

the material independence of judges (Quigley 1990: 67). In the same year, a system for trial by jury was created for the most serious criminal cases. Moreover, the legal reform brought a crucial reduction in the scope of criminal law, so that many activities related to economic exchange and production were removed from criminal-law statutes. The political import of criminal law characteristic of totalitarian regimes was substantially reduced at this time, and the number of political or political/economic crimes was diminished.³⁴ In parallel, these legal changes included provisions both for the curtailment of political encroachment on judicial functions and for the establishment of a Constitutional Supervision Committee (1989–91), which was designed to promote judicial integrity and to perform constitutional review of normative acts. Members of the committee were elected in 1990, and it assumed functions analogous to those of a constitutional court. Throughout, these pieces of legislation were designed to place a legal apparatus above the everyday acts of the state and to guarantee greater accountability of state officials. At the same time, however, these processes were also intended to prise apart the conventional privatistic attachment between singular persons and political and judicial offices, and to distil the power of the Soviet state as distinct from, and positively usable against, those incumbent in office. The formation of a separate parliamentary legislature and the reform of the judiciary and the state administration were thus designed, in conjunction, to raise the autonomy of the state and, above all, to curtail the centrifugal power exercised by actors obtaining public office by private or clientelistic means, mediated through the party (see Solomon 1990: 185). In many respects, in fact, the legal reforms in the Soviet Union under Gorbachev bear comparison with functional dimensions of much earlier processes of reform, and their basic function was to reduce the privatism of the state apparatus by separating structures of office holding from personal control.³⁵

Furthermore, the early move towards constitutional rule under Gorbachev involved, centrally, an expansive concession of rights of economic autonomy, and it was driven by far-reaching goals of economic reform. By 1990, a raft of legislation was introduced in respect of

³⁴ On these changes in criminal law see Feldbrugge (1993: 30).

³⁵ For a good recent study of patrimonialism and weak statehood in the Soviet Union see William Tompson (2002: 936–8). For brilliant analysis, stressing weak central control and neo-patrimonial brokering of public office as features of the Soviet system, see Anderson and Boettke (1997: 38, 43–4).

proprietary rights: this legislation renounced the principle that municipal or state-owned property could be legally differentiated from private property, and it stipulated that neither private property nor private enterprise were bound by the state (van den Berg 1996: 119, 124). These rights were reinforced by the law on the Principles of Civil Legislation of 1991, which afforded protection under civil law to personal rights and other rights vital for independent economic activity. In 1990, anti-monopoly legislation was introduced, which released enterprises from control by the state ministries, and reduced the degree of immediate convergence between the state and independent economic concerns. In 1991, further, wage agreements were removed from state jurisdiction, so that, outside certain general parameters, the state was not required to act as full guarantor for wage levels or industrial settlements. Importantly, at the end of 1991 the old system of taxation, in which revenue had been transferred directly from public enterprises to the state, was replaced by a fiscal apparatus that enabled the state to raise revenue on economic activities outside its immediate control (Feldbrugge 1996: 288). In these respects, the diffuse process of constitutional reform served to detach the state apparatus from its previous economic obligations, and it provided legal means through which the state could begin to stabilize its relation to the economy as a social field external to itself. Placed alongside political rights, the recognition of independent economic rights immediately restricted the social centrality of the state, and, in allowing the state to position itself in more differentiated manner towards other social spheres, rights also began to evolve as institutions that controlled the boundaries of the state and heightened the autonomy and positive flexibility of state power.

In the first instance, in consequence, the concept of government by general constitutional laws, articulated at once under public and private law, served in the Soviet Union *perestroika* era as a multi-faceted normative principle. The insistence on the rule of law as a normative goal of political transformation acted as a lever in the process of severing the political apparatus from its attachment to government by a single party, and it acted to construct the state as personally distinct from the particular mechanics of governance and functionally to liberate actors committed to reform. Tellingly, by the early 1990s legal elites had assumed a distinctively powerful position in the process of transformation (Trochev 2008: 26–7). In fact, as well as acting to isolate the state as a relatively free-standing and autonomous order, the principle of legal rule also formalized the obligations of the central state within the federal system of the Soviet

Union: this meant that the states within the union could (notionally) be regulated by uniform laws and their relations with the central state simplified. The evolution of the constitutional ideal in the Soviet Union, thus, as in other transitions, formed (or was designed to form) a normative response to the undifferentiated and pluralistic density of the state. The construction of a separate constitutional order within the state formed a reaction in the political system to its relative loss of autonomy and excessively personalized social convergence, and the reinforcement of constitutional provisions over rights and legal uniformity was intended as a principle for substantially intensifying state autonomy.

