

【Special Features: Multiple Aspects on Constitutionalism –Asian “Contexts” and its Logic】

Constitutionalism and State-Building in Post-Soviet Eurasia

PARTLETT William*

Abstract

In Europe, Latin America, and Asia, new written constitutions have emerged as foundational instruments for breaking with centralized, authoritarian governance and constructing effective and just forms of constitutional government. Yet, despite textual commitments to overcome the Soviet past in new post-Soviet Eurasian constitutions, transformative constitutionalism remains unrealised in many of the former Soviet republics. With the exception of the Baltic states, most have rejected transformative constitutionalism and instead have built centralized super-presidential systems. Underpinning this authoritarian resilience is a deeply-rooted discourse that views centralism as the best strategy for post-Soviet state-building. To be successful, advocates of constitutionalism must show how it offers a better path to effective state-building than centralism.

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* Associate Professor, Melbourne Law School.

I. Introduction

Post-Soviet Eurasia comprises 15 nations that became independent in late 1991 with the disintegration of the Soviet Union. These countries span from the west of Ukraine to the Russian Far East and were once part of the Soviet Union and, before that, the Russian empire. To differing extents, these countries share a common history dating back to the Tsarist Russian Empire. The core or interior part of the Russian Empire included Moscow and the surrounding area.¹ To the east, it later extended across the Ural mountains and Siberia to the Pacific Ocean. On the western periphery it included the modern-day Baltic countries of Estonia, Lithuania, and Latvia as well as Ukraine, Belarus, and Moldova.² On the south-eastern periphery are the five modern-day countries of Central Asia and the Russian Far East.³ And, finally, the south-western peripheries of the Russian Empire include the modern-day countries of the Caucasus: Armenia, Azerbaijan, and Georgia.⁴

This region shares a deeply-rooted tradition of viewing centralism and statism as critical to its state-building goal of constructing a “strong state” (*sil’noe gosudarstvo*). Both Tsarist and Soviet political discourse consistently argued that the centralization of power in a single leader (the Tsar or the leader of the Communist Party) and the prioritization of state interests over the interests of the individual were the best way to achieve a strong state and its developmental goals. This “centralized state discourse” is grounded in the dominant historiography of the region, which views centralized statism as critical for overcoming the particular historical challenges that the region faces.⁵

With the collapse of the Soviet Union, however, written constitutions appeared to be drafted to overcome this centralized state discourse. All of the post-Soviet constitutions contain foundational norms committed to individual rights and the separation of powers. For instance, Chapter 1 of Russia’s 1993 Constitution declares that “the individual and his rights and freedoms” have the “highest value” (Article 2) in a constitutional order grounded on “ideological and

¹ Leonid Gorizontov, ‘The “Great Circle” of Interior Russia: Representations of the Imperial Center in the Nineteenth and Early Twentieth Centuries’ in Jane Burbank, Mark von Hagen and Anatoly Remnev, *Russian Empire: Space, People, Power, 1700–1930* (Indiana University Press 2007) 90.

² Edward Thaden, *Russia’s Western Borderlands, 1710–1870* (Princeton University Press 1984).

³ Richard A Pierce, *Russian Central Asia, 1867–1917: A Study in Colonial Rule* (University of California Press 1960).

⁴ Ronald Grigor Suny, ‘Constructing Primordialism: Old History for New Nations’ (2001) 73 *The Journal of Modern History* 862, 873 (discussing how national consciousness was not particularly well developed in the Caucasus).

⁵ William Partlett, Post-Soviet Constitution-Making, pp. 545-551 in H. Lerner & D. Landau, *Comparative Constitution Making* (describing how the statist school of historiography views the unique challenges of the region requiring a centralized and therefore strong state); Tsygankov, *The Strong State in Russia*.

political pluralism” (Article 13).⁶ In addition, the new post-Soviet constitutions include long lists of rights.⁷ For instance, Chapter 3 of the Constitution of Azerbaijan lists a number of individual rights, including the right to freedom of speech, movement, conscience as well as the right to life, housing, and a pension. The Azerbaijan Constitution further explicitly states that rights can only be limited to the extent that this limitation is “proportional” to state interests.⁸

Yet, despite these textual commitments, these new constitutional orders have yielded a diversity of commitments to the use of a constitution to transform politics. In three post-Soviet Baltic states (Estonia, Latvia, and Lithuania), these new constitutional orders have successfully yielded a powerful break with the past, helping to create resilient and strong systems of democratic constitutionalism and rights protections.⁹ The Baltic countries have therefore successfully used their new constitutions as “an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”¹⁰ They are therefore neglected examples of the “transformative constitutionalism” underway in South Africa, Germany, India, and Colombia.¹¹

