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Academic Foresights

Russian Constitution



How do you analyze the present status of the Russian constitution?

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In order to understand the Russian Constitution “in action” and its present status within the Russian state, it is necessary to look to its past and analyse the circumstances of its birth. Indeed, the Constitution presents two main characteristics: first of all, as it was adopted by referendum on December 12, 1993, the Constitution represents a radical break from its Soviet past; but as it was adopted in a context of a severe political crisis, it is also characterized by an imbalance in favor of the winner of the battle: the presidential institution.



First of all, the present Constitution symbolizes a rupture on both a substantive and a formal level. Speaking of its content, the 1993 Russian Constitution puts an end to the socialist regime. Let us first recall that the 1977 USSR Constitution proclaimed, in Article 6, the role of the Communist Party of the Soviet Union (1) in leading and guiding Soviet society. Conversely, the principles of democracy and of the rule of law are enshrined in the post-Soviet Constitution. Article 1 states: “The Russian Federation – Russia – is a democratic federative law-governed state with a republican form of government”. The exercise of power is given back to the people (qualified by Article 3 as the sole bearer of sovereignty) and the principle of separation of powers (Article 10) replaces the unity of state power. Political diversity and a multi-party system are protected by Article 13.3 and according to the Constitution, no ideology shall be proclaimed as State ideology or as obligatory (Article 13.2). Finally, a long chapter 2 is devoted to the rights and freedoms of man and citizen, including more “modern” rights such as the “right to a favourable environment, reliable information on the state of the environment and compensation for damage caused to his/her health or property by violations of environmental laws” (Article 42).

The 1993 Constitution also established new institutions and a new political system. The constitutional text has been influenced by several foreign regimes, such as the French and American systems. Indeed, different foreign experts were consulted by the Constitutional Committee. But the “final product” remains a hybrid product that borrows from several models without reproducing any of them completely. The Russian Constitution sets up a presidential system that uses some features of the American regime, without espousing all of them. Thus the President of the Russian Federation



shall determine the guidelines of domestic and foreign policy, has a legislative veto power, just as the U.S. President, but it also has the right of legislative initiative and the right to issue decrees and edicts in the legislative field (ukaz) without the consent of the Parliament. Also similar to the U.S. system, the Russian President may be impeached by the Council of Federation, on the basis of a charge of high treason or another grave crime brought by the State Duma and confirmed by a resolution of the Supreme Court. The President also addresses the Federal Assembly with annual messages, modeled on the State of the Union address given to the US Congress. However, other aspects take the Russian system away from the U.S. presidential model. For example, the Russian Constitution establishes a government headed by a president of government, appointed and dismissed by the President of the Federation upon consent of the State Duma. Additionally, another major difference should be highlighted: the Duma may be dissolved by the President of the Federation.

The break with the Soviet past is also evident on a formal level. The Constitution described by Lenin as a “piece of paper” has disappeared in favor of a Constitution called the “Fundamental (or Basic) Law”. Furthermore, the 1993 Russian Constitution has gained the status of the highest norm in the hierarchy of norms, illustrated by Article 15 declaring its supreme legal force and direct effect. A guardian of the Basic Law has also been introduced in the form of a Constitutional Court. According to Article 125, the Constitutional Court has a fairly broad jurisdiction, including reviewing norms (statutes, presidential decrees, regulatory acts issued by the government, legal acts adopted by the federated entities and international treaties before their entry into force), supervising government and presidential action (it participates in impeachment proceedings initiated against the President of the Russian Federation) and interpreting the Constitution.

The second characteristic of the Russian Constitution lies in its ambivalence, because of the situation of conflict in which it was born. We cannot speak of a single conflict, but of a plurality of conflicts, whose outcomes have casted a shadow over the legitimacy of the constitution.

After having initially encouraged the federated republics to “take as much sovereignty as they could swallow”, Boris Yeltsin had to face in 1992-1993 the rise of separatist claims from several “subjects” of the Federation. Therefore the 1993 Constitution was adopted by referendum, by a majority of 58.4 % of voters, but did not meet unanimity from all subjects. Abstention was very strong in Tatarstan, the “no” won in Dagestan and Bashkortostan, while Chechnya did not vote...

