

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

[Research Comments] Paradigms of Analysis in Post-Soviet Constitutionalism

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This paper is a commentary to the papers resp. to the presentations by William Partlett (“Former USSR trends: State-building and Constitutionalism in the Former Soviet Region”), Anna Gritsenko (“Cases from Russia: Revision of International Law by the Constitutional Court of Russia: When It Was Not Possible to Reconcile International and National Law”), Aziz Ismatov (“Cases from Uzbekistan: The Introduction of Modern Constitutionalism in Central Asian Post-Socialist Context – Constitutional Debate and Development on Human Rights in Uzbekistan in the 20th and early 21st Century”), and Gangabaatar Dashbalbar (“Development of Constitutionalism in Mongolia”) in Session 3: “Constitutionalism in Eurasian Transitional Countries”.

In the following, we will use the term “post-Soviet space”. This includes not only the states that have issued from the former Soviet Union but, as a matter of convenience, Mongolia as well. It is true

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that socialist Mongolia was a formally sovereign state, whereas the republics of the USSR were not. But materially, Mongolia had to obey orders from Moscow just as much as the local leaders in Soviet Central Asia had. After all, it was only a matter of chance and not of concept that during World War II Mongolia did not share the fate of Tuva and could maintain its formal independence instead of being incorporated into the sham federalism of the USSR. The proper position of Mongolian statehood during the Soviet period is discussed under point 2.2.

I. Tool of Analysis No. 1: Centralisation and Decentralisation of Political Power

William Partlett presents as his central paradigm to analyse the constitutional developments in the successor states of the USSR the question of “centralisation – decentralisation” of political power. In this sense, centralism means that all or most political power is held by one organ, in (super)presidential systems by one person, the president.

1. Centralism as a Tool of Regional (Post-Soviet) and Global Analysis

William Partlett’s underlying assumption equates centralism with a weak constitution and with the absence of a democratic and constitutional culture. In this sense, centralism denotes the potential arbitrariness of the political centre. Here, the question arises whether this assumption is correct. First of all, centralism is the absence of a separation of powers. This, however, is not necessarily identical with a dysfunctional or undemocratic constitution. Democratic constitutional orders in the sense that the will of the people prevails are, at least in theory, well conceivable without a separation of powers. Rousseau’s philosophy is just one example. With regards to the post-Soviet space, however, Partlett’s assumption is correct: the hypercentralist presidential and superpresidential systems do not only waive with a separation of powers, but they also stifle democracy. Still, if we wish to use centralism as a tool of analysis on a global scale, we have to abstract from post-Soviet specialities and need to bear in mind that there is no logically compelling link between centralism and the lack of democracy.

The same is true for another term Partlett identified in post-Soviet political and constitutional debate: the “strong state”. In the post-Soviet space, this strong state is akin to the centralist presidentialism because post-Soviet thinking conceives the strong state necessarily as having a strong man with wide powers at its top. However, ideas of a “strong state” outside the Soviet space show that such ideas do not necessarily advocate the absence of democracy, of constitutionality or even of a separation of powers, as the British ideas of a “strong government” exemplify. Here again, we need to

be aware that what appears to be a truism in the post-Soviet space, i.e. the antidemocratic nature of the “strong state”, is a specific regional trait that we will have to abstract from once we use the “strong state” as an analytical topos or tool with a wider geographical scope.

2. The Post-Soviet Space in General

In the post-Soviet space, however, centralism means more than the mere absence of the separation of powers. It means an arbitrary political centre where the tendentially unlimited powers of the strong state concentrate in one organ, in one person. This centralism existed in the Tsarist rule just as it did in the Soviet Union. Centralism is viewed as the “normal” architecture of the state. Insofar, the political identity of that post-Soviet space is centralist. The various successor states use centralism, i.e. their centralist legacy, in various ways.