In other remaining Soviet republics, however, the project of implementing these textual commitments to transformation has been less successful. Underlying much of this resistance is the idea that constitutionalism—and its restrictions on state power—are unable to ensure a strong state. First, in some parts of the former Soviet Union (Tajikistan, Turkmenistan, Azerbaijan, and Uzbekistan), constitutions have done nothing to interrupt the practice of centralized, authoritarian politics. In Uzbekistan, for instance, the constitution’s provisions on individual rights remain largely unimplemented by a Constitutional Court that has issued less than 30 decisions over the course of 27 years.¹² Second, in other parts (Russia, Kazakhstan, Belarus), political power has been centralized in the office of the president and constitutional courts have deferred to the state in enforcing individual rights in the face of federal legislation. For instance, the Russian Constitutional Court has cautiously exercised constitutional review

⁶ Constitution of the Russian Federation. 1993. Official version available at: <http://constitution.kremlin.ru/>.

⁷ Constitution of Turkmenistan 1992, art 63.

⁸ Azerbaijan Constitution, art 71.

⁹ Eivend Smith, *The Constitution as an Instrument of Change* (2003).

¹⁰ Karl Klare, *Legal Culture and Transformative Constitutionalism*, *Legal Culture and Transformative Constitutionalism* (1998).

¹¹ *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* 21 (Daniel Maldonado, ed. 2014); Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 13 *AM J. OF COMP. L.* 527 (2017) (describing how the term applies in Germany’s post-authoritarian transition).

¹² <http://www.icconnectblog.com/2019/10/late-soviet-constitutional-supervision-a-model-for-central-asian-constitutional-review/>

but has largely upheld federal legislation strengthening authoritarian governance on the basis of reflecting Russia’s unique tradition.¹³ Finally, in the remaining parts of the former Soviet Union (Armenia, Ukraine, Georgia, Moldova, and Kyrgyzstan), pluralistic politics has not translated into a serious commitment to use constitutional law to transform politics.¹⁴ For instance, in Moldova, the Constitutional Court was recently used by a corrupt political group to block the rise of an opposition coalition government.¹⁵

Strong Constitutionalism	Instrumental/contested	Weak	Sham
Estonia, Latvia, Lithuania (3)	Moldova, Ukraine, Kyrgyzstan, Armenia, Georgia (5)	Russia, Kazakhstan, (2)	Tajikistan, Uzbekistan, Azerbaijan, Belarus, Turkmenistan (5)

The success of transformative constitutionalism in these non-Baltic parts of post-Soviet Eurasia requires linking the implementation of the foundational constitutional values in Eurasian constitutions with the construction of a strong state. Almost thirty years of centralism in much of the post-Soviet space has not yielded a strong state; on the contrary, it has fostered corruption, overly personalized leadership, and institutional weakness.¹⁶ Constitutionalism offers a better path to building strong institutions and effective legal control. In fact, constitutionalism is not a project of limiting state power; it is a project that aims at building a strong and effective state.¹⁷ This is certainly the case with German, Colombian, and South African transformative constitutionalism, where constitutionalism has placed obligations on the state to act in the construction of a stable, effective, and just state. By linking the implementation of its textual commitments to constitutionalism with a strong state, advocates of constitutionalism can work within their own constitutional orders to build stronger and more effective states.

¹³ Arman Mazmyan, *The Judicialization of Politics: The Post-Soviet Way*, 13 INT’L J. CON. L. 200 (2015) (describing how post-Soviet courts have generally acted in the interests of the dominant group in power); Alexei Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006* (2008). William Partlett, *The Contested Nature of Russian Constitutional Review*, available at <http://www.icconnectblog.com/2019/02/russias-contested-constitutional-review/>.

¹⁴ Maria Popova, *Political Competition as an Obstacle to Political Competition*, *Comparative Political Studies* (2010).

¹⁵ See, e.g. Moldova: <http://www.icconnectblog.com/2019/07/why-political-pluralism-is-not-enough-moldovas-constitutional-crisis/>

¹⁶ See, e.g. Barbara Geddes, Joseph Wright, and Erica Frantz, *How Dictatorships Work* (2018) (arguing that personalized dictatorships are less stable); Erica Frantz, *Authoritarianism: What Everyone Needs to Know* (2018).

