

Paternalist Constitutionalism and the Emergence of Sovereign Cultural Identity: The Case of Russia

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Now that the path of constitutional reform in Russia has reached its conclusion, with the adoption of almost all the implementing measures of Constitutional Amendment Law of the 14th March 2020, a more thoughtful reflection on the rationale of this complex constitutional restructuring is needed, taking into account long-term political and cultural phenomena.

The complex path of transformation, only to all appearances rapid and limited in scope despite the heading of the Amendment Law (“On *improving* the regulation of *individual* issues of organisation and functioning of public authority”) cannot be understood without an investigation into its deepest cultural motivations and the constitutional spirit of Russia. This is a country with a complex genetic identity where Western influences, including European constitutional models, are mixed with deep-rooted indigenous elements, the result of the complex history and geography of the country. Both the long-term constitutional development which we find confirmed in the Great Putin’s Reform along a trajectory which dates back centuries, and the complex management and architecture of power, are conditioned by this dual nature. The balance of the different components has varied over time and, in recent years, the greatest degree of emphasis appears to have been placed on the ‘indigenous’ elements, as shown by the Great Putin’s Reform, where the elements of conservation emerge more than those of innovation. It was a matter of unveiling the deepest and most traditional soul of the ‘new’ Russia, that could not fail to be steeped in its secular political traditions, notwithstanding the important transformations that have taken place in the post-Soviet period.

The reform clothes the regime with the protective veil of constitutional identity as interpreted by the ruling political class, but one that is steeped in the tradition and values of the multinational people. These values include not only the protection of sovereignty, culture, language, religion, traditional family, respect for defenders of the homeland and for those that have made it great (including the Soviets), territorial integrity and social solidarity, but also the conception and nature of the supreme ruler (nowadays the President, once the Party and, even before that, the Tsar), which is called upon to preserve the complex balance of factors on which this identity is based, as its historical mission of conservation for the purpose of preservation.

The reform brings to the constitutional level the cultural transformation which already existed below the surface, aligning the constitutional text with the political and legislative practice which has been in force for several years. At the same time, it was a sort of ‘repatriation’ of the constitution. Indeed, during the difficult 1991-1993 period, when President Yeltsin was in power, the Western models were taken into consideration, because of the historical weakness of the young post-Soviet Russia, with the aim of being supported and welcomed by the international community. This meant that the first part of the constitution was in line with the standards of the Council of Europe, as certified by the Venice Commission in 1994. From the very beginning, the second part, now extensively restructured, brought about the emergence of a clear Russian nature in the conception of power, especially in that division proclaimed but disavowed by the constitutional architecture, even before the political practice, in the name of the presidential and federal concentration of powers. If, in the first decade, this mixed strain was more easily perceptible, with the advent of the Putin’s system, this hybrid model shifted towards a more Russian version of the constitutional legal order. This time, not only in terms of power but also of its ideal justification, or rather, of cultural identity and values. An identitarian, nationalist and sovereign turning point brought forward by the official ideologists of the Kremlin among which we include, as well as Surkov, Zorkin, the eternal Chairman of the Constitutional Court. The Yeltsin constitution therefore became the Putin one, or rather, the two constitutions coexist in an irreconcilable conflict. Principles and rights of Western origin found in chapters 1 and 2 (division of powers, superiority of international law, political pluralism, secularism, equality, local self-government) are disavowed in the second part of the text. This is not so much about the powers’ organization (only partially restructured in 2020 against to the existing political practice) as the introduction, in the characteristics and competences of the federation or government, of a series of typically Russian values, culturally and ideologically conservative, under the banner of nationalism and sovereignty (including not only the redefinition of the relationship between domestic and international legal sources but also the so-called ‘nationalisation of the elites’ as well as the paranoid closure towards the West).

The 2020 reform does not intervene suddenly, despite formal appearances. It was a case of including, at the constitutional level, a transformation which was already contained in legislation and case-law, as well as in

political practice. As admitted by the same Russian constitutional scholars, the need to express the national spirit in the constitution is clearly proclaimed. The constitutional repatriation allows us to put aside the use of the term ‘post-Soviet’: despite the numerous legacies of the Soviet period, the emphasis is placed on the even older elements of the ‘material’ constitution that the same Soviet period had preserved.

To the question of power and values is added a third important element which characterises the constitutional evolution in continuity with the achievements of the past. This is an important series of social elements, introduced both to encourage popular approval of the Amendment Law and to address the social dissent which has grown up over recent years (minimum wage, pensions indexation, education of the young, protection of the disabled, social solidarity expressed in different aggregative forms including volunteering, etc.). It was not a case of adding new rights to the bill of rights (that is not modified, as stated) but of reinforcing state paternalism and welfarism.

However, the reality of power cannot be concealed: although the reform manifestly strengthens federal and presidential powers, this is at the same time a clear symptom of weakness, of the fear of chaos, division, protest and of decadent Western values. The ‘Power’ is weak because it has become ‘sclerotized’, being incapable of regeneration and of bridging the gap with the people. The reformed constitution becomes a symbol of the Russian identity in which the people can recognise themselves more effectively. This is a different view from that of countries that have lived through liberal revolutions followed by democratisation, even after authoritarian phases. The constitution is not a recognition of rights and guarantees but it is the ‘garment’ of power, its symbolic legitimation. Not an individualistic conception of rights but that of the man-community, an individual that achieves fulfilment within the solidarity of the group and in the accomplishments of the homeland, even of the previous Soviet homeland, which is openly praised.

The particular constitutional path of Russia should make us reflect on the role of the constitution in countries which have not been affected by significant limitations of power. Here, there is a conception of the constitution that we could define as ‘anti-constitutionalism’, in which the Fundamental Law is an indispensable symbol of the legitimation of power and of recognition of values by the community. Unlike authoritarian constitutionalism where everything comes from the top in a sterile, monolithic manner, anti-constitutionalism uses the constitution as a tool to defend power, not so much against society (which is detached, indifferent and passive) as against the outside world (an identitarian paranoia, anti-Western nationalism and patriotism which, until now, had remained outside of the constitutional text). A paternalist constitutionalism that strengthens the social profile of power, uniting people in order to face external dangers, division, disputes, and the moral degeneration of the West. Against the background of some anthropological features such as legal nihilism, the lack of an individualistic conception of human rights, the need for protection and guidance from above.

‘Anti-constitutionalism’ is a path which lets surface at constitutional level a specific conservative value-driven choice. It represents a complex set of factors that cannot be simply identified with past authoritarian models and which is placed in a dialectical position between the Eastern and Western vision of constitutionalism. This new constitutional vision surpasses a previous hybrid system in which Western and national constitutional patterns coexisted (apparently) in a more blended way. This leads us to reaffirm that the imposition of constitutional models that do not correspond to the spirit of the country, sooner or later, ends up with their rejection. Post-colonial constitutionalism is for instance full of such rejections. And the same appears in that more recent path of democratic conditionality directed at former communist countries by the EU institutions. While not wanting to generalize, it is essential to reflect on the constitutional spirit of each country, on the necessity of understanding their deepest roots. Counter- or anti- constitutionalism, in the Russian version of paternalistic constitutionalism, where the legacies of the Soviet model are combined with some more ancient cultural constants, represents a key to interpreting some new constitutional developments that can also occur in other contexts.

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