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BOOK REVIEWS

Konstitutsionnye proekty v Rossii, 18–nachalo 20 v.
otv. redaktory S. Bertolissi, A. N. Sakharov (Moskva: IRI RAN, 2000)
[*Draft constitutions in Russia, 18th to early 20th century,*
S. Bertolissi–A. N. Sakharov, eds. (Moscow: IRI RAN, 2000)]

In 2000 the Institute of History of the Russian Academy of Sciences and the Oriental Institute of the University of Naples, in a joint publication, released a book of great importance on the history of Russian constitutionalism. The subject of Russian constitutionalism is today of exceptional interest and importance. The continuing global significance of Russia's role in political, military and cultural affairs means that the development of Russian constitutionalism will be watched with great interest from outside Russia's own borders, just as it had been in the previous era. The book is in a class of its own, endeavoring a full and thorough introduction to the origins of Russian constitutionalism. It aims to present Russian constitutionalism in its entirety, understanding constitutionalism in the narrower sense of the term. The volume contains documents, which were drafted to limit tsarist autocracy. The collection begins with various constitutional plans discovered in connection with the ascendance of tsarina Anna Ivanovna in 1730, and covers projects up to the Constitutional Convention of 1917.

The book offers a truly exceptional presentation of unique historical documents. The largest part of this more than 800-page-volume is devoted to the development of Russian constitutional thought, in which 50 documents, covering the main stages of constitutional development, are presented. Extensive introductory essays by A. N. Sakharov, S. Bertolissi and A. N. Medushevsky open the presentation of these documents. The three introductory essays, written from three different perspectives, as well as the detailed references in the work of A. N. Medushevskij, comprehensively illuminate the historical context of the documents' origins. This apparatus also makes the historical documents accessible to those not that familiar with the intricate details of Russian politics, law, and institutional and social history. Indeed, the need to outline the legal and institutional historical context is of great significance given that, as the title suggests, the book contains only those draft constitutions that were (actually) intended to be realised. These drafts can only be properly

analysed with an understanding of their legal and institutional context. By placing these documents one after the other, it becomes possible to reconstruct and analyze in its entirety the nearly three centuries of Russian constitutional thought, which began following the reign of Peter I.

The massive amount of historical material offers useful insights not only to those specialising in Russian history. Foreign scholars of European and North American comparative law and constitutionalism who are less familiar with Russian history and constitutional developments may also make exciting discoveries. Analysing the development of Russian constitutional thought through concepts, institutions and solutions that emerged during the centuries-old evolution of constitutionalism in Europe and North America, reveals aspects of this development, which would otherwise have remained hidden. (Although, to a certain extent, such an outsider approach might seem rigidly analytical and overly unhistorical.)

Sakharov approaches Russian constitutionalism primarily from its historical, cultural and civilizational aspects. Full of ideas and inspiration for further thought, Sakharov's essay touches upon a few major episodes in the development of the Russian political system before the reign of Peter I, which had the potential to direct Russian history in a completely different direction. A central concept in his essay is the emphasis on the non-determinate, alternating nature of Russian history. Although following the rule of Peter I, the "constitutional" or "liberal" alternative was clearly more apparent, with a slight exaggeration, it was already noticeable before his reign. It is in this light that Sakharov evaluates, admittedly only tangentially and in a careful fashion, the boyar opposition to Ivan IV ("the Terrible"), the Russian elite's renewed attempts to limit the tsar's power in the time of Boris Godunov and Prince Vasily Shuysky, and—with much greater emphasis—Prince Kurbsky's opposition to the 'terrible ruler'. In relation to Kurbsky, Sakharov speaks directly of "his draft constitution to limit autocracy". The author places much significance on Kurbsky's endeavors to reform the "Chosen Council" and to include representative elements in local councils. In Sakharov's view, had these reforms been realised, they would have brought into being a completely different, alternative model of Russian political development in the second half of the sixteenth century which would have been "on the level of East-European and Swedish civilizational experience". In Sakharov's evaluation, Kurbsky's stance against Ivan IV "was the first forceful and dramatic attempt in the ongoing struggle for an alternative Russian development to end in failure".