¹⁷ Nick Barber, *Principles of Constitutionalism*

II. Explaining this Diversity: Constitutionalism and State-building

What is driving these differing outcomes? The answer lies in the differing approaches to state-building in the post-Soviet space. In the early 1990s, all of the newly independent countries urgently needed to build effective and legitimate forms of political authority in the wake of the collapse of one-party, communist led governance. In fact, the collapse of communism unleashed a serious crisis of state capacity in the region.¹⁸ A central question for the fate of constitutionalism in these fifteen post-Soviet state-building projects therefore was whether the particular challenges of state-building required abandoning centralized state discourse? Or did these challenges require the continued embrace of this approach?

1. The Baltic States: Strong Constitutionalism

Since the collapse of the Soviet Union, the three Baltic states have embarked on a state-building project that has rejected centralism. This state-building project has instead placed the construction of democratic constitutionalism at its center. This project was strongly underpinned by the central goal of Baltic state-building: to join the European Union.

This state-building goal has contributed to a powerful engagement with European and German transformative constitutionalism. In all three countries, a broad, principle-based approach has been taken to interpreting the constitution that is heavily influenced by the ECHR and the German Constitutional Court.¹⁹ For instance, a 1994 decision Estonian Supreme Court decision stated that “the general principles of law developed by the institutions of the Council of Europe and the European Union should be considered” in declaring statutes unconstitutional.²⁰ At the same time, the Baltic courts have looked to one another to further develop their own particular version of transformative and strong-state constitutionalism. One clear example is the development of a positive constitutional right to health care in the Lithuanian context.²¹ For instance, in 2005, the Court held that the state is constitutionally obliged to render social assistance to a person whose health is impaired as a result of improper, unsafe and unhealthy working conditions (including accidents at work and occupational diseases).²²

¹⁸ V I Ganev, *Post-Communism as an Episode of State-Building: A Reversed Tillyan Perspective*, *Communist and Post-Communist Studies* (2005).

¹⁹ See the three chapters outlining the powers of the court.

²⁰ (217, Uno Lohmus). Decision No III-4/A-5/94. 30 September 1994,

²¹ The Lithuanian Constitutional Court has been particularly influential in this context. *The Influence of the Rulings of the Constitutional Court on the Development of Health Law in Lithuania*

²² 7 February 2005 decision of the Lithuanian Constitutional Court.

2. The Eurasian Core: Weak and Sham Constitutionalism Amidst Continued Embrace of Centralism

The six post-Soviet countries in the Eurasian core have embarked on state-building projects that are very different than the Baltic states. These countries have reemphasized the importance of centralism and statism for a strong and independent state identity. Underpinning these state-building projects is a national tradition and identity that values centralism and personalized power. These state-building projects have therefore ultimately ignored the foundational norms in the constitution in favor of continuing this tradition.

(1) Example 1: Russia's Weak Constitutionalism

From the early period, Russia's state-building project has emphasized the importance of centralism to post-Soviet state building. Initially, under Yeltsin, centralism was justified as an expedient by President Yeltsin and his team as necessary for the creation of a market economy and to overcome the Soviet past.²³ Later, under President Vladimir Putin, centralism has increasingly been justified as the natural reflection of Russia's particular identity. For instance, in 2000, President Vladimir Putin wrote that “[t]he institutions and structures of our state (*gosudarstvo*) have long played a particularly important role in the life of our country and people. For Russians a strong state is not an anomaly, or something that should be struggled against. Quite the contrary, Russians see it as a source and guarantor of order, and the initiator and main driving force of any change.” This strong state has been linked to a system of personalized and centralized power. More recently, Vladislav Surkov—an influential Kremlin ideologist—discussed Putin's centralized state as a long-standing Russian approach to governance that is grounded on a relationship between the people and the powerful leader and which will ensure Russia's powerful position in the world.²⁴

This centralizing state-building project underpins Russia's super-presidential constitutional design.²⁵ It has also been used to justify the Russian Constitutional Court's deference to the state in individual rights cases.²⁶ Finally, the Russian Constitutional Court has translated these

²³ William Partlett & M. Krasnov, *Russia's Non-Transformative Constitutional Founding*, 15 *European Constitutional Law Review* 644 (2019).

²⁴ Vladislav Surkov, *Dolgoe Gosudarstvo Putina* (Putin's Eternal State), *Nezavisimaya Gazeta*, available at http://www.ng.ru/ideas/2019-02-11/5_7503_surkov.html. See also Andrei Tsygankov, *The Strong State in Russia: Development and Crisis* (2014).

²⁵ William Partlett, *Super-Presidentialism* (under review for publication).

