CoCoA Working Papers

A LIVING JUDICIARY FOR A LIVING LAW: CONSTITUTIONAL TRANSITIONS AND GOVERNMENTAL CHECKS AND BALANCES

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INTERNATIONAL CONFERENCE
"JUDICIAL POWER IN THE COUNTRIES IN TRANSITION"
27 MAY 2016, MOSCOW

Higher School of Economics Law School, Moscow
Institute for Law and Public Policy, Moscow
Venice Commission

ISBN 978-88-8443-638-2

ISSN 2532-3520

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1. Introduction.

Since World War II, the awareness of the historical failure of a merely procedural notion of the democratic principle and of the principle of legality – both principles having been formally respected in the countries whose majoritarian dictatorships led to Shoah and to the war[1] – has encouraged establishing and shaping a more sophisticated constitutional system of checks and balances among governmental institutions in individual European States.

The European historical experience and theoretical notion of "countries in transition", therefore, covers a fairly long period of time[2] and includes quite a large and ideologically non-uniform set of transitions from authoritarian and/or totalitarian rule.

Such developments thus allowed their respective forms of government to proceed beyond a merely mechanistic application of the 19th century principle of separation of powers and therefore gave a strong imprint to a twofold transition: (i) a first transition of the domestic *political régime*, namely from authoritarian and/or totalitarian rule to liberal and constitutional democracy, as well as (ii) a second transition of the *legal and constitutional* system, from the *rule of law state* (*Rechtsstaat*) to the *rule of*

[1] Exceptions to this trend are provided by those very few countries – such as Denmark, Finland, the Netherlands, Norway and Sweden - that did not produce from within significant authoritarian political attitudes and movements. The Constitution of the Netherlands goes as far as stating that (art. 120) "the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts" (it has been commented that the provision "is therefore more than a narrow exclusion of constitutional review of statutes and treaties: embedded in a system of strict separartion of judicial and lawmaking stasks, the provision is a basis for a much broader immunity of the legislature as against the courts", in A. W. Heringa and Ph. Kiiver, *Constitutions Compared. An Introduction to Comparative Constitutional Law*, 3rd ed., Intersentia, 2012, 183. Belgium and Switzerland are also to be added to this list of exceptions, their respective system of constitutional judicial review being established originally and mainly because of the federal structure of the form of government.

[2] A first cycle took place right after the war in the late 40s and concerned Italy and Germany, a secondo cycle in the '70s included Greece, Portugal, and Spain, and a third cycle since the 90s affected Central and Eastern and South-Eastern European Countries.

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constitutional law state (*Verfassunsrechtsstaat*), as consistent with current western mainstream constitutionalism.

Both transitions – jointly leading to a system of *constitutional democracy*, that is *democracy based on the rule of constitutional law* - have consequently been experienced in several if not most European countries, so that the condition of being "transition countries" is part of a shared itinerary. Such a wide and long historical experience has already indicated that constitutional transitions do take time to get to an end and that there are no well established and fully persuasive (scientific or even political) standards that allow to say when the process of transition has been definitely accomplished, the assessment by the international community likely being one of the reliable criteria[3].

Among such countries, the Russian Federation – because of its strong historical legacies related to a short and weak contact with 19th century liberal constitutionalism until the earlier part of the 20th century, then followed by a relatively long and decidedly strong socialist political *régime* and to a mainly positivist legal culture - presents characters of its own that inevitably affect current constitutional developments and that their assessment quite difficult without an adequate knowledge.

I do not claim having even a satisfactory familiarity with the Constitution of the Russian Federation and with its actual implementation other than its textual source (furthermore, in its English translation). Therefore, while being aware that a Constitution is much more than a set of written words, I have chosen as the method of my presentation to rely on the text of the 1993 Constitution (as amended in 2008) in order (i) to detect *normative ideological connections* between the Russian Constitution and mainstream constitutionalism in Europe and (ii) to assess the *potential* for Russian participation to further shared developments of constitutionalism in Europe, as a consequence – among

[3] Membership in the European Union, because of the lengthy and incremental process of admission as well as because of the openly stated conditionality of the so called Copenhagen criteria may be regarded as one of the indicators that a good portion of the transition process has been accomplished.