Apart from any discord with some of the republics, there was another conflict that had far-reaching consequences on the Constitution: the conflict between the President and Parliament in 1992-1993. Very shortly after its beginning, the process of the Russian state’s rebuilding encountered a deterioration in the relationship between President Boris Yeltsin and the Chairman of the Supreme Soviet, Ruslan Khasbulatov, the latter

being very critical vis-à-vis the liberal policy led by the Gaidar government. The institutional crisis grew throughout 1992 before breaking out in December. Beyond the political disagreement, at stake was the very definition of power relations that led the crisis to a climax. The protagonists opposed each other through interposed draft constitutions. The "presidential" draft, if intended to strengthen the powers of the President, was in opposition to the draft prepared by the Supreme Soviet that deprived the President of the right to dissolve Parliament. After several months of an intense political crisis, a final step occurred on September 21, 1993 when Boris Yeltsin issued decree N°1400 "On Gradual Constitutional Reform in the Russian Federation". By this decree, the Russian President suspended the activity of the Congress of People's Deputies until the election of a new Parliament and stated that the country will be governed by presidential and governmental decrees until the adoption of a new constitution. In response to Decree N°1400, the Supreme Soviet stated that President Yeltsin was no longer exercising his functions and transferred his powers to the Vice-President, Alexander Rutskoi. Denying the force of law, Boris Yeltsin decided to outmanoeuvre the Parliament and launched on October 4, 1993, a massive artillery attack against the White House; over a hundred people died while Ruslan Khasbulatov and Alexander Rutskoi were arrested and imprisoned.

In such a context, the presidential Constitution draft was advanced, after some minor amendments, to the popular vote in December. These events assist in understanding the text of the Constitution, adopted on December 12, 1993, and the stigma from the confrontation between the presidential and the parliamentary institution. Written by the "winner", the Russian Constitution "reflects" the supremacy of the President over Parliament. While institutionalizing the supremacy of the office of the president, the victor in the battle, the post-totalitarian Constitution creates an unbalanced normative system of reference, which "chains up" its interpreters.

In your opinion, how will the situation likely evolve over the next five years?

The Russian Constitution celebrated its twentieth anniversary on December 12, 2013. Despite the chaotic context in which it was adopted, it has shown stability as it was scarcely amended during its first fifteen years. Until 2008, the few modifications that were introduced concerned the list of federated entities. Originally composed of 89 "subjects" (Article 65), the Russian Federation is currently made of 83 entities; most of the former autonomous districts have decided to merge with their original region (oblast) or territory (krai). These various revisions can be analyzed as simple adjustments that did not lead to major changes in the constitutional system.

In fact, there were only two "substantial" revisions, both in 2008, under the presidency of Dmitry Medvedev. Indeed, with the adoption of the Federal Constitutional Law (FKZ N°6) of December 30, 2008, the presidential term was extended from 4 to 6 years, while the term of the State Duma's members was extended from 4 years to 5

years. On the same day, a second Federal Constitutional Law (FKZ n°7) strengthened the supervisory functions of the State Duma over the executive power, requiring the government to submit annual reports on the results of its work, including on issues raised by the State Duma. If at the time, the official political discourse explained these revisions by the will of insuring stabilization and allowing the government to carry out the reforms, these revisions can be analyzed in different ways: one can consider them as a clear attempt to strengthen the presidential power, while another one can interpret them as a real attempt to strengthen the parliamentary efficiency and parliamentary control over the executive. Following the two substantial changes in 2008, it could have been said that no further constitutional change would be necessary in the five forthcoming years. In fact, the constitutional text itself is not an obstacle to the presidential power: its provisions establish such powers, and furthermore the Russian President may “enlarge” his powers by using a “constructive” interpretation of the Constitution. The third term of Vladimir Putin is the perfect illustration of this: if the Constitution forbids a person to hold the presidential office for more than two terms running, it does not mean that it absolutely and generally forbids a person to hold the presidential office more than two terms – at least, such an interpretation was chosen by Vladimir Putin himself, when he ran for reelection as President of the Federation in 2012.

However, the celebration of the 20th anniversary of the Constitution raises doubt over the previous prediction. Indeed Putin himself, in 2013, declared his intention to amend the Constitution. In November, the Kremlin’s intention to create a constitutional commission in charge of introducing improvements to the Constitution, was mentioned in the newspapers.⁽²⁾ Different proposals were also made by members of Parliament, such as Evgeny Fedorov, from United Russia. He proposed repealing Article 13.2 of the Constitution, prohibiting a state ideology, in order to authorize the development of a “national idea” based on “national values”. The Kremlin, however, refused supporting this kind of amendment to the Constitution. In fact, in his Address to Parliament on December 12, 2013 ⁽³⁾, Vladimir Putin first recalled that the Constitution combines two key priorities – the high status of rights and freedoms and a strong state. He underlined that the “constitutional skeleton” has to be stable and especially in the case of Chapter 2 of the Constitution, dedicated to rights and freedoms. According to his speech, we can therefore conclude that any changes that affect the rights and freedoms, are in principle, definitively excluded by Vladimir Putin. However, he immediately added that “the constitutional process should not be analyzed as something definitive, dead” and that “specific corrections” can – and sometimes should – be introduced “taking into account the application of law and life itself”. The only constitutional amendment proposed by Vladimir Putin in his Address concerned the merging of the Supreme Court and the High Court of Arbitration. To support this proposal, the President mentioned that the different legal positions given by the two High Courts in similar cases were sources of uncertainty and injustice..

