social media, get out to central squares of capital cities of countries situated on different continents in order to take part in civil disobedience actions, normally do not do it under the banner of constitutional restructuring. The ideas, legal or political, entrenched in written Constitutions do not provoke rejection, "revolutions" do not set the goal of changing those Constitutions. On the contrary, political regimes are usually changed under the aegis of indefeasible Constitutions—after successful "revolutions" (coups) new political regimes are formed within the framework of constitutional rules and procedures developed and tested by the overthrown political forces. Even engaging in changing the wording of constitutional documents, revolutionary governments do it to produce an appearance of a constitutional process, where the adoption of a new Constitution is used as a symbol of putting a new political regime in place, rather than characterizes its true content or orientation. And there is no question of existence or emergence of constitutional illusions among such countries' population.

[1] Marx, as we have just seen, suggests that the men of the French Revolution dressed their actions in a heroic disguise in order to conceal the true nature of their enterprise. Had they frankly confessed to themselves and to their followers that their real purpose was to create the conditions in which bourgeois trade and industry might flourish, they would never have been able to act with the zeal and enthusiasm which the task demanded.

The method of "appeal to constitutional values and ideals" is not present among the "198 Methods of Nonviolent Action" of Gene Sharp, who, in only five short paragraphs of his guidelines entitled "From Dictatorship to Democracy", offers a number of very primitive recommendations:

> "The Constitution should set the purposes of government, limits on governmental powers, the means and timing of elections by which governmental officials and legislators will be chosen, the inherent rights of the people, and the relation of the national government to other lower levels of government.
>
> "Within the central government, if it is to remain democratic, a clear division of authority should be established between the legislative, executive, and judicial branches of government...
>
> "...The constitution should preferably be one that establishes a federal system with significant prerogatives reserved for the regional, state, and local levels of government. In some situations, the Swiss system of cantons might be considered in which relatively small areas retain major prerogatives, while remaining a part of the whole country.
>
> "If a constitution with many of these features existed earlier in the newly liberated country's history, it may be wise simply to restore it to operation, amending it as deemed necessary and desirable. If a suitable older constitution is not present, it may be necessary to operate with an interim constitution. Otherwise, a new constitution will need to be prepared. Preparing a new constitution will take considerable time and thought. Popular participation in this process is desirable and required for ratification of a new text or amendments. One should be very cautious about including in the constitution promises that later might prove impossible to implement or provisions that would require a highly centralized government, for both can facilitate a new dictatorship.
>
> "The wording of the constitution should be easily understood by the majority of the population. A constitution should not be so complex or ambiguous that only lawyers or other elites can claim to understand it."[1]

That's it! Gene Sharp leaves constitutional illusions, doctrines and myths to the "old democracies" and "enlightened peoples". To attain

[1] http://bookscafe.net/read/sharp_dzhin-ot_diktatury_k_demokratii-30896.html#p28

the ends of "democratization", there is no need in discussing complex matters, which may feature philosophical content. It is quite enough to rely on plain and simple symbols and characteristics, such as: Bulldozer Revolution (2000) in Yugoslavia; Revolution of Roses (2003) in Georgia; Purple Revolution (2003–2005) in Iraq; Orange Revolution (2004) and Euromaidan (2013–2014) in Ukraine; Tulip Revolution (2005) and Melon Revolution (2009) in Kyrgyzstan; Cedar Revolution (2005) in Lebanon; Saffron Revolution (2007) in Myanmar; Lilac Revolution (2009) and Chrysanthemum Revolution (2015–2016) in Moldova; Jasmin Revolution in Tunisia (2010–2011); Lotus Revolution (2011) in Egypt; and different versions of the Arab Spring in Syria, Libya and Egypt.

The unsuccessful Umbrella Revolution (2014–2015) in Hongkong, Revolution of Sockets (2015) in Armenia, Bluebonnet Revolution (2006) in Belarus, and Bolotnaya Square protests in Russia, as well as unnamed protests in Macedonia, Malaysia, Mongolia, Brazil, South Korea and Uzbekistan did not make any constitutional demands.

Taliya Kharbieva, in her study "Constitutional Reform in the Modern World" [Kharbieva T. Ya., 2018. P. 65], draws attention to the point made by French authors, *"This "magic word" (i. e. Constitution — Taliya Kharbieva) is used in such a period in the life of a people, when the "process of rationalization and nationalization of the power" is coming to its end. The Constitution is something of the utmost value, a basic law expressing the political rights of a nation, the form of government and political rule."*[1] However, the above quotation contains an obvious contradiction — if the word "Constitution" only means "a basic law expressing the political rights of a nation, the form of government and political rule", it is not "magic" at all. In modern states, the "processes of rationalization and nationalization of the power" are enabled quite successfully by means other than constitutional regulation. In other words, very often these processes are carried out within the framework of and in compliance with existing Constitutions. However, the essence of these processes may be in conflict with the very foundations of the constitutional order.