First of all, there is the “Baltic exception” that Partlett describes. After 1991, Estonia, Latvia and Lithuania chose a decentralised political system and have stuck to it since. However, this exception can be explained easily by the fact that the population of these countries never shared centralism as part of their identity. Even in the period when they belonged to the Tsarist empire and the Soviet Union, they did not stop to be, culturally, a part of Western Europe and its non-centralist culture, a fact which was helped by their Catholic resp. Lutheran traditions which made them look towards the West rather than towards the East. Therefore, the Baltic governments, backed by their peoples in this question, found it easy to adopt and maintain values often labelled as “Western” such as a decentralised political system with a separation of powers and well-protected human rights.

3. The Post-Soviet Space in Particular: Russia

In Russian politics, especially in the Russian dialogue with the west, centralism has turned into a sort of identitarian or even nativist argument. In order to fight off “Western” ideas Russian power-holders argue that Russia has always been centralist, that this is part of Russia’s political identity or nature, and that other models would not work in Russia.

Anna Gritsenko exemplifies this Russian self-assertion with view to the role of international law in the domestic hierarchy of sources of law. Although she does not use centralism as a factor of analysis, her description of the case-law of the Russian Federal Constitutional Court and of the accompanying legislation can be read as a story of re-centralisation. Both the Tsarist empire and the Soviet Union closed their domestic legal space against international law: it had no role as a domestic source of law. The West has a different tradition. Although the details vary, its legal systems do accept

international law as a source of domestic law. International law as part of the domestic legal system is quite a far-reaching form of decentralisation because the state power accepts that some of the rules valid on its territory are not only not made by the political centre but even by external agents who are under no control of the state, i.e. by the international community. This deprives the centre of controlling a part of the legal system and therefore is a strong case of decentralisation.

After the end of socialism, the Russian constitution enshrined international law as one of the sources of the Russian legal system, and Russia signed the European Charter of Human Rights, thus accepting an external judicial review of its human rights performance. In other words, Russia decentralised its system of sources of law significantly. This was not much questioned in the Yeltsin years, but when Putin came into power, he initiated a programme of recentralisation and of creating the image of a “strong state” (which, however, has remained a very weak state, if one cares to take a closer look). The first years of Putin were dedicated to the recentralisation of the internal power structures. In due course, the Markin case, the Anchugov and Gladkov case and the Yukos case triggered the re-centralisation of the sources of law. It is open to argument whether these cases are the true reason for re-introducing the supremacy of domestic (constitutional) over international law, or whether Putin would have turned against international law anyway.

The result of these and other cases, as well as of the accompanying legislature and the proposed constitutional amendments, is unequivocal. This development puts Russia back into control over how international law operates in the domestic legal space, and it puts Russia back into control over whether decisions by the European Court of Human Rights are executed by and within Russia or not. Formally, at least part of the power is vested within the Federal Constitutional Court. Given the court’s obedience to the president’s wishes and policy, this re-centralisation materially strengthens the political centre, i.e. the President. The two dissenting opinions in the Yukos case confirm this diagnosis because they had no impact on the court’s majority decision. They are the exceptions that confirm the rule.

4. The Post-Soviet Space in Particular: Uzbekistan

The Uzbek development is quite the opposite of Russia. After the end of the of the Soviet Union and its sudden independence, the country started with a superpresidentialism of a degree that Partlett defines it as a “sham constitution”. Thus, Uzbekistan started as an extremely centralised political system. However, in recent years, the system started to soften. Some elements of decentralisation were included, first cautiously, quite recently with stronger impacts.

The story of strengthening human rights in Uzbekistan is part of this story of gradual decentralisation. Human rights empower the individual, most importantly vis-à-vis the state. The power that human rights confer upon the individual is lost for the state, i.e. for the political centre, since it can no longer define the individual's behaviour in the sphere protected by human rights. This weakens centralism.

