

Studien des Instituts für Ostrecht

Band 86



Institut
für Ostrecht
München
Institute for East European Law

Aziz Ismatov, Herbert Küpper, Kaoru Obata (Eds.)

Dynamics of Contemporary Constitutionalism in Eurasia

Local Legacies and Global Trends



Berliner
Wissenschafts-Verlag

Preface

In 1991, the Soviet Union collapsed and fifteen newly independent countries began the process of drafting new post-Soviet and post-socialist constitutions. These constitutions uniformly contained abstract commitments to the rule of law, separation of powers, and individual rights. Thirty years later, however, many of these constitutional principles have still not been realized. This book makes an important contribution to understanding these problems of constitutional implementation. Including contributions from constitutional law experts both inside and outside the region, this book discusses the key challenges to successful constitutionalism in the region. These issues range from deeply rooted practices of executive centralism to the weakness of new institutions that seek to protect constitutional values. In reaching these conclusions, the authors draw on a wide range of academic methodologies and approaches from history to institutional analysis.

This book makes two general contributions. First, it fills an important gap in comparative constitutional law literature. As English-language comparative constitutional law literature has expanded into Asia and Africa, the role constitutional law in these former Soviet republics has been neglected. Second, and more broadly, this book is more than just an invaluable window into the internal debates and questions plaguing the region. It also shows how the region contributes to broader debates in constitutional law. The post-Soviet republics teach us a great deal about the importance of history, institutional development, and political culture to the development of constitutionalism. It therefore contributes to a broader understanding of the key forces and factors in the construction of constitutionalism. This insights from this book will therefore serve as an important starting point for future work on the region as well as enrich conceptual and theoretical discussions of constitutionalism more broadly.

William Partlett

William Partlett is an Associate Professor at the Melbourne Law School, where he writes and teaches in the field of public law. A principal field of his research is the constitutional development in the post-Soviet space.

Table of Contents

Aziz Ismatov / Herbert Küpper / Kaoru Obata
Introduction
Constitutionalism in the Post-Soviet World 9

Herbert Küpper
The Politics of the Past and their Effect on the New Constitutions 13

Aziz Ismatov
A Failure of Constitutional Revolutions in Central Asia
Traditionalism, Nominalism, and Rights 27

European Commission for Democracy through Law (Venice Commission)
Russian Federation Interim Opinion on Constitutional Amendments
and the Procedure for their Adoption 45

Elena V. Gritsenko
Federalism and Local Self-Government in the Light of Russia’s 2020
Constitutional Reform 99

Andriy Tyushka
Revolutionary Constitutionalism
Constitutional Order, Contentious Constitutional Politics and Participatory
Constitutional Change in Ukraine since 1990 117

Davit Zedelashvili
Constitutionalism in Georgia
Internal Contradictions and Confrontations with Abuse 149

Anahit Manasyan
Constitutionalism in the Republic of Armenia
Contemporary Challenges and Prospects for Evolution 175

Table of Contents

Ceyhun Qaracayev
The Constitutional Development of the Republic of Azerbaijan 195

Munkhsaikhan Odonkhuu
Judicial Independence and Accountability in Mongolia 219

IkHyeon Rhee / HwanYong Choi
The Constitutional Court of Korea
Its Role for Constitutionalism..... 249

Aliia Maralbaeva
Constitutional Review in the Kyrgyz Republic 267

Akmal Saidov
Constitutional Development of Uzbekistan and Japan
Comparative Analysis 289

Botirjon Kosimov
Constitutional Issues of Ensuring Judicial Independence in Uzbekistan 307

Akmal Sodikov
Constitutional Control and Efficiency of Law Making..... 329

Serikbek Alpamysovich Murataev
Problems of Formation of Legal Policy in the Republic of Uzbekistan 347

Mirzatillo Tillabaev
Uzbekistan’s Progress towards Compliance with International Obligations
on Human Rights 367