Worthy of note is Sakharov's "cultural" and "civilizational" approach, which can be traced on more than one occasion both within and outside

Russia, admittedly imbued with differing value content. In the end, he connects the autocracy—constitutionalism duality back to the Russia—Europe duality. Furthermore, perhaps exactly due to the systematic application of this "cultural" outlook, the reign of False Dimitry I is presented in a fundamentally different manner than is commonly accepted in historiography. False Dimitry I came to power during the so-called Time of Troubles, the time of the fatal blow to Russian statehood, and he is commonly held to have represented Catholic and Polish interests. At the same time, Sakharov's interpretation of False Dimitry I's reign presents a perspective which fits well into the "autocracy" v. "liberalism / constitutionalism" dualism of Russian history. From this perspective, the measures adopted by False Dimitry I point exactly in the "liberalism/constitutionalism" direction. False Dimitry I permitted Russian people to freely travel abroad, he announced freedom of religion, he eased the situation of the peasants and *kholoptsvo,* and planned to convene the elected representatives of the serving nobles to familiarise himself with their demands. According to Sakharov, the origins of the conspiracy to overthrow and assassinate False Dimitry I can basically be explained by the above measures of the usurper tsar. In Sakharov's conception (which is at notable variance with standard historiography) the reign of False Dimitry I was of great significance as it presents the focal point of a potential for an alternative Russian history that could have stepped off the path of autocracy.

Sakharov's evaluation of the character of Peter I similarly differs from common historiography. In his description it is Peter I who represents the ever-dominant autocratic-authoritarian pole in Russian history. This is opposed to Regent Sophia and Prince Vasily V. Golytsin, a key figure under the Regent's reign and the head of the '*posolsky prikaz*', i.e. the minister of foreign of affairs (in the words of Sakharov the "enlightened chancellor") who represented the failed non-autocratic/authoritarian alternative. (Their reign ended in 1689 by the coup d'etat of the Naryshkin clan, thereby assuring the reign of Peter I.) Peter I did not continue any of the important aspects of Sophia's and Golytsin's reform measures and carried on the previous autocratic traditions of Moscow Russia, his own superficial reforms changing nothing. Thereupon, it is not surprising that Sakharov presents twelve documents in relation to the attempts to limit the powers of the Supreme Privy Council in the 1730's. At the time the eight-member oligarchic Supreme Privy Council attempted to limit the power of the ascending tsar, Anna Ivanovna in a legal document, setting certain "conditions", thereby also highlighting the constitutionalist alternative.

Besides the above document prepared by the autocrats of the Supreme Privy Council (of which the book presents numerous versions), a good number of other plans were produced in the circles of the nobility which also sought to limit the power of the autocratic ruler. These attempts were supplemented by countless highly articulate open political initiatives undertaken by Russian nobility up to 1905. These events point beyond themselves and are truly worthy of further examination.

Having read the assorted documents on Russian constitutional thought after Peter I, Sakharov's central argument concerning the alternating nature of Russian history seems very fertile and inspiring, yet it still bears a number of paradoxes. Indeed, it is arresting that constitutional plans which sought to limit autocratic power were often fatally aborted at the last minute, sometimes being thrown out by the ruler herself right after royal concession (Anna Ivanovna, Catherine II, the Great). Alexander II, who accepted the plan for constitutional reform (the consultative involvement of the *'zemstvo'*-s and municipal representatives in the legislative process), was assassinated two weeks after he affixed his signature on the resolution, which made the reforms executable. His heir, Alexander III had no intention in continuing his father's work, and in the first weeks of his rule issued the famous manifesto on the reinforcement and inviolability of autocracy—a departure from the logic of constitutional reform presented**.**