²⁶ Sergei Belov, *Russian Constitutional Values in the Text and Practice of Interpretation*. 131 *Sravnitel'noe konstitutsionnoe obozrenie* No. 4 (2019). Pp. 68-83.

identarian arguments into the doctrine of the Court itself. In particular, the RCC has adopted a constitutional identity doctrine as a way of resisting key aspects of international human rights law. Underlying this approach is that international legal decisions cannot override Russian constitutional identity. The Chairman of the Russian Constitutional Court has developed this as a way of asserting Russia's statist history.²⁷ Pointing to the importance of the state, the Chairman of the Russian Constitutional Court, Valery Zorkin, has stated that “the Constitutional Court, should take into account the ‘rich experience of collectivism’ as opposed to the ‘liberal-individualistic version of legal understanding’ of the West ‘as a person’s freedom, limited only by the freedom of another person.’”²⁸

(2) Example 2: Uzbekistan’s Sham Constitutionalism

Uzbekistan has even more strongly linked its state-building project with centralism. In 1992, Uzbekistan achieved independence and became the first post-Soviet republic to adopt a written constitution. Since then, Uzbek state intellectuals have constructed an “Ideology of National Independence” to legitimate ongoing centralist governance.²⁹ This ideology locates Uzbek identity in the identity of unity and therefore concludes that a centralized and personalized state is a “natural and uncontroversial” reflection of this part of Uzbek history.³⁰

The “naturalness” of centralism for Uzbek governance has been used to legitimate a super-presidential design that concentrates vast formal power in the office of the presidency. This centralism has undermined the implementation of the written constitution’s list of rights as well as calls for democracy. Furthermore, it has undermined the success of the Uzbek Constitutional Court—as well as other institutions of constitutional control—in implementing the transformative aspects of the Constitution. Most notably, the constitution’s provisions on individual rights remain largely unimplemented by an Uzbek Constitutional Court that has issued less than 30 decisions over the course of 27 years.³¹ As a result, the written constitution (and court) has done little to transform Uzbek political life.

²⁷ Anna Pushkarskaya, “Valery Zorkin Promises a New Globalization,” 4 December 2017, available at <https://www.kommersant.ru/doc/3486576>.

²⁸ Anna Pushkarskaya, “Valery Zorkin Promises a New Globalization,” 4 December 2017, available at <https://www.kommersant.ru/doc/3486576>.

²⁹ (March at 212).

³⁰ March at 221.

³¹ <http://www.icconnectblog.com/2019/10/late-soviet-constitutional-supervision-a-model-for-central-asian-constitutional-review/>

3. The Hybrid Periphery: Contestation and Instrumental Constitutionalism

In the five remaining post-Soviet states, state-building strategy remains contested. In these countries, national identity remains highly contested: Is the identity of the country European? Or Eurasian? This contested identity is frequently the subject of ordinary political contestation as different political parties represent competing identities. For instance, in Moldova, the Party of Socialists is pushing for a more centralized approach to power that harkens back to Soviet-era identity and centralism; the ACUM party, by contrast, advocates a more European identity for Moldova.

This competition has undermined constitutionalism and encouraged the strategic manipulation of bodies of constitutional implementation such as courts. For instance, constitutional courts in these countries have intervened in highly political moments on behalf of powerful interests and without real basis in the text of the constitution. This reflects the fact that political interests facing defeat will do anything to avoid the loss of power, including placing “strategic pressure” on the courts. Alexei Trochev explains that, in these kinds of regimes, political uncertainty “forces rivals to focus on winning at all costs in the immediate future, because losing a battle now might mean losing the whole war.”³²

A good example is Ukraine, where the Constitutional Court has also become an instrument of political partisanship. The most obvious case involved a series of constitutional amendments passed in 2004 in the wake of the Orange Revolution that weakened the power of the Presidency and strengthened the Parliament. Although they were made in violation of the constitution, the constitutional court took no action for seven years.³³ In 2011, however, the Ukrainian Constitutional Court struck down these 2004 constitutional amendments under heavy pressure from a newly elected President: Viktor Yanukovich.³⁴ This decision effectively enhanced President Yanukovich’s powers and weakened his opponents’ powers.

In recent years, however, political revolutions in all five countries have created openings for a serious engagement with the democratic constitutionalism. For instance, in Armenia, after large-scale protests linked to the corrupt regime of Sargis Sargsyan, a new Prime Minister (Nikolai Pashinyan) has come to power calling for new approach. Pashinyan has sought to

³² Alexei Trochev, *Meddling with Justice*, 18 *Demokratizatsiya* 122, 125 (2010).

³³ Venice Commission, *Opinion on the Procedure of Amending the Constitution of Ukraine* (October 2004) (expressing deep concern about the lack of involvement by the Constitutional Court in the amending process). Available at: <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282004%29030-e>.