Introduction

Constitutionalism in the Post-Soviet World

In the early 1990s, the formerly socialist states in Eurasia – a term which we use as a short equivalent for the successor states of the Soviet Union and Mongolia – as well as in Eastern Europe started to transform their entire systems. In this process of post-socialist transition, they faced multiple long-term challenges, including the need to consolidate rather sudden independence, the construction of a full state apparatus including institutional (re-)building and governance, the foundation of this independent state in a state-nation which, in some cases, needed to be created from zero, the conversion of a command economy into a market economy, and replacing universal state tutelage by an independent civil society. From an idealistic perspective, the post-socialist transition and its constitution-making process appear to be a part of moving towards a Western model of democracy and the rule of law. In reality, various local varieties emerged in the post-socialist world and created specific ways of constitution-making and constitutional culture. The until 1990 seemingly uniform Soviet world started to diversify: some states were well prepared to cope with the transition challenges, whereas others were less eager or unprepared. Therefore, the constitutional transition process offers multiple scenarios, some of which are similar to, and some of which are fundamentally different from Western Europe, post-authoritarian states such as South Korea, or post-independent Asia and Africa. Consequently, constitutional dynamics in the formerly socialist states need to be viewed as a complex phenomenon requiring a differentiating conceptualization even within the context of Eurasia with its common Soviet heritage.

Consequently, constitutionalism in post-Soviet societies represents a hybrid mixture of constitutional cultures, traditions, and logic. It is vibrant, diverse, and sometimes full of surprises. After decades of uniform stagnation, the successor states of the Soviet Union and its former allies have embarked on their own independent paths, which include varying constitutional choices. In some countries, constitutional development reflects deep-rooted conflicts about the very nature of these choices. Examples are Ukraine and Moldova, which fight over a decision for a ‘Western’ or an ‘Eastern’ orientation. This conflict about the country’s fundamental orientation has been a driving force behind the constitutional developments of the last decades. Similarly, the ongoing clashes in Kyrgyzstan may be read in the light of a fight about which orientation the country should take. On the other hand, Russia’s parallel debates of the 1990s about the ‘European’ or ‘Eurasian’ identity of Russians and their multinational state seem to have lost relevance.

In other countries, constitutional development has been more constant. By restoring their pre-Soviet legal personalities and constitutions, the three Baltic republics created the basis for a successful integration into EU and NATO; in doing so, their constitutional dynamics share more common features with the former Soviet satellites in Central Europe than with the other ex-Soviet republics. Constitutional life in Armenia and Georgia, too, is characterized by a general, though sometimes tumultuous, tendency to a more 'liberal' constitutional architecture. The same is true for Mongolia where, however, 'Asian' or 'Mongolian' values receive more emphasis in the constitutional self-identification than in Armenia and Georgia. Unlike some Asian states, Mongolia interprets its indigenous elements not as the opposite but as a local modification of democratic constitutionalism. Uzbekistan's cautious legal reforms that depend on one political figure's will seem to point in a similar direction: Uzbekistan's official debate tries to combine democratic constitutionalism with 'Asian' and/or 'Central Asian/Uzbek' values. In this context, this country often refers to the specific cases of 'successful Asian democracies' such as Japan and South Korea.

On the other hand, some countries strengthen the authoritarian or autocratic elements of their constitutions. The most blatant examples include the Russian constitutional amendments of 2020. Much earlier, Belarus started to dismantle the liberal substance of its constitution in 1996. Without major formal constitutional amendments, Azerbaijan's political and constitutional culture has moved quite constantly towards authoritarian structures, which the government defines as 'traditional Asian' or 'traditional Middle Eastern', carefully avoiding qualifying them as 'traditional Muslim'. Finally, Turkmenistan never seems to have paid more than lip service to the democratic elements in its post-Soviet constitution but managed, as far as one can judge from the outside, a smooth transition from late Stalinist to more indigenous forms of autocracy. This diversity raises scholarly interest and necessitates an individual country-oriented approach to analysing transitional countries' constitutional dynamics and conceptualizing their underlying self-definitions and legal philosophies.

To date, there has been relatively little work on Eurasian constitutionalism *per se* apart from some specific jurisdiction-focused studies. Therefore, we think that the post-Soviet space and its constitutional life deserve more attention than they have been given so far.