In this respect, the rule of Alexander I is extremely interesting, as a number of constitutional plans were commissioned and prepared during this period, which occupy a significant place in the present book. Most notable among these include 'The most gracious charter to the Russian people' from the Unofficial Committee (Neglasny Komitet) (1801), Speransky's plan entitled 'An introduction to the code of state laws' (1809), and Nikolai Novosiltsev's 'The charter of Russia's state organisation' (1820). Had any of these draft constitutions been adopted, they would have affected Russian history in a manner, which would be felt even today. According to the original plan, the proclamation of the 'The most gracious charter' was to be introduced on the occasion of Alexander I's coronation in September 1801. Speransky enjoyed the full confidence of the tsar between 1807 and 1811 and was almost as powerful as the almighty favourites of the 18th century, who actually decided on all state affairs. In the light of the magnitude of his influence, his quick fall is even more striking (Alexander I having expelled him).

As if observing the cruel play of destiny, the choreography of key aspects, the pattern of events is strikingly similar. In an autocratic environment, documents that have the capacity to bring about substantial changes (those

containing the minimum of civil rights) are prepared in the highest circles of the government, sometimes even with the encouragement and assent of the czar, and seem to have every chance of being realised. Yet, hardly any of these documents, some of which were lengthy and thoroughly elaborate, such as Speransky's, were put into effect, or they were realised with their most important elements being left out. Out of Speransky's plan, components of a bureaucratic machinery such as the institution of ministries and the Council of State were preserved. An exploration of the historical context of the constitutional documents presented in the volume tends to suggest that there should be some deeper reason standing in the way of the realisation of these constitutional projects. Curiously, the failure of these constitutional projects, which were so close to being realised, often contains a tragic element, given that these schemes could have lead to a totally different path for Russian constitutional development and Russian history in general.

Studying all the draft constitutions presented in the book, one is inclined to agree with many considerations that Medushevsky makes in his essay. On the one hand, Russian constitutionalism, just as its counterparts in Western Europe, was born from a conflict between state and society. Thus, the stages and the principles of Russian constitutionalism are akin to those found in Western Europe. However, there are a number of significant, possibly structural, differences. For instance, in Russia a social class or group that could carry the idea of constitutionalism was always absent, or at least very small and isolated. All draft constitutions or legislative reforms emanated from the highest circles of government or from groups in the political elite, and at times it was even the ruler who inspired or commissioned such proposals (i.e. the Instruction of Catherine II, the Great). For this reason, until 1905 and 1917, constitutional reforms were not representative of the political forces of the society, which, through the political process could have been capable of reforming the absolutist-autocratic state. (The events of 1730 might be an exception to this). In Russia, reform was a purely philosophical or ideological phenomenon, where reform of the method of exercising power was sought for the sake of principles and the implementation of the reform was expected from the state itself. The all-encompassing rationale behind the reform initiatives was to make the state rational and more efficient, to make the administration more professional through reforms, which are conducted from above. In Russia, the primary force of constitutionalism is the autocratic state itself. This is the underlying paradox and self-contradiction of Russian constitutionalism, and it is this feature which makes Russian constitutionalism essentially different from its Western European counterparts. This also explains the differences in the emphasis of

themes that exists between various Russian projects and Western European solutions.

This further sheds light on the fact that despite the radical declaration of basic rights in the various reform schemes, the government could never commit itself to the final step on the most crucial issue, that of full popular representation, which could have substantially limited autocracy. In this respect, Medushevsky rightly quotes one of the interpreters of "The most gracious charter" of 1801, who explored the Western European sources of this document (the Habeas Corpus Act of 1679 and the declarations of the rights men and citizen found in three French Constitutions): "on the soil of Russian peasants, these formulas were similar to those tropical plants, which have been planted in frozen soil".