The official Address of December 12, 2013 was quite reassuring, in a context where many proposals – rather heterogeneous – reflected worrying nationalist discourses. Therefore, we can assume that the Russian Constitution will not experience major changes in the forthcoming years – at least in its “letter”. The question of its practice remains to be analyzed.

What are the structural long-term perspectives?

In order to analyze the Russian Constitution in the long term, we need to take into account its application more than its text. In fact, on a formal level, the Constitution of December 12, 1993 sets up the foundations of a democratic and law-governed state. And the respect for the Constitution has been integrated into the political rhetoric, including the presidential rhetoric. If Vladimir Putin’s third term can be analyzed as incompatible with the required changeover of political power between parties – which is a sign of democracy – he was able to keep the power, while respecting the Constitution. Similarly, the 2008 constitutional amendments were made in conformity with the law. Therefore, more than the formal aspect, what has to be looked at is the practice of the Constitution and its application – or more precisely, its interpretation. Any fundamental evolution in the Russian constitutional system will depend on a change of political and legal cultures.

Since 1993, the Constitution has been interpreted in order to strengthen the presidential power and the centralization of power. One of the few institutions that could be the last bastion against this “presidentialist” interpretation of the Constitution is the Constitutional Court. Indeed this Court has adopted a significant number of important decisions in order to protect rights and freedoms. For example, in 2009, the Court adopted a very symbolic decision (4) and ruled against the application of the death penalty in Russia even after the expiration of the moratorium on January 1st, 2010. The Court underlined the international commitments taken by Russia at the time of its accession to the Council of Europe in 1996 and bypassed the resistance of the Duma, which had not yet ratified Protocol N°6 to the European Convention on Human Rights concerning the abolition of the death penalty. Thus the Constitutional Court finished the work that was initiated ten years earlier when it ruled in its decision of February 2, 1999 that the death penalty could not be pronounced as long as courts of assizes were not set up in all federated entities.

Among the tools available to the Constitutional Court in changing the Russian system is the application of European standards. In fact, the Constitutional Court very often quotes provisions of the European Convention and the decisions of the European Court of Human Rights in order to legitimise its case-law. However, the Constitutional Court remains largely constrained by exogenous factors, both political and normative. Indeed, since 1993, the dominance of the President on the Russian political scene is reflected either by the lack of respect for the parliamentary majority (1993-1999) or by a total

submission of the Parliament to the President (since 2000). This explains why as an arbiter of the constitutional disputes, the Constitutional Court has become an instrument for the protection of the parliamentary majority.

Such a difficulty for the Constitutional Court to fulfill its role of a minority guardian therefore reflects the perpetual ambivalence that characterizes the post-Soviet transformation process. The latter is made simultaneously of real democratic progress and problematic step backs. The drafting of electoral laws or the supervision of political demonstrations is a good example of this. If on one hand, civil society is invited more and more to participate in political life, on the other hand, the opposition fails to accede to power. Fundamental structural changes may only occur with a change in mentalities and in the relationship to the law as well as with the rise of a new political culture that does not just rely on the theory of a “strong state”. The consolidation of democracy requires checks and balances. And the shift in power will be possible only if two conditions are fulfilled: the emergence of a recognized leader among the opposition and the acceptance by those in power of defeat as a result of the polls.

Notes:

(1) In its initial version, Article 6 of the 1977 USSR Constitution stated: “The leading and guiding force of the Soviet society and the nucleus of its political system, of all state organizations and public organizations, is the Communist Party of the Soviet Union”. On March 14th, 1990 Article 6 was amended in order to abolish the one-party state and to introduce a multi-party system.

(2) Anastasia Kachevarova, “Putin will tell in his Address to the Parliament whether the Constitution needs to be modified” (Анастасия Кашеварова, “Путин в послании расскажет, следует ли менять Конституцию”), 14 November 2013.

(3) See the full text of the Address on : news.kremlin.ru/transcripts/19825

(4) Resolution of November 19, 2009 (1344-O-R/2009).

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