The constitutional situation in the Soviet Union changed dramatically in 1991 when the Soviet Union collapsed and fifteen independent states withdrew from the union. At this point, government was repeatedly conducted by decree, as Boris Yeltsin assumed extensive emergency powers in order both to introduce further economic reforms and to organize the executive. In 1992, however, a new constitution was drafted for the reformed state of Russia. The 1993 Constitution ultimately consolidated a balanced arrangement between executive and legislature, which concentrated extensive powers in the hands of the president, but also accorded important countervailing, albeit subsidiary, powers to the elected Duma. This constitution also sanctioned a very comprehensive catalogue of basic rights: indeed, it accepted that in cases of legal conflict international law was to take precedence over domestic legislation. The rights acknowledged in the constitution included classic rights of personal integrity, especially rights of ownership, expression, privacy and movement. However, as in other transitional states, the catalogue of rights differed substantially from classical liberal constitutions: it guaranteed the right to shelter and social housing (Art. 40), the right to social security in cases of deprivation (Art. 39), and the right to freedom from racial or religious abuse (Art. 29). Vital for the legitimating role of this constitution was that it guaranteed political freedoms and (formally) decriminalized political dissent (Arts. 29–30), and it stipulated rights of protection against the state in cases of unlawful actions committed by state officials (Arts. 52–53).

Of particular importance in this was the fact that the 1993 Constitution contained strong provisions to support a separate and independent judiciary, and it placed under express protection the independence of the courts (Art. 120), the inviolability of judges (Art. 121) and the right to open trials. The constitution also prohibited irregular judicial proceedings: in Article 118, it eliminated the judicial power of the Communist Party.

After 1996, the traditional dependence of courts on political and logistical control through the Ministry of Justice was (in principle) eradicated. Further, as in earlier transitions, the constitution provided for regulation of the functions of the judiciary by a separate Constitutional Court. This court was in fact established in 1991, and it decided its first case in 1992. However, its position was formalized in the 1993 Constitution. Notably, the Constitutional Court had some distinctive features. Although initially endowed with very strong powers, including the power to initiate cases for review, its status was altered in 1994, owing to its involvement in the struggle between parliament and president: this led to its suspension by Boris Yeltsin, after which its powers were substantially constrained and it was less eager to engage in fractious political dispute. Moreover, unlike other post-communist judicial systems patterned on the Austro-German design, in Russia a model of dual judicial control developed, in which the Constitutional Court existed alongside a Supreme Court, which gradually asserted responsibility for judicial decisions and protection of rights in ordinary courts.³⁶ Nonetheless, the Constitutional Court remained (notionally) authorized to conduct review (although this repeatedly came under siege). It retained strong powers for ensuring constitutional conformity of federal statutes and for resolving disputes over jurisdiction between federal state bodies and between supreme state bodies of subjects of the Russian Federation (Art. 125). In its original conception, in fact, it created the basis for a thorough legal rationalization of the political order, in principle placing powerful rights-based normative constraints on the operations of government, and it reinforced an abstractive structure for the dislocation of the state executive from private actors assuming state power through party-mediated influence (Fogelklou 2003: 186; Thorson 2004: 196).

In this respect it needs to be stated unequivocally that, naturally, the Constitutional Court in Russia was not able to act with even near impunity, and it could not sidestep serious political restriction. Its provisions for a rights-based *Rechtsstaat* were subject to endemic neglect, and minimum thresholds of respect for rights were, throughout the longer reformist period in the 1990s, barely preserved. Moreover, it needs quite expressly to be emphasized that the development of a constitutional order in Russia only selectively restricted private control of public office, and at different points in the longer transition legal/constitutional regulation of access to political and judicial power failed

³⁶ For excellent analysis see Krug (1996).

almost entirely. It has been widely diagnosed that in the earlier 1990s Russia suffered sporadic collapse of state autonomy, and it witnessed such rapid and comprehensive usurpation of state power and administrative resources by private actors and neo-patrimonial oligarchs that it lost the ability to impose reforms: this was also reflected in a consonant decline in legal order (McFaul 1995: 242; Gel'man 2004: 1024). The constitutional preconditions of integral statehood were thus only formally instituted in transitional Russia: the constitution offered only a partial solution to the internal weaknesses of the state, and it was not strong enough to detach the state structure from private control. Indeed, it has also been widely argued that the presidential system remained very susceptible to lobbying and retained a high porosity to informal groups, that the civil service was not formally brought under constitutional rule and both the civil service and the judiciary remained beset by corruption, and that the federal structure often facilitated violations of general legal rules (Fogelklou 2001: 233–4). In each of these respects, the constitutional system that evolved after 1989 provided for only an incompletely regulated pattern of statehood, and it offered only a precarious normative framework of legitimacy for the state. In short, it would be evidently counterfactual to suggest that the Russian constitution consistently performed the functions attached to other constitutions in maximizing state autonomy or abstracted power.

As in earlier transitional settings, however, the judicialization of political procedures in Russia brought longer-term, although distinctively attenuated, functional benefits to the emergent state, and it acted both to simplify the processes through which the state obtained legitimacy and, ultimately, to perform an overall consolidation of state power. First, for instance, the Constitutional Court gradually led to clarification of the relation between executive and legislative powers within the state, it obstructed the endemic arrogation of legislative power by private persons, and it acted rudimentarily to ensure procedural integrity in legislation. In particular, it opposed the practice of passing joint 'executive-legislative decrees' that had typified Soviet-era legislation and had underpinned the control exercised over the state by the party (Trochev 2008: 105). The court also ultimately, albeit in rivalry with the Supreme Court, established the principle that it alone should have powers of 'binding interpretation' of the constitution, and it subordinated ordinary, regional and subsidiary courts to the directives issued by a clear centre of jurisdictional authority (Sadurski 2007: 20–1). In this respect, the court at once enhanced the general application of the law,

ensured that state power was not diluted by conflicting patterns of legal interpretation and enforcement, and impeded personal acquisition of power. Moreover, in assuming responsibility for particularly controversial political contests, the court progressively made sure that the state's requirements for factual coercive power were subject to selective limits and that power was only exceptionally used outside a small group of functions. Indeed, in preserving economic and contractual rights, the constitutional court ensured that the state itself was not forced to intervene in disputes between potent economic actors (for example between banks and clients), it reduced the responsibility of the executive for legal planning and implementation, and it meant that the state's need to politicize its economic policies in a newly differentiated and precariously balanced society was limited (Trochev 2008: 167).

In consequence, the transition to a constitutional system in Russia noticeably, over a longer period, strengthened the positive structure of the state apparatus. The existence of a constitutional court, although less politically interventionist than in Poland or Hungary, was an ultimately important innovation in this respect, and it at once cemented the apparatus of the state as distinct from the particular processes in which its power was consumed and ensured that the deepest legitimating resources of the state were extracted above its factual operations and only exceptionally called into question or directly politicized. In Russia, in fact, the constitutional court assumed a distinctive strategic state-building function, and its technical utility in abstracting and cementing the superstructure of the reformed state outweighed its contribution to preserving social pluralism or socio-political freedom. To illustrate this, it has been widely noted that in Russia the acceptance of an international rights regime and the neutral functions of a Constitutional Court sat easily alongside, and in fact commonly reinforced, a tendency towards selectively authoritarian governance (Kahn 2004: 2). The fact that the dynamic of constitutional reform first originated within the state apparatus and reflected strategies of political consolidation meant that, from the outset, the reforms centred on a highly legalistic and semi-prerogative refinement of state power. Indeed, it has been widely noted that during the early period of constitutional reforms in Russia the state acted as both the object and the initiator of liberalization, and the state reformed itself in order, in part, not to generate conditions of effective socio-political or rights-based inclusion, but to obtain a heightened degree of infrastructural power in society (Weigle 2000: 272). Under Vladimir Putin, finally, a very distinctive model of constitutional order