However, Aziz Ismatov shows that this paradigm of decentralisation by strengthening the human rights in Uzbekistan is not entirely unequivocal. Arguments of communitarianism, of "Asian" or "Oriental" values indicate that the state is cautious about the decentralising effect of the human rights and would like to retain at least some leverage to control human behaviour. If one takes a closer look at these Uzbek arguments, as Ismatov does, they do not very much differ from the debate of the possibility of limiting human rights by the rights of others and by other constitutional values that is also common in Western jurisdiction. "Asian" or "Oriental" values thus do not constitute an Uzbek specific but is rather an argumentative strategy to retain some control of the degree of decentralisation that human rights bring about. Still, this does not alter the general tendency of the Uzbek development: where Russia enters on a path of re-centralisation, Uzbekistan dares decentralisation.

5. The Post-Soviet Space in Particular: Mongolia

The principal feature of Mongolia's development is not so much the conflict between centralism and decentralisation but much rather the paradigm of decolonisation, which we will deal with under point 2, especially under point 2.2.

As far as centralism and decentralisation is concerned, this conflict was seen and addressed immediately after the end of the socialist one-party state. The debates of the early 1990ies created as a sort of compromise a mixed system. Subsequent constitutional amendments differ only partly from this basic compromise. The 2000 amendments remain within the paradigm achieved in the early 1990ies. The debates about the incompatibility between a seat in parliament and a seat on the ministers' bench stay well within the balance between a centralist and a decentralised system in force since the early 1990ies.

The tendency of the 2019 amendments has a stronger element of decentralisation. It includes the people as a compulsory element into the constitutional amendment procedure, giving the people a sort of veto power. Apart from this procedural decentralisation, other elements contain a material decentralisation because they strengthen the separation of powers. In this context one can state a remarkable parallel: the uncertainties around the Judicial General Council reflect the negative

experiences of quite a few formerly socialist countries in Eastern Europe with their respective judicial councils.

Coming back to the question of centralism, the 2019 amendments contain at least a formal decentralisation. Whether the popular veto in the constitutional amendment process will lead to a material decentralisation of decision-making by introducing another player, or whether it will centralise the system by opening an avenue to the president to manipulate the people's will and thus strengthen his own control over the process, i.e. whether it will turn into a plebiscitarian pillar of the president's power, is not yet clear and will have to be seen in the future. As far as the law on the books goes, the 2019 amendments are an element of decentralisation.

II. Tool of Analysis No. 2: Decolonialisation as a Central Moment for Both the Former Metropolis and the Former Colonies

1. Decolonialisation as a Tool of Regional (Post-Soviet) and Global Analysis

Next to the paradigm of centralism, I would like to propose another factor of analysis: decolonialisation. William Partlett shortly mentions some of its elements in his paper, but does not use it as a fully-fledged tool of analysis. I would like to propose to do so.

To analyse the developments that the various papers describe under the aspect of decolonialisation does not replace centralism as a tool of analysis. Rather, decolonialisation is another, in a certain way complementary way of analysis. Thus, the two tools do not exclude but complement each other.

And another thing can be said for decolonialisation as a tool of analysis: it opens the way into global constitutional comparison. Centralism, too, is a paradigm used in universal comparison of constitutional systems. However, when one deals with the post-Soviet space, the superpresidentialism we find there leads one to just look at the regional specifics which may make one think, i.a., that centralism and a lack of democracy are identical. These post-Soviet truisms may block the way to relate them to global tendencies, to introduce them into the mainstream of universal constitutional comparatism. This regionalistic danger is much less existent under the prism of decolonialisation.

2. Decolonisation in the Post-Soviet Space

Decolonisation has different effects on the former metropolis and on the former colonies. In the post-Soviet space, we find one former metropolis: Russia as the successor to the Tsarist and Soviet

empire(s). The other states in the region are former colonies. It is true that this concept raises questions with view to the European successor states such as Ukraine, but it certainly holds strong in the Caucasus and in Central Asia including Mongolia. Mongolia formally was an independent country, but factually it was a Soviet colony. Since the Brezhnev doctrine – which Mongolