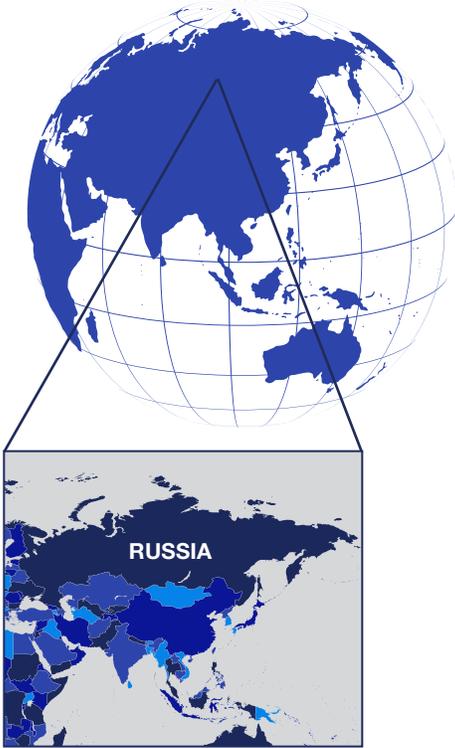




Russia

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I. INTRODUCTION

2020 will be remembered in Russia as the year of Putin’s ‘great’ constitutional reform. This is a large reform package that includes the amendments to the constitution and numerous implementing laws that have been carried out at all costs despite the pandemic, the heavy economic crisis and a series of social protests. The symbolic relevance of the initiative, in the year of the 75th anniversary of the ‘Great Patriotic War’, was such as to overwhelm every possible obstacle including an unpredictable pandemic.

The reform was intended not only to solve the problem of the expiry of the last presidential term that Putin could run for with the Constitution unchanged, but also to perpetuate ‘Putinism’; a political regime centered on nationalistic, patriotic, conservative, sovereign and identity elements that the reform expressly includes in the Constitution, distorting its original character. In the 1993 version of the Constitution, some typically Russian concepts (such as ‘territorial unity and integrity’ and ‘power’s unity’) were mixed with principles of European constitutionalism such as the division of powers and the superiority of international treaties over internal laws in the event of inconsistency. Now, the Yeltsin’s Constitution has become ‘Putinian’, increasingly distancing its own core value from the European constitutional heritage.

Regardless of the most evident political point, namely, the ‘Tereshkova amendment’, allowing the President-in-office to stand for 2 more terms despite having already run for 4 terms; the contextual environment of this reform must be considered, being linked to a desire for stability. In recent years, the fear of instability and of a power vacuum has grown in

Russia. Mindful of the events of the past (such as troubles that followed the collapse of the USSR or the stormy Yeltsinian period), most citizens and power groups cannot allow themselves to lose a bastion of stability and solidity like the ‘Putinian power’. It is an authoritarian solution, unacceptable in the eyes of Western observers but the only one capable of reassuring those who are fearful of the turmoil of globalization and the degradation of Western democracies. The year 2020 is therefore characterized by three major developments: the constitutional reform aimed at perpetuating ‘Putinism’, the fight against coronavirus (which the President has delegated to governors and administrative structures) and the fight against ‘non-systemic opposition’ with further restrictions on the activity of NGOs and the freedom of public assembly.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The 2020 reform is a set of changes and additions to the Constitution characterized by content-related and procedural anomalies. Instances of procedural strain include an incredible speed in the drafting process and two requirements not provided for by Articles 136 and 108 of the Constitution, i.e. a prior opinion of the Constitutional Court and a final ‘all-Russian vote’. The latter, initially scheduled for 22 April, was moved due to the pandemic to 1 July 2020.

As far as the content of the project is concerned, it is a complex text. It largely takes to a constitutional level what had already been introduced in legislation, jurisprudence or political practice. It is very difficult to summarize its content, because it brings together different and apparently unrelated things. Furthermore, some relevant changes are in-

cluded in the inappropriate Constitution section (not to touch unchangeable chapters 1, 2, 9). However, the ‘systemic’ impact of the reform is very broad, confirming and symbolically placing the political vision of the Putinian elite in the Fundamental Law. This is a mixture of sovereignism, nationalism, conservative and identity values. As for the power structure, the already existing centralization of political power in the federal center has been confirmed and strengthened; especially in the hands of the head of state. Other state institutions (houses of parliament, government, bodies of subjects and local self-government, courts, prosecutors, council of state, presidential administration, security council, public chamber) remain as transmission belts of the political impulse coming from the presidential center and can be replaced and sanctioned, or simply ignored, if they do not support the messianic role of the head of state. At the same time the reform is also a symptom of weakness, of fear of disintegration and disorder. It is an attempt, as can be seen from the numerous references to social issues, to stem social dissent across the country.