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other factors – also of membership to the Council of Europe and of being a party to the ECHR and to the ECtHR[4].

Therefore, it is thanks to the textual existence of such normative ideological connections and of such a potential of the written Constitution[5] that my presentation is not focused on Russian constitutional law as it is or as it should be, but rather it is based on the assumption of the applicability to the Russian institutional setting of the main *systemic functional features* of what I consider to be a *Living Judiciary for a Living Law*.

2. Constitutional developments in transition countries in Europe.

Earlier in the post World War 2 period, specific reference to the introduction of innovative rules effectively safeguarding the independence of the judiciary and, in particular, providing for judicial review of the main forms of exercise of public powers is to be made to transition countries in western Europe such as, mainly Italy (1948 Constitution) and Germany (1949 Grundgesetz); and, although with different premises and also with an original solution of its own, in France, not as visible in the 1946 Constitution (whose art. 91 established a Constitutional Committee) as in 1958 (that established a Constitutional Council with the function, among others, of *a priori* abstract control of legislation) and quite more effectively in 2008, with the introduction of the *a posteriori* concrete control of legislation by the same Constitutional Council (the so called *question prioritaire de constitutionnalité*). The case of France – that did not have to deny a former authoritarian *régime* of its own – is indicative of the cultural

[4] It is due to such a methodological approach that I have chosen to quote in footnotes the provisions of the written Constitution of the Russian Federation from which I draw the existence of the normative ideological connections and of the potential for being part of mainstream European constitutionalism.

[5] See art. 1. ("Russia is a democratic federal law-governed State"); art. 4.2 ("The Constitution of the Russian Federation and federal laws shall have supremacy in the whole territory of the Russian Federation"); art. 15 ("1. The Constitution of the Russian Federation shall have the supreme juridical force, direct effect and shall be used on the whole territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution of the Russian Federation. 2. The bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution of the Russian Federation and laws"); art. 16 ("1. The provisions of the present chapter of the Constitution comprise the fundamental principles of the constitutional system of the Russian Federation, and may not be changed otherwise than according to the rules established by the present Constitution. 2. No other provision of the present Constitution may contradict the fundamental principles of the constitutional system of the Russian Federation").

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difficulties of shifting the focus of the system from an elected politically accountable parliamentary assembly to a court whose legitimacy is indeed rooted in the Constitution but not in democratic elections.

A further step in the same direction has been taken in the '70s, with the new Constitutions of formerly authoritarian *régimes* such as the ones in Greece, Portugal and Spain; and then again, more recently, in the 90s, as a consequence of the collapse of the Soviet Union, in the new Constitutions of the Russian Federation and other formerly Soviet Republics, of Central and Eastern European Countries, in South-Eastern Europe. In all such countries, concrete judicial control of legislation has been introduced and, explicitly or not, direct effect to constitutional rules protecting fundamental rights in individual cases has been judicially acknowledged and implemented.

Repeatedly and systematically, Constitutions have placed both substantive and procedural limitations on parliamentary legislative powers as well as on the power of amending the Constitution itself[6].

[6] See Chapter 9. Constitutional Amendments and Review of the Constitution and in particular art. 134 ("Proposals on amendments and review of the provisions of the Constitution of the Russian Federation may be submitted by the President of the Russian Federation, the Council of the Federation, the State Duma, the Government of the Russian Federation, the legislative (representative) bodies of the subjects of the Russian Federation, and also by groups numbering not less than one fifth of the number of the members of the Council of the Federation or of the deputies of the State Duma"); art. 135 ("1. Provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation may not be revised by the Federal Assembly. 2. If a proposal on the review of the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation is supported by three fifths of the total number of the members of the Council of the Federation and the deputies of the State Duma, then according to federal constitutional law a Constitutional Assembly shall be convened. 3. The Constitutional Assembly shall either confirm the invariability of the Constitution of the Russian Federation or draft a new Constitution of the Russian Federation, which shall be adopted by the Constitutional Assembly by two thirds of the total number of its members or submitted to a referendum. In case of a referendum the Constitution of the Russian Federation shall be considered adopted, if over half of the voters who came to the polls supported it and under the condition that over half of the electorate participated in the referendum"); art. 136 ("Amendments to the provisions of Chapters 3-8 of the Constitution of the Russian Federation shall be adopted according to the rules fixed for adoption of federal constitutional laws and come into force after they are approved by the bodies of legislative power of not less than two thirds of the subjects of the Russian Federation"); art. 137 ("1. Amendments in Article 65 of the Constitution of the Russian Federation determining the structure of the Russian Federation shall be introduced on the basis of the federal constitutional law on the admission to the Russian Federation and the creation of new subjects of the Russian Federation within it, on changes in the constitutional-legal status of a subject of the Russian Federation. 2. In case changes are made in the name of a Republic, territory, region, city of federal importance, autonomous region or autonomous area, the new name of the subject of the Russian Federation shall be included in Article 65 of the Constitution of the Russian Federation"). Although there is no eternity clause, the Russian Constitution does establish a hierarchical system of sources of constitutional law. Furthermore, art. 14 ("5. The creation and activities of public associations whose aims