In line with such a pluralist objective, we invited distinguished constitutional scholars from Eurasia to a conference on "Dynamics of Contemporary Constitutionalism in Eurasia" in order to discuss these fundamental questions in their diversity. We are very grateful to the University of Nagoya and its Centre for Asian Legal Exchange (CALE) for having hosted this conference. Its findings are presented in this book. It will look at

the theoretical constitutional foundations and discuss how constitutional ideas have evolved in the course of the transition and who is given control of the constitution. The conference and its discussions have produced rich insights into individual specifics of constitutional identity that include, *inter alia*, parliamentarism, presidential structures, elections, constitutional review, human rights, and the rule of law in post-Soviet constitutionalism. By focusing on their concrete research topics, the authors also point to the factors that strongly affect contemporary constitutional development in the region.

We intend this book to be a first step, and we would be more than happy if it triggers more research into the exciting world of post-Soviet constitutionalism in Eurasia and beyond.

Aziz Ismatov is an Assistant Professor at the Centre for Asian Legal Exchange (CALE) Nagoya University (Japan). He also serves as a lecturer of law at the Aichi Prefectural University (Japan). He obtained an LL. M. (2011) and LL. D. (2014) in International Human Rights Law at the Graduate School of Law at Nagoya University. He is a former Visiting Scholar at Melbourne Law School (Australia), and an alumnus of Harvard Law School (Global Scholars Academy). Dr Ismatov's research and publications, *e.g.* 'Do Hybrid Legal Systems Matter in Legal Transplantation Projects? Some Philosophical Aspects of Legal Aid in Uzbekistan as Provided by Foreign Donors' (AJLS, Cambridge UP, 2021) centre specifically on public law issues in a post-socialist or post-colonial transition context. Currently, he is participating in several authoritative research projects, including joint research between National University of Singapore and Melbourne Law School on 'Statelessness in Asia', and Oxford University's project on 'Law and Development in China'. E-mail address: ismatov@law.nagoya-u.ac.jp.

Herbert Küpper is the Director of the Institute for East European Law Munich (Institut für Ostrecht München, www.ostrecht.de), a Professor at the Andrassy Gyula University Budapest, and a Vice-President of the German Association of South East European Studies (Südosteuropa-Gesellschaft). His research focuses on Hungarian law, post-socialist law, and comparative constitutional and administrative law. Dr Küpper is the author of numerous monographs, articles, and legal translations, and co-authored academic commentaries on the Hungarian and the Russian constitutions. From 2009–2012, he was a key expert in twinning projects with legal institutions in Kosovo; in 2010/11, he conducted the research project 'Structures of Japanese and German International Legal Co-operation with Formerly Socialist Countries' at the Centre for Asian Legal Exchange (CALE) Nagoya University; and in 2014, he participated in drafting the Hungarian Administrative Court Procedure Act as a guest researcher at the Hungarian Academy of Sciences. His academic distinctions include a "honorary professor" of the Andrassy Gyula University Budapest (2007) and a "doctor et professor honoris causa" of the University of Pécs (2014).

Kaoru Obata is a Professor at Nagoya University (Japan). He studied law at Kyoto University (LL. B. and LL. M.) and was awarded an LL. D. (Kyoto) in 2016. He published several books and many academic articles relating to international law and international human rights. His publication include: “What is the *traité-loi* of Human Rights?” (2020) in: 119(2) *Journal of International Law and Diplomacy (Kokusaihō-Gaikō-Zasshi)* 37 (in Japanese with English summary); “The Emerging Principle of Functional Complementarity for Coordination among National and International Jurisdictions”, in: Takao Suami *et al.* (eds.), *Global Constitutionalism from European and East Asian Perspective* (Cambridge UP, 2018); “The European Human Rights System beyond Europe: Interaction with Asia” (2015) 23 *Journal für Rechtspolitik* 36; *The Constitutionalization of the European Human Rights Law* (in Japanese, Shinzansha, 2014).