By the beginning of the 21st century, every single country had a system described as constitutional and democratic. The fetishization of the Constitution, which is conceived by any self-respecting state as a must, as something it would be extremely inappropriate not to have (a situation comparable to publicly recognizing the legitimacy of cannibalism), has played a cruel joke — the Constitution is no longer perceived as a

[1] См.: Gicquel F., Giquel F. — E. Droit constitutional et institutions politiques, 25 ed. Montchrestien. P., 2011.P. 183. Cit. ex: Kharbieva T. Ya.. Named work. P. 29.

magic social contract. However, from the historical perspective, it is one hundred percent fair, since back in the day the Constitution itself dismissed the idea of the divine origin of the power having replaced it for the doctrines of "popular sovereignty" and "social contract".

"Since the days of Lucian's "True Story", too ardent professions of something being true have been considered as an unmistakable sign that we are dealing with an artistic fiction" [Eko U., 2014. P. 439] In fact, little has changed since then. At best, the content of constitutional myths and prevailing illusions became different, and new, more sophisticated ways of delivering them to consumers appeared. Karl Marx asserted, *"Up till now it has been thought that the growth of the Christian myths during the Roman Empire was possible only because printing was not yet invented. Precisely the contrary. The daily press and the telegraph, ..., fabricate more myths (and the bourgeois cattle believe and enlarge upon them) in one day than could have formerly been done in a century."* [Marx K., Engels F., 1964. P. 215] The "geometrical progression" of Karl Marx can be continued: every second the Interned fabricates and supplies myths in quantities that were hardly conceivable in the past. Some of these myths are presented in the format of "breaking news", others come in the flavor of "fake news"—the choice of definition is determined by specific interests of the "bourgeois donkeys". In no way can constitutional myths or illusions be given rise to in such circumstances!

So, how should we deal with the constitutional mythology? There is an idealistic suggestion, voiced by Francisco Alexandre de Paiva Forte, that constitutional myths should be transformed from utopia into constitutional instruments in accordance with the reality. [Forte F. A. P., 2007. P. 197] This suggestion is worth support, but with the provision that in such a case the suggestion itself should be considered an illusion. This does not dispute the fact that one of the objectives of those, who explore constitutional myths and illusions, is not to dispel myths or eradicate illusions, but, on the contrary, to subject them to comprehensive legal treatment, to ensure that idealistic reminiscences establish themselves as essential elements of the history of nationhood, or that potentially fond hopes become reference points for development.

Constitutional myths of the past continue to exist in the modern society influencing discussions on the development of the state, society and individuals in the postmodern era. Exploring this phenomenon, Umberto Eco says, *"The past, since it cannot really be destroyed, because its destruction leads to silence, must be revisited: but with irony, not innocently"* [Eko U., 2007. P. 130]. Such revisiting does not put an end to

the constitutional myths of the past but precludes the advent of new ones. The modern constitutional doctrine, very pragmatic and politicized, does not provide favorable conditions for mythmaking.

The basic constitutional illusions of the past are exhausted. The era can be said to end[1]. It is possible, and even likely, that, in the new era (information-driven or digital), the society will generate new illusions. But today we should admit that the Constitution is a very special law, a cementing force, which forms the future image of the state and society. Constitutional illusions and constitutional myths are reflections of the country's history, adopted international best practices and representation of the nation's vision of the modern world and machinery of the state. Collective consciousness absorbs, in the first place, those fundamental illusions of the era, which help to maintain the existing state system with its social, political, economic and other institutions.

Admitting the exhaustion of constitutional illusions in the modern era, one should not disregard a simple fact—Constitution is a very useful and convenient thing. Its pragmatic nature and practicability allow modern states to put in place favorable conditions for the development of the economy and business, functioning of the civil society and self-development of individuals. The loss of its magic does not entail the loss of practical usefulness. Thus, at earlier stages of development, the humans theologized various natural phenomena, then they strived to conceive the magic of electricity, how the electric or steam power puts locomotives in motion. Even now, many of us can hardly understand, how the voice is transmitted over telephone wires or, even weirder, over satellite communication channels. On a daily basis, we use magic things and do not care, who invented them, or what laws of nature make them work. The same is true for the Constitution.

The esteem for Constitutions is unwavering. It is becoming even more demonstrative, but this only demonstrates respect to history, pursuit of stability, acknowledgement of the constitutional rule as the best and most promising way of reproduction of power. Can it be true that this esteem leaves no room for constitutional illusions?[2] Have they ceased to exist? Has the word "Constitution" really lost its magic?!

1 Arthur Miller, "An era can be said to end when its basic illusions are exhausted." "The Year it Came Apart", New York magazine, Vol. 8, No. 1 (30 December 1974–6 January 1975), p. 30.

2 At least, in the sense of hopes or trust in the saving grace of the Constitution, rather than in the cynical Lenin's interpretation providing for the acknowledgement as constitutional of an order, which has never been such.

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