Constitutions have enlarged the scope of as well as the typology of instruments allowing direct or indirect access to constitutional judicial review of legislative acts, administrative decrees and even judicial decisions.

Moreover, a further strengthening of the judicial role in protecting fundamental rights and freedoms is a consequence of international cooperation within the Council of Europe (the reference is to the European Convention and to the European Court of Human Rights in Strasbourg)[7] as well as of the process of European integration within the European Communities first and now within the European Union, having regard to the thoroughly judicial origin and early development of a new system of protection of fundamental rights set up mainly by the European Court of Justice in Luxembourg, through judicial dialogue with the domestic courts of member states.

At the same time, one is to emphasise, almost as two faces of the same coin, not only an easily noticeable expansion of the role of constitutional adjudication – for instance, well beyond the limited role of Kelsenian negative lawmaker - but also – although we deal here with a permanently contentious issue - a prevailing attitude of *acquiescence* to such an expansion by the political branches of government within State systems as well as by States' governments with regard to the two European courts.

One may well identify the introduction of constitutional judicial review as a factor of characterisation of post World War II European constitutionalism - national, international and supranational – to the extent that the very form of government may be regarded as having experienced a historical transformation, from the rule of law to the

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and actions are aimed at a forced change of the fundamental principles of the constitutional system and at violating the integrity of the Russian Federation, at undermining its security, at setting up armed units, and at instigating social, racial, national and religious strife shall be prohibited") does provide for a constitutional protection of the constitutional democratic *regime*; see also art. 16 ("1. The provisions of the present chapter of the Constitution comprise the fundamental principles of the constitutional system of the Russian Federation, and may not be changed otherwise than according to the rules established by the present Constitution").

[7] See art. 15 ("4. The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied").

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«rule of constitutional law», from the *Rechtsstaat* to the «*Verfassungsrechtsstaat*», from the *principe de legalité* to the *«principe de legitimité constitutionnel»*. In other words, any description of current constitutionalism in Europe that should limit itself to the traditional 19th century model based on separation of powers and ignore the inclusion of the judiciary, with particular regard to constitutional courts and to the functional circuit between ordinary courts and constitutional courts, within the governmental organisation would be inaccurate, inadequate and quite misleading[8].

Does such historical transformation require also a corresponding theoretical transformation and elaboration as a permanent feature of the western legal tradition? F. Rubio Llorente, having experienced membership in the Spanish Constitutional Court, significantly wrote that "*the introduction of constitutional jurisdiction in Europe has not been the product of an evolution, but rather of a revolution*"; and suggested that there is the need for "*a theory of jurisdiction more descriptive of its true nature than the theory of the "automaton judge, a theory that would accentuate the creative moment*"[9].

Indeed, we do not have a theory that properly and persuasively construes such new role of the (constitutional and ordinary but also international and supranational) judiciary but at the same time we have to acknowledge that the theory that we do have (*le juge bouche de la loi*, the judge who does not interpret the law, the judge who does not see the law but only sees the written statutory source) is obsolete and unfit to explain how the system works. What we have, therefore, is a conventional practice which, although controversial, is nevertheless fairly widely spread and at least implicitly accepted.

In other words, the United States Supreme Court that could be defined as "*the least dangerous branch*" in *The Federalist Papers* or the continental judge who is not but "*la bouche de la loi*" according to the well known definition by Montesquieu – inasmuch as

[8] See art. 10 ("The state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial power. The bodies of legislative, executive and judicial power shall be independent") and also, although a system of checks and balances is not expressly stated as in other transition Constitutions, art. 11 - subject to interpretation - ("1. The state power in the Russian Federation shall be exercised by the President of the Russian Federation, the Federal Assembly (the Council of the Federation and the State Duma), the Government of the Russian Federation, *and the courts of the Russian Federation*", italics added).

[9] F. RUBIO LLORENTE, in A. PIZZORUSSO (ed.), *Law in the Making. A Comparative Survey*, Springer Verlag, 1988, 165.

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both definitions implied the total absence of any discretionary power of interpretation in the hands of the judiciary (in fact, the automaton judge) that might bear some even indirect politically relevant effects – do not quite correspond to the current and prevailing features of the judiciary as we know them to operate today.

Hence the question: are we witnessing a pathological involution of European constitutional systems, a systematic nullification of the traditional democratic principle supporting government by the politically elected and politically accountable majority in favour of a different system of *gouvernement des juges*[10], that is a system of government by unelected and politically non accountable few top members of the judiciary?

Or, quite to the contrary, is the inclusion of the judiciary – and particularly of constitutional courts interacting with ordinary courts – within the present organisation of government and of policy-making institutions quite physiological, an incremental consequence of the strengthening of *the rule of constitutional law* as distinct from the traditional *rule of law*, a proper *non majoritarian guarantee*[11] against the very possibility of a majoritarian dictatorship, a further step strengthening checks and balances – including *non-majoritarian checks and balances* - between and among governmental institutions?

3. The rule of constitutional law as the supreme law of the land and its impact on the concept of living law and on the role of a living judiciary.

My personal hypothesis of construction of *an institutional setting of non-majoritarian checks and balances founded on the interaction between the law-maker and the judiciary* is founded on the acknowledgment that

[10] See E. LAMBERT, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois,* Giard, Paris,1921, new edition, Dalloz, Paris, 2005.

[11] It is important to stress that "non-majoritarian" is not synonymous of "anti-majoritarian", as long as parliamentary majorities do not legislate in violation of the Constitution. In this sense, "non-majoritarian" is rather synonymous of "constitutionally consistent", or "consistent with the majority that enacted the Constitution", as judicially interpreted.

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(i) the rule of constitutional law as "the supreme law of the land" ought to be taken seriously;

that (ii) the rule of constitutional law – once taken seriously – does require the recognition of a function of its own: namely, the *function of constitutional implementation and of constitutional policy making*;

that (iii) such function has a *negative* character (invalidating any expression of public powers inconsistent with the supreme law of the land) as well as *positive* features (a proactive commitment to the full enforcement of the constitution);

that (iv) such a function emphasises cooperation between the political branches and the judicial branch of government and therefore is developed as a *shared interactive rule-making competence* that allows a living judiciary to interpret and enforce a living Constitution and allows as well a living representative law-maker to adapt rules to the changing environment;

that (v) due to the widespread deficit of political representation, the judiciary has the competitive advantage over the law-maker of being closer to the plurality of needs and sensitivities of individuals and minorities, thus giving a functional expression to *interests and rights that are not adequately protected by the majoritarian principle and introducing a necessary non-majoritarian balancing instrument of implementation of the Constitution*;

that (vi) such arrangement does provide a *systemic balancing effect*, as indicated, although paradoxically, by the acquiescence by the political branches of government as well as by their occasional reaction to an unacceptable excessive expansion of the judiciary, by means of employing the instrument of constitutional revisions, therefore changing the very paradigms of constitutional interpretation;

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that (vii) the combination between judicial activism and judicial self-restraint is to be the resulting outcome of *a shared awareness* of the requirement for the systemic balancing effect due to reliance on non-majoritarian checks and balances;

finally, that (viii) such a shared awareness is very much part of the *culture of judicial independence* of and in the system.

The culture of judicial independence is a complex notion: it draws from the past and nevertheless it is expressed and developed in contemporary times; it is formalized and rooted in written law and yet it makes itself visible by the practice of judicial decision-making and also through concrete behaviour by judges, in courts and elsewhere; it has sociological underpinnings but it is thoroughly legal and institutional as to its impact over litigation as well as with regard to legislative enforcement, separation of powers and checks and balances.

Judicial independence may be regarded as a multi-faceted feature of a system based on the rule of law – concerning recruitment, training and managing the career of judges, presiding over judicial ethics and deontology, affecting methods of legal interpretation - and the culture of it as *the* factor that combines and holds together all those facets.

In fact, the culture of judicial independence is part and parcel of the legal culture as such of a country, as it is not confined to the judicial world but it goes quite farther, including, as it does, also the expectations of the legal community, of the policy and law-making institutions and of the public at large. From this perspective, *the culture of judicial independence is as asset of and for the whole system* and whenever it happens to lose its systemic foundation the negative consequences are of general relevance.

It is quite evident that *judicial independence does require to be interpreted as an intrinsically non-majoritarian balancing element in a rule of constitutional law country*. Such a high notion of the culture of judicial independence is a specific challenge for polities experiencing a *systemic transition.*

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4. Judicial independence and interpretation of the law.

Judicial independence is a pre-condition for managing the complexities of interpretation of the law.

In civil law countries, the dogma of the completeness of the legal system and the obligation of judges to give a solution to any controversy by enforcing the existing law (the principle of *non liquet*) require that there is a rule that makes the fiction of the dogma into an operational instrument. In the case of the civil code of the Russian Federation, such a supplementary rule is provided by art. 6 of the civil code that openly relies on *necessary judicial interpretative discretion* (likely under the obligation of being exercised consistently with the Constitution)[12].

Reliance on judicial independence is a general precondition for a proper functioning of the system in a plurality of circumstances whereby *margins of judicial interpretive discretion* are inherently present and necessary.

Such circumstances appear to be physiologically present in the context of the Russian Constitution: (i) with regard to the interpretation of "universally recognized human rights and freedoms" not listed in the Constitution of the Russian Federation (art. 55); (ii) with regard to the adjudication of cases entailing the judicial assessment of reasonableness and proportionality of federal laws limiting the rights and freedoms of man and citizen only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State (art. 55)[13]; (iii) with regard to the judicial interpretation of an ordinary rule in

[12] See the text of art. 6 of the civil code: "Application of the Civil Legislation by Analogy 1. In cases when the relations, stipulated in Items 1 and 2 of Article 2 of the present Code are not directly regulated by legislation or by an agreement between the parties, while the custom of the business turnover that would be applicable to them does not exist, and if this is not in contradiction with their substance, the civil legislation shall be applied, which regulates similar relations (the analogy of the law). 2**.** If it is impossible to apply the similar law, *the rights and duties of the parties shall be defined, proceeding from the general principles and the meaning of the civil legislation (the analogy of the right), and also from the requirements of honesty, wisdom and justice* (emphasis added)**.**

[13] See the text of art. 55 ("1. The listing in the Constitution of the Russian Federation of the fundamental rights and freedoms shall not be interpreted as a rejection or derogation of other universally recognized

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conformity with the Constitution, with international treaties, with the case-law of the ECtHR.

Further circumstances of the same kind concern the identification of a hierarchy of rules in the very text of the Constitution (as indicated also by the different procedures for amending them)[14]; the interpretation of the legitimacy of limits on certain fundamental rights in times of emergency[15]; the interpretation of the general clauses of the Constitution[16]; the protection of the actual reach of constitutional rights due to the direct effect of the Constitution without any intermediation by the law-maker[17]; the use of the comparative method by courts.

It is important to stress that the opinion presented here is not even a first attempt at elaborating a legal theory. It is much more simply a personal attempt at reinforcing the need for a theory by way of emphasising the physiological (and not pathological) role to be expected by the judiciary and by constitutional adjudication.

Such final and personal remarks are not unconditional and in fact do require a whole set of preconditions and systemic and behavioural features (which are usually present), such as: (i) a good process of higher legal education, recruitment and in-service training – inclusive of foreign and international experiences - of judges and especially of

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human rights and freedoms. 2. In the Russian Federation no laws shall be adopted cancelling or derogating human rights and freedoms. 3. The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State").