The reform affects crucial points of the Constitution: powers and relations between the main constitutional bodies with a further empowerment of the head of state; the system of checks and balances (judges, prosecutors, regional and local authorities), which is weakened; identity issues (language, culture, religion, historical role of the country, family); sovereignty (relationship with international organizations and law, requirements for those who hold public offices) and social aspects (minimum wage, pension indexation, volunteering, protection of the disabled, education of children, health protection, voluntary work, environment).

As for the executive power, the ostensible redistribution of prerogatives of the President and Parliament’s houses in the appointment of the Prime Minister and ministers is illusory. A double government is constitutionalized, one appointed by the President in collaboration with the Duma and the other (the so-called ‘force block’) in consultation with the Council of Federation. The President remains the arbiter of the appointment

and dismissal of both governments and is directly responsible for managing the executive. The Duma can be dissolved in case of refusal of the Prime Minister’s candidature proposed by the President and in case of refusal of more than a third of ministers’ candidatures proposed by the Prime Minister. In both cases, Prime Minister and ministers are appointed equally. The President can dismiss the Prime Minister, head prime ministers and ministers at any time with no consultation. Some powers of appointment moved from the upper house to the President, who can propose to this house the dismissal of higher court judges under some circumstances. The Prime Minister no longer heads the government and is expressly accountable to the President. The President can challenge federal and regional laws before the Constitutional Court, including constitutional amendment laws, before their enactment, and even bills; he can appoint up to 30 federal representatives in the upper house. Former presidents may become senators for life.

A further centralization of power, both horizontally and territorially, is implemented through the concept of ‘single system of public power’, in which the organs of local self-government are included. The autonomy of the federation entities is further reduced by the transfer of some matters from the joint authority to the federal one, by the preventive appeal against regional laws, and by the elimination of the opinion of regional assemblies for the appointment of regional prosecutors.

Jurisdiction and composition of the Constitutional Court are partially modified, confirming for this institution a passive role, one supportive of the Kremlin politics. First of all, the number of judges is almost halved (from 19 to 11). The court is endowed with new powers (mostly already present in the legislation), of which the most important are checking the acts before their enactment and verification of the constitutionality (and thus the enforceability) of the decisions of international bodies / courts (The Venice Commission underlined the danger of this point for compliance by Russia with its international obligations). This latter power is added to other sovereign-type innovations concerning the so-called ‘nationalization’ of elites, i.e. the prohibition for all

the highest federal and regional officials to have foreign citizenship, residence or bank accounts abroad (at the same time, compatriots abroad are formally protected!). The defense of national sovereignty is also pursued through the prohibition of alienation and incitement of alienation of parts of the territory, the inadmissibility of interference in the internal affairs of the state, and a series of patriotic aspects (homeland, USSR heritage, inadmissibility of diminishing the momentum of the defenders of the homeland, defense of historical truth).

Social and identity elements meet a social sentiment fed by official rhetoric with a strong anti-Western and conservative imprint (God, family, land). See, for example, the protection of the family based on marriage between a man and a woman and the education of children in a conservative, patriotic and family-centred manner. The overall amendments however are fully consistent with the Russian constitutional tradition since the original version of the 1993 Constitution, which was ambiguous and contradictory in certain respects (with a bill of rights in line with Western standards and the superiority of international law over inconsistent national laws), had been disavowed by the implementation practice, losing the few liberal elements and especially a limited division of powers. If the official rhetoric presents the reform as a dislocation of power towards parliament and parties, in reality, it is a strengthening of the centralist and authoritarian tendencies that have marked Russian politics in the last 20 years.

III. CONSTITUTIONAL CASES

1. Conclusion on the conformity with the provisions of chapters 1, 2 and 9 of the Russian Constitution of the provisions of the Law amending the Constitution of the Russian Federation with a view to ‘Improving the regulation of individual issues of organisation and functioning of public authority’ that have not yet entered into force, as well as the conformity with the Russian Constitution of the procedure for the entry into force of Article 1 of that Law (March 16, 2020)

It is a question of assessing in the light of the jurisdiction conferred on the Court by Article 3 of the Law amending the Constitution entered into force on March 14, 2020 the constitutionality of the not yet effective amendments (Article 1, Amendment Law) and of the special procedure provided for their entry into force in derogation from the current Constitution (Article 2). In particular the President asks the Court to verify the constitutionality of Article 81 paragraph 3-1 (on the re-eligibility, once the reform has come into force, of the President in office and the former Presidents). Confirmation of the constitutionality of Articles 1 and 3 allows the activation of Article 2 on the all-Russian consultation, upon the favorable outcome of which Article 1 of the Amending Law will come into force.