began to emerge. Putin repeatedly took notable steps to reform the judiciary: these included measures to increase the financial independence of courts, to introduce new procedural codes, to expand trial by jury and to harmonize laws between federal government and regions. Rather than enhancing the democratic structure of the state, however, these reforms created a political system in which a rationalized judiciary, centred around the Constitutional Court, acted as a semi-authoritarian instrument of state consolidation. Although at crucial junctures in Putin's presidency the Constitutional Court acted to limit the political branch of government, at other times, and in fact more consistently, the court provided a formal framework to consolidate and solidify a powerful executive and to facilitate Putin's policy of government founded in authoritarian executive-led and judicially rationalized legalism (see Fogelkrou 2001: 225; Trochev 2008: 185–7). Indeed, if in the earlier periods of transitional reform the consolidation of state autonomy was insecure and the state was fragmented by privatistic usurpation of offices and benefits, Putin pursued legal and judicial reform as a technical policy for rigidifying public authority against private actors and for consolidating central administrative power against personal corruption and fragmentation. The pattern of constitutional reform in Russia, in fact, had its most obvious antecedent in the minimal executive constitutionalism of the softened Bonapartism of many later nineteenth-century societies, and it produced a model of contemporary constitutionalism *sui generis*, in which regular judicial order and legal constraints on private authority acted, not primarily to check, but rather to underpin a semi-detached executive.

Despite this, nonetheless, during the periods of legal reform in Russia under Gorbachev, Yeltsin and Putin techniques of constitutional transformation were employed partly as a normative framework for the construction of a state that at once was differentiated from other functional spheres and possessed internal checks and legal constraints to preserve it against internal/particularistic fragmentation. The rule of law, however imperfectly, acted as an instrument which ultimately strengthened the power of the state, and the principle of the separation of the powers, governed by a Constitutional Court applying general catalogues of rights, provided a mainstay for the relative stabilization of state functions. If the rule of law, constitutional review and the application of rights were only weakly obtained in Russia, Russia remained an example of the classical sociological functions of constitutional reform. The case of Russia, above all, exemplifies the fact that one-party

governmental systems have much in common with pre-democratic systems, and they tend to suffer from the same problems of weak abstraction: privatization of public office, clientelism, weak statutory power, low powers of general integration and political inclusion. Indeed, post-communist Russia might be seen as possessing some of the common features of constitutional rule in the imperial era, and the strategic and minimalistic constitutionalism promoted in particular by Putin might be viewed as a distinct expression of the classical sociological functions of constitutions in eradicating the vestiges of feudal order and excessive privatism in the state.



Conclusion

The first conclusion of this book has a functional focus. It claims that constitutions, although often observed as normative arrangements which are deduced and imposed from outside the socio-political structures and institutions of society, are in fact functional articulations of inner-societal processes. In the first instance, constitutions developed as institutions that made it possible for societies, at different stages in their formation, to abstract resources of distinctively political power, to preserve the differentiation of their power from other functions, and to utilize this power, in measured inclusivity, in the context of a differentiated, functionally pluralistic and increasingly positivized societal environment. Constitutions normally play a vital role in enabling societies to construct and address some of their exchanges as distinctively relevant for and included in power: as *political*. Moreover, constitutions bring the crucial benefit to societies that they allow political systems in modern societies positively to produce power and internally to *multiply* the reserves of power that they contain. Constitutions have the indispensable inner-societal function that they allow political actors to extract a supportive internal definition of their power, which means that political actors can refer to stable and withdrawn self-constructions in order positively to reproduce, procedurally to apply, and internally to maximize their power in a number of different spatial and temporal settings. On these grounds, this book concludes that constitutions are functional preconditions for the positive abstraction of political power and, as such, they are also, over longer periods of time, highly probable preconditions of institutions using power: that is, states. It is argued throughout this book that modern societies are defined by the fact that they have successfully developed institutions that are able to construct and gradually to augment stores of power that are in some way and to some (always precarious) degree *public* (that is, internally reproducible, collectively positivized and autonomously abstracted against singular persons): this fact gives a distinctively inclusive and pluralistic form to modern societies. Constitutions play the most central role in ensuring that modern

political institutions, and modern society as a whole, do not forfeit this institutional form through an endemic re-patrimonialization of their power and that, in consequence, societies do not relinquish their ability to reproduce their power in reasonably autonomous manner. As discussed, re-patrimonialization of power is a constant danger for modern societies, and where this occurs societies experience a dramatic diminution of their power and, accordingly, a rapid loss of plurality and freedom.