³⁴ Ekaterina Mishina, *The Difficult Destiny of the Ukrainian Constitution*, available at <http://imrussia.org/en/rule-of-law/698-the-difficult-destiny-of-the-ukrainian-constitution>; Alexei Trochev, *A Constitution of Convenience in Ukraine*, *JURIST - Forum*, Jan. 18, 2011, <http://jurist.org/forum/2010/11/a-constitution-of-convenience-in-ukraine.php>.

change the traditional centralized approach to political power. Even more recently, the newly elected of Ukraine President Zelensky has begun the process of trying to reform the Ukrainian courts (including the constitutional court), an aspect of Ukraine that has proven difficult to reform in the years since the Maidan revolution of 2014.³⁵

A key part of this success of these movements is to link this project with the creation of a strong and effective state. In fact, rampant state capture and corruption has seriously weakened state capacity; constitutionalism offers an important part of the solution. This project therefore must link this with the idea that constitutionalism is about more than just limiting the state; it is also about creating a strong and effective constitutional order.

III. Conclusion: How to Kick-start or Support these Constitutional Movements

This analysis provides a critical lesson for those interested in advancing the project of post-Soviet Eurasian constitutionalism. The region has long been focused on the need for a strong state to cope with particular challenges. The necessity of a strong state was particularly pressing after the collapse of the Soviet Union. Constitutionalists must seek to break the link between centralism and a strong state; they then must seek to link constitutionalism with a strong state. This requires a two-fold strategy.

First, they must demonstrate how persistent (and formally unconstitutional) centralism and statist governance undermines a strong state by leading to personalized leadership and fostering deep-seated corruption and weakening institutions.³⁶ The ineffectiveness of centralism in state-building has become increasingly clear in recent years. For instance, in 2010, in Kyrgyzstan, after a significant corruption scandal, then-President Bakaev was pushed out and super-presidentialism was replaced with a new balanced checks-and-balances semi-presidential constitution.³⁷ More recently, in Moldova, a pragmatic coalition recently came to power in order to overcome massive corruption. This new coalition came to power in the wake of a major constitutional crisis precipitated in part by the constitutional court, which had been captured by the corrupt pre-existing leadership.³⁸ The victory of this new coalition included the resignation of the entire Constitutional Court.

³⁵ https://www.ecfr.eu/publications/summary/guarding_the_guardians_ukraine_security_and_judicial_reforms_under_zelensky

³⁶ See, e.g. Barbara Geddes, Joseph Wright, and Erica Frantz, *How Dictatorships Work* (2018) (arguing that centralized and personalized leadership are less stable and weaken state capacity).

³⁷ <http://constpalata.kg/en/about/istoriya/>

³⁸ [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)012-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)012-e) (discussing the problematic decisions made by the Constitutional Court).

Second, proponents of constitutionalism should then argue that the better approach for building strong states in the post-Soviet region is to adopt constitutionalism. Underpinning this argument is increasing evidence that constitutionalism does more than place limitations on state power; instead, constitutionalism is actually a project actively engaged in the creation of a strong state.³⁹ Recent comparative experience from all over the world—including countries with significant problems of poverty—suggests that constitutionalism is “an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”⁴⁰ In this context, constitutional courts or other institutions of constitutional control have played a leading role in ensuring that the state becomes an instruments in ensuring a more just political order.⁴¹

Taken together, this analysis therefore suggests that the project of implementing the textual commitments in Eurasian constitutions is not a project of convergence with western models or values. Much as the project of transformative constitutionalism has taken different forms in Colombia and South Africa, constitutionalism will differ across the post-Soviet space. Understood this way, constitutionalism is an ongoing project squarely aimed at overcoming the particular problems of state weakness that continue to plague the development of individual countries. It therefore offers a far more promising path to the long-term state-building goal of a strong state than the traditional ideas of centralism and statism.

³⁹ Nick Barber, *The Principles of Constitutionalism*.

⁴⁰ Karl Klare, *Legal Culture and Transformative Constitutionalism*, *Legal Culture and Transformative Constitutionalism* (1998).

⁴¹ They are, of course, not the only institutions that are necessary for this. See Eivind Smith, *The Constitution as an Instrument of Change* (1993) (discussing the role of the president, ombudsman, the media, and parliament in also upholding constitutional justice). For representative examples among many, see, e.g., Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Wash U. Global Stud. L. Rev. 1, 67 (2009) (discussing a “a global shift to check representative institutions with increasingly broad principles of good governance.”); Helen Stacy, *Human Rights for the 21st Century—Sovereignty, Civil Society, Culture* (2009) (looking at Colombia, India, and South Africa courts as powerful guardians of judicially protected human rights).