With regard to procedural issues, the Court justifies the legitimacy of its own intervention and of the popular consultation with the aim of reinforcing the amendment procedure.

With regard to the content of Article 1, all the ‘identity’ and ‘sovereignty’ provisions are deemed to comply with chapters 1 and 2 of the Constitution. The provisions checked do specify the constitutional aims and conditions of federal and regional institutions and therefore do not have an ideological character; they do not limit the democratic pluralism and the secular character of the state. The reference to the faith in God does not mean a renunciation of the secular character of the state but has a historical-cultural value with reference to the relevance of the religion in the creation and development of Russian statehood.

Concerning the protection of the family and traditional marriage, included in Article 72, this represents a value that ensures the perpetuation of the pluri-national people: even if the state must not interfere in the private life of citizens or discriminate against them on the basis of their sexual orientation, the purpose of the provision is to protect the ‘traditional’ family to favor the perpetuation of the human species.

With regard to changes in powers and composition of some constitutional bodies, the

Court does not dwell much on the details, limiting itself to saying that it is up to the constitutional legislator to organize as it sees fit reciprocal powers and relations between these bodies. As to the constitutional status of the President, his powers and guarantees of office (Articles 80, para. 2, 82, para. 2, 83, 92-1 and 93), these ‘agree with the nature and principles of the institution of the presidency’. With regard to the ‘zeroing’ of presidential mandates, according to the Court the number of presidential mandates the same person can hold can be decided by the Constitution in a different way: the bases of the Russian constitutional order do not provide an answer to these questions. The President in office has the right to stand again for election in competition with other candidates, and this exception is counterbalanced by the strengthening of parliamentarism. Furthermore, the exception for the President in office is justified due to the particular historical circumstances of the country: ‘the constitutional legislator can also take into account the concrete historical factors in the adoption of the relative decision, including the degree of threat to the state and society, and the situation of the political and economic system’.

Concerning the amendments to chapter 7 (on the judiciary), all new powers of the Constitutional Court fall within the discretion of the constitutional legislator, including the reduction in the number of constitutional judges. The requirements for the civil service (i.e. the prohibition for senior officials to have foreign citizenship, permanent residence abroad or accounts abroad) are aimed at protecting Russian sovereignty, ensuring that these officials are not influenced by a foreign state (in Russia dual citizenship is allowed by the Constitution). Anyone wishing to become a higher official in Russia must renounce foreign citizenship.

With regard to local self-government, in particular its inclusion in the new ‘unitary system of public power’, this is a concept which, although not literally envisaged in chapter 1 of the Constitution, can be deduced from the basic concepts of ‘statehood’ and ‘state’ that indicate a political union of the multinational people of Russia.

2. On review of the constitutionality of Article 3.4 of the Samara Region Law ‘On the Procedure for Filing a Notice on Holding a Public Event and Ensuring Certain Conditions for the Realisation of the Citizens’ Right to Conduct Public Events in the Samara Region’, challenged by 3 citizens (Judgment No. 27-P, 4 June 2020)

The challenged provision was the subject of consideration insofar as it includes places located closer than 150 meters from military facilities; buildings of educational organisations; buildings and objects used for worship and religious ceremonies and buildings occupied by organisations where in-patient medical care is provided into the list of places where meetings, rallies, marches and demonstrations are prohibited.

The challenged provision was found to be inconsistent with the Constitution of the Russian Federation insofar as the prohibition to hold meetings, rallies, marches and demonstrations in designated places was established beyond the constitutional limits of the legislative powers conferred on the constituent entities of the Russian Federation and disproportionately limits the freedom of peaceful assembly. Therefore, the Constitutional Court reiterates that the federal entities cannot arbitrarily limit the places for public demonstrations.

In November 2019, the Constitutional Court had declared as unconstitutional the prohibition, imposed by a law of the Republic of Komi, to hold public demonstrations near the buildings of the organs of regional and municipal power. Referring to this position the citizens of the Samara Region had attempted to carry out protests and received a refusal from the authorities, held to be legitimate by the courts, as the regional law prohibits such demonstrations near schools, hospitals, kindergartens and churches. The applicants therefore turned to the Constitutional Court, which affirmed that the regions do not have the power to autonomously and abstractly expand the list established by the federal legislator of places where mass actions are prohibited. The threat to public order and security must be assessed in each concrete case. The legislator of

the Samara Region, as well as those of other regions, must include the necessary changes in the regional laws. The federal legislator must specify the limits of the powers of the regional legislative institutions and the courts must review the applicants' cases.