[14] As provided for by art. 16, *supra*.

[15] See art. 56.1 ("In conditions of a state of emergency in order to ensure the safety of citizens and the protection of the constitutional system and in accordance with the federal constitutional law certain limitations may be placed on human rights and freedoms with the establishment of their framework and time period) and 56.3 ("The rights and freedoms envisaged in Articles 20, 21, 23 (the first part), 24, 28, 34 (the first part), 40 (the first part), 46-54 of the Constitution of the Russian Federation, shall not be liable to limitation).

[16] Consider, for instance, art. 7 "1. The Russian Federation is a social State whose policy is aimed at creating conditions for *a worthy life and a free development of man*"; art. 8. "1. In the Russian Federation guarantees shall be provided for the integrity of economic space, *a free flow of goods, services and financial resources*, *support for competition*, and *the freedom of economic activity*" (emphasis added).

[17] See art. 3 of the federal law on the Constitutional Court: "Powers of the Constitutional Court of the Russian Federation: To protect the foundations of the constitutional system and the fundamental human and citizen rights and freedoms, and to ensure the supremacy and *direct effect* of the Constitution of the Russian Federation on the entire territory of the Russian Federation, the Constitutional Court of the Russian Federation:[…] (emphasis added).

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constitutional judges (reproducing the main values orientations of the country and the plurality of its social fabric) in order to gain trust and legitimacy by all citizens and to achieve a reasonable expectation of acquiescence by the political branches of government (a pluralist reflective judiciary)[18]; (ii) a framework of cooperation with the ordinary judiciary (incidental reference to the Constitutional Court by judges suspending the judicial originating the issue of constitutionality) in order to increase the systemic sensitivity to the supremacy of the Constitution (also among attorneys); (iii) a proper balance between judicial self-restraint and judicial activism, founded on the general understanding of the proper role of the Constitutional Court; (iv) a wide range of instruments elaborated by the case law of the Court itself (judicial interpretative creativity), such as (a) subordinating the constitutionality of a provision to one only interpretation; (b) articulating the effects of its own decision in time; (c) elaborating principles of constitutional interpretation as "suggestions" to the lawmaker; (v) a principle of favour for concrete control rather than abstract (and preventive) control; (vi) an understanding of judicial accountability of the judiciary, in particular through critical technical assessment of decision making. Concurring and dissenting opinions are instrumental to achieving a good degree of accountability.

Therefore, reliance on the beneficial systemic effects of constitutional adjudication is all but unconditional and, rather, is quite demanding.

A corollary of such approach leads as well to identifying a role of public responsibility also for *academic scholarship*, working in contact with the wider international scientific

[18] In fact, the culture of judicial independence is expected to reach a proper balance between the objective and most necessary requirements of independence established by art. 29 of the Federal Constitutional Law Of the Constitutional Court of the Russian Federation ("The Judges of the Constitutional Court of the Russian Federation shall be independent and while exercising their powers shall be guided solely by the Constitution of the Russian Federation and the present Federal Constitutional Law. In their activity the Judges of the Constitutional Court of the Russian Federation shall act in their personal capacity and shall not represent any state or social bodies, political parties and movements, state, social, other enterprises, agencies and organizations, officials, state and territorial establishments, nations, societal groups. The decisions and other acts of the Constitutional Court of the Russian Federation shall express the legal position of the Judges corresponding to the Constitution of the Russian Federation and free from political bias) and the structural pluralism of the polity, as guaranteed by art. 13 ("1. In the Russian Federation ideological diversity shall be recognized. 2. No ideology may be established as state or obligatory one. 3. In the Russian Federation political diversity and multi-party system shall be recognized").

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community and having the necessary technical tools for evaluating the methodological appropriateness of legal and constitutional interpretation by courts. Making the law thus becomes almost *the outcome of a cooperative commitment of a variety of institutions* – political, judicial, academic – *operating as a sort of unitary interactive synergic virtual epistemic community*.

The benefits of such a setting are the outcome of a mature constitutional democracy and yet they are especially necessary in transition countries.

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