On these grounds, this book also proposes a second, more methodological, conclusion. This claims that the conventional normative strategies for analysing and evaluating constitutions, the provisions normally contained in constitutions (i.e. rights, separation of powers, procedures for pluralistic democratic self-legislation), and the legitimating functions of constitutions and constitutional rights, have fundamentally misconstrued their object. The institutions of constitutional rule, viewed in normative inquiry as external or deductively constructed preconditions of power's legitimacy, are in fact embedded elements of adaptive societal reflexivity, which act within the structure of political power. If we assume that modern differentiated societies demand, and in fact can only effectively utilize, power as an autonomously abstracted and replicably inclusive phenomenon, the institutions of legitimate constitutional rule can be observed as normative principles that the political system of modern society produces or externalizes *for itself* in order to heighten the societal abstraction of its power and to fulfil the complex requirements for positive statutory laws and rulings that characterize modern societies. The primary norms of constitutional order are thus best explicable within an exclusively internalistic and sociological paradigm. As discussed, first, the constitution *per se* (defined as an extracted and inclusionary public-legal order within the state) initially evolved as an institution that allowed states to underwrite positive statutory functions through reference to an articulated set of norms, to detach their functions from private social milieux, and to imply a consistent personality in order to unify the acts in which power was transmitted and to stabilize the environments in which power was consumed. The rights enshrined within more modern constitutions then evolved, second, as institutions that permitted states at once to police their social inclusion, and to construct and simplify the terrains to which they applied power in relatively controlled and internally consistent manner. The norm of sovereign-democratic inclusion, third, evolved as a principle that allowed states to authorize their power in highly abstracted and inclusive fashion, to separate their power from external interference, and to

transmit their power across wide social spaces at a high level of positive reproducibility. The primary norms of constitutional rule, in consequence, can be seen as adaptive dimensions of political power itself. These are institutions generated within power as power became progressively sensitive to highly differentiated societal environments, and as society as a whole, shaped by its functional extension and differentiation, created and encountered a need for more inclusive and autonomous capacities for using power. In a modern society, in short, political power is always likely to be applied through constitutional laws, through rights, and through reference to the inclusionary norm of popular/sovereign authority. Moreover, political power is always likely to be perceived as *legitimate* if applied in this form: constitutional laws, rights and selective popular inclusion create an internal apparatus within political power through which it can reproduce and transmit itself through society at a high level of internal consistency and with a minimum of unpredictable resistance. Societies that do not articulate power in this internal normative form are (over longer periods of time) unlikely to utilize power very effectively, and they are always susceptible to the threat that they might forfeit their inclusive political structure and erode their defining capacities for spatial and temporal extensibility, relatively rapid and reliable decision making and effective inclusion. To this extent, normative or analytical theory intuitively grasps a basic truth in its common claim that the legitimacy of political power depends on its exercise through constitutions and distinct legal rights. However, these primary objects of normative constitutional analysis (constitutions, rights and legitimacy) can only be adequately explained by sociological reconstruction.

The third conclusion of this book has a more formally normative quality. It is that in modern societies political power is always likely to assume certain basic normative legal features. Above all, if we assume that modern societies are usually determined by the fact that they require innumerable positive and replicable decisions (statutes) and they necessitate positive procedures for the positive, extensible political inclusion of very diverse actors and exchanges, it is probable that in these societies political power will assume and preserve an internal normative shape that is defined by constitutional laws, uniform subjective rights and some degree of popular/democratic inclusion. These principles or institutions might be seen as the *functional norms* that underpin modern power, and that permit societies recursively to apply and reproduce their power. To this limited degree, in fact, sociological analysis might allow itself to suggest that the norms of constitutional rule are probable preconditions