The Constitutional Court stressed the fact that adoption of this judgement does not repeal Article 8, Section 21 of the Federal Law 'On Meetings, Rallies, Demonstrations, Processions and Pickets', according to which, after the executive authorities of the constituent entity of the Russian Federation determine specially designated (adapted) places wherein to hold public events, as a rule public events are held in such places.

3. On review of the constitutionality of Para. 5, subpara. 3 of the Governor of the Moscow Region Decree 'On the Introduction in the Moscow Region of a High Alert Regime for the Authorities and Forces of the Moscow Regional Emergency Prevention and Response System and some Measures to Prevent the Spread of a New Coronavirus Infection (COVID-2019) across the Territory of the Moscow Region', challenged by a court in the Moscow Region (Judgement No. 49-P, 25 December 2020)

The challenged provision was the subject of consideration, to the extent that acting in conjunction with the general system of constitutional and legal and relevant special regulations, it established the obligation on citizens in conditions of high alert in order to prevent the spread of coronavirus infection, not to leave their places of residence or domicile (except for those cases stipulated in this provision), the breach of which would entail administrative liability.

The applicant in the main proceedings had infringed the disputed provisions by being in a public place and having consequently been the subject of an administrative offence report for non-compliance with the rules of conduct provided for in the event of an emergency situation or threat of its occurrence.

The court of the city of Protivno in the Moscow Region, in whose jurisdiction the case arose, reached the conclusion that the con-

stitutionality of subpoint 3 of point 5 of the Governor of the Moscow Region Decree of 12 March 2020 No. 108 (prohibiting citizens to leave their place of residence or domicile with the exception of a series of cases) had to be checked in order to exclude unfounded administrative liability of citizens. It suspended the proceedings and applied to the Constitutional Court with a request for verification of the constitutionality of this provision (ordinance of 11 August 2020). The appellant believed that the legal regulation by the decree in question had been carried out by the Governor of the Moscow Region exceeding his powers and had limited the freedom of circulation of citizens inconsistently with Articles 15, 17, 18, 27, 55, 71 and 72 of the Constitution.

The Constitutional Court declared the challenged provision consistent with the Constitution, since the constitutionally significant purpose for its stipulation was dictated by the objective need for a prompt response to the extraordinary (unprecedented) danger of the spread of the coronavirus infection (COVID-2019). Also, the measures it introduced were not in the nature of an absolute ban, allowing for the possibility of movement of citizens under valid circumstances, were short-term, and the possibility of their stipulation was timely confirmed in federal legislation.

According to the Court, the introduction of the limitations (forbidding citizens to leave their place of residence unless they needed emergency medical care or had to carry out work activities; they were also allowed to go to the nearest grocery stores, to let pets out - at a distance of no more than 100 meters from their place of residence or domicile - and to deliver waste to the nearest collection point) was due to the objective need to react operationally to the exceptional and unprecedented danger of COVID-19 spreading. The ban was not absolute and the measures taken were held to be temporary.

The supreme officials of the subjects of the Federation were obliged to develop and implement a set of restrictive measures and other measures, including special rules for moving around the relevant territory and for the use of public and private transport.

The Court also considered that the bodies called upon to apply the law, including the courts, would have to take into account circumstances attesting the existence of serious reasons whereby the citizen had been forced to leave his home or residence.

IV. LOOKING AHEAD

The 2020 constitutional reform will be further implemented in 2021, though the majority of implementing acts have been adopted in the second half of 2020 (the relevant legislative packages were submitted by the President to the State Duma on September 22, October 14, and October 31). Among them, the new law on government, and the amendment of laws on Constitutional Court, Prokuratura, and Council of Federation.

The State Duma general elections are expected to take place in September 2021. The entire 2021 risks being marred by repression of the 'non-systemic' opposition. As for constitutional case-law, given the new set of powers conferred on the Russian Constitutional Court with the 2020 constitutional amendments, one can expect a higher number of decisions. Considering the new role of the Court in the legislative process (the so called *ex ante review*), this could involve the Court in more sensitive political issues.

V. FURTHER READING

Angela Di Gregorio, 'Dinamiche di contesto e caratteristiche generali della Legge di Emendamento della Costituzione della Russia del 14 marzo 2020' (2020) 2 *Nuovi Autoritarismi e Democrazie* 1

William Partlett, 'Russia's 2020 Constitutional Amendments: A Comparative Perspective' (2020) *SSRN*

Anna Shashkova, Michel Verlainne, Ekaterina Kudryashova, 'On Modifications to the Constitution of the Russian Federation in 2020' (2020) 8 *Russian Law Journal* 1