The autocratic Russian state has never committed itself to limiting and thus weakening its own power. Many thought that self-restraint would have put an end to Russian statehood. Among others, this position was shared by Nikolay M. Karamzin in his famous work, *Memoir on Ancient and Modern Russia* [Zapiska o drevnei i novoi Rossii (1811)], who criticised the views of Speransky. Karamzin's words are well known and widely quoted: "Autocracy has founded and resuscitated Russia. Any change in her political constitution has led in the past and must lead in the future to her perdition, for she consists of very many and very different parts, each of which has its special civic needs; what save unlimited monarchy can produce in such a machine the required unity of action? If Alexander [I] inspired by generous hatred for the abuses of autocracy, should lift a pen and prescribe himself laws other than the laws of God and of his conscience, then the true, virtuous citizen of Russia would presume to stop his hand and to say: 'Sire! you exceed the limits of your authority. Russia, taught by long disasters, vested before the holy altar the power of autocracy in your ancestors, asking him that he rule her supremely, indivisibly. This covenant is the foundation of your authority, you have no other. You may do everything, but you may not limit your authority by law!' "[1]

The extent to which the delineation of competencies and the clarification of the relationships between the various planned bodies are absent from even the most progressive reform schemes is striking for the non-Russian constitutional lawyer. It may be said that such practical considerations were lost in the intellectual and institutional vacuum in which such schemes came into being, given that it was not a question of arranging the relationship between

[1] Translation in: Richard Pipes: *Karamzin's Memoir on Ancient and Modern Russia, A Translation and Analysis*, Cambridge, Mass.: Harvard University Press, 1959, 139.

real and existing bodies. It may have been that the clarification or the precise description of legal competencies could have made the tsar of the day suspicious, since even those tsars who would otherwise flirt with limiting autocratic rule do not particularly like to see their own power actually restrained. What is for sure, however, is that the various constitutional schemes contain hardly anything as for practical matters. The concept of a legislative act is similarly underdeveloped. Some of the constitutional schemes had the modernisation of the legislative procedure as their primary purpose, but did not aim to alter the established governmental structure. This may be in line with the enlightened absolutist model of the 17th century, but it does not answer the question as to whose will the rationalised legislative process is ultimately supposed to represent. For the non-Russian constitutional lawyer it appears that a certain tradition of thought is emerging, in which '*zakon*' [legislative act] and other norms are mixed. And since the constitutional schemes (again with an eye on autocracy) do not differentiate between legislators, no legal hierarchy, which is the basis of the rule of law, emerges.

The present volume contributes significantly to the study of Russian constitutionalism. The analysis of the never realised draft constitutions prepared in Russia before 1917, and the illustration of their destinies, may help contemporary Russia in finding the path to modern constitutionalism.

András Sajó and Gábor Sisák

MIKLÓS LÉVAY (ed.): **Essays for Professor Emeritus Tibor Horváth's 75th Birthday (Tanulmányok Horváth Tibor Professor Emeritus 75. születésnapjára).** Miskolci Egyetem, Bíbor Kiadó, Miskolc, 2002

The 3rd Serial of the Bulletin of Criminal Scientific Section, a brochure of the Department of Criminal Sciences at the University of Miskolc, has been released in May 2002. The volume features essays of current concern from the field of national and international criminal law, edited by Professor Miklós Lévay, head of the Department of Criminal Sciences, Dean of Faculty of Law. The recently published omnibus edition, Volume III, is collated on the occasion of Professor Emeritus Tibor Horváth's 75th birthday, a great authority at the University of Miskolc. This book allows space for the essayists and the editors to express to their gratitude to Tibor Horváth, who is also the founder of the Miskolc workshop of criminal sciences. The writers them-

selves studied and graduated at the Faculty of Law, University of Miskolc, so they were all educated by the honoured professor and they are former or present participants of the department project of "Evolution Tendencies in Criminal Sciences" directed by Tibor Horváth, embraced by the doctoral program (Ph.D.) of the Faculty. The papers widely explore and review international legal literature, so the rich notation helps those interested get informed in the field of criminal sciences.

Márta Ábrahám's essay offers insight into *The Reformulation of the Austrian Criminal Procedure*. As the author asserts, the amendment of the Penal Procedure Code was necessitated by the Janus-faced situation that, although, the legislator's intention was to guarantee a leading role to the judge in the investigation process, instead, the police department controls it *de facto*. According to the Code in force, the principle of letting the judge control and monitor police investigation, is not admissible. Urgent measures cannot be formerly authorised by the prosecutor, nor can be monitored by the judge, since the police is liable to make the first step and the prosecutor's role is mainly reduced to laying an indictment. The paper provides a detailed analysis of the draft act, which is focused on the „*restraints and outweighs*". The hinge of the draft is the empowerment of the position of the offended party, as well as the abolishment of immediate trial investigation. Ábrahám, while analyses the channels of collaboration among the police, the prosecution and the court, also draws the attention to the anomalies of the amended draft.

Edit Fogarassy, while starts her analysis in her work titled *About the Criminal Acts Ex Post Facto* from the underlying principles of „*nullum crimen sine lege*" and „*nulla poena sine lege*", construes the interdiction of a stricter penal stance adopted as retrospective, as a concept enacted after World War II. In her paper, she studies the emergence, the evolution as well as the reinforcement of the standard above, its theoretical and historical background, as well as its role in international law. The essay relies on *Pál Angyal*'s unique monography published in 1916, which surveyed the emergence of the retrospective effect of substantive penal law.

According to the study by *József Gula*, the economic, social and judicial changes of recent years faithfully reflect the transformation of economic crimes. The paper, dealing with *Jurisdiction and Legislation Problems in the Field of Economic Crime,* emphasises the role of penal law as „*ultima ratio*".

The effect of penal law must be dramatically limited in respect of economic movements. At the same time, there is a contrary demand for the

protection of the new market-economic legal institutions, which, following the European legal harmonisation process, puts pressure on legislation. However, the writer enumerates the advantages of lawmaker's frame disposition on economic crimes and attaches importance to the relative stability of detailed regulations as a fundamental prerequisite of lawful conduct. The writer offers a stunning presentation of the transformation of the field of economic crimes and of the way, in turn, they have transformed frame provisions.

According to his analysis, organised crime and money laundering is a severe illness of our society, which, finally, creates a vicious circle, since „clean" money originating in money laundering ensures that racketeering rolls onward. Therefore, the legislators' most important mission is to penalise hiding or concealing possession arising from crimes on both the national and transnational level. In the volume, we find two excellent papers that discuss the problem of legislation on money laundering.

Judit Jacsó provides a survey of *The Provisions of the Austrian Penal Code for Money Laundering and Confiscation of Property*. Both international collaboration against and the national demand for criminal prosecution of organised crime (the Austrian method) indicate that a war should be declared on money laundering and confiscation of property by efficient legislation. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceedings from Crime (Strasbourg, 8 November 1990), which unified regulations on confiscation of property, was ratified by Austria in 1997. However, the legal preconditions of the confiscation of property arising from acts of crime have been formulated under the Amendment of 1996 of the Penal Code in consistence with the EU directive. The study reviews the ways of confiscation of illegally obtained money and presents the up-to-date Austrian regulation.

The paper by *Ferenc Sántha* focuses on *Money Launder within the Monetary Sector and the European Convention on Laundering* (see above) and in connection with that *The Legal Regulations of EU Member States*. Harmonisation and strict coordination of legal regulations by the states are highlighted as primary imperatives of the treaty. EU Member States apply different regulations within the framework set by the standard, which are eventually in accordance with the *acquis*.[1] Therefore, potential offenders can concentrate their actions on countries that sustain the most favourable conditions for crime.

[1] *Acquis*: an umbrella term for European Union legal norms, which is supposed to be followed by acceding states.

Katinka Kígyóssy, based on the studies of French legal scientists Mireille Delmas-Marty and Christine Lazerges, provides an introduction to *the models of criminal policy*. The scope of antisocial activities covers not only crimes, but also actions, which are dangerous for society and potentially interfere with public order. She claims that criminal political considerations are not restricted to the fields of substantive penal law, penal procedure law and criminology, but instead, tend to establish a global plan, an embracing strategy. By studying responses from different segments of society, such as family, school, professional circles and other communities, the essayist proposes social action plans as proper methods of criminal–policy against crimes and deviant behaviour.

László Miskolci examines *The Way Police Provoked Crimes are Judged in Different Systems of Common Law*. According to his argument, the evolution of criminal methods should be tracked both by substantive and procedural law, as well as by way of according adjustment of the objectives of prevention, the scope of criminology and the investigation process. To reveal crimes that remain unreported requires special agents. The revealing method of „*invisible*", unreported crimes is employed in secret police actions, such as decoy or lure operations, manna from heaven operations, honey-pot operations, "sting", etc. The study outlines different views on *entrapment*, which is the most controversial form of "proactive" police operations and examines this practice in various systems of common law, in terms of the related legal regulations and debates on the admissibility of punishment in that case.

Péter M. Nyitrai reviews an array of *Pros and Cons of the Extradition of the Home Object.* Whereas in continental law extradition of the home object was substantially prohibited, it was a practice from the 19th century onward. Which was contrary to the principle effective in common law countries, where even home objects were liable to extradition to the state on petition (the petitor state) in order to prevent probation difficulties. While the writer analyses the arguments and counter-arguments in a realistic manner, presents the European institution of the warrant of arrest and the related new extradition procedure due to come into force.

Ildikó Soós analyses *The Effect of Positivist Criminology on Hungarian Legislation in Relation to the Amendment of 1908 Penal Law.* Soós surveys penal judiciary letters and theories since the end of the 19th century to the first third of the 20th century. She provides a cross-sectional overview on the trends of the age from Lombroso's criminal-anthropology to Tarde's criminal-sociology, from the *offender-focused school* up to the *intermediary*

school. She also reviews the work of the most noted Hungarian legal scientists, whose activity is attached to the radical transformation of the classic definition of guilt. She studies the basic notions and trends that mark the age of fierce legal debates. Some of them, like penal sanctions against juveniles, the methods of enforcing penalties, the problems of „patronage", death penalty and fines and the advisability of suspended sentence still need serious consideration.

Nóra Széles surveys *The Development of Derivational Crime* and summarises *The Amendment of Substantive Penal Law* as well as *Criminal Conspiracy and Criminal Organisation* in her study. The definitions of criminal conspiracy and criminal organisation as amended are in compliance with EU norms and in accordance with the objectives of legal attempts at struggle against organised crime, which becomes more and more important nowadays. The study points out the new components of definitions in a critical manner and compares them to EU protocols and conventions. The question that arises here is if it makes sense to interpret those definitions of Hungarian law that are incommensurable with EU legislation in terms of the EU regulations, and amend penal regulations, non–compliant with European Union legislation, for geopolitical considerations.

The edition presents us with an opulent perspective on legal trends and legal history, while it does not lack critical censure or theories useful for legislators. This is an extensive collection of miscellaneous studies. Not only as former students, but also as candidates, the essayists are all obliged to Professor Horváth for embedding a veneration of values of Hungarian criminal cogitation, a sensibility for the exploration and analysis of newly arising problems and thoroughness in work.[2] The writer of this review, who also graduated at the Faculty of Law of the University of Miskolc, wishes to contribute to the essayists' gesture of paying tribute to Professor Horváth in the belief that the community of professionals in law has been enriched due to the publication of that valuable and noteworthy volume.

Katalin Parti

[2] For further details on Tibor Horváth's teaching and research, see, *Annual Essays*, vol. II. for Professor Tibor Horváth's 70th Birthday. Bíbor Kiadó, Miskolc, 1997, ed, I. Görgényi–Á. Farkas–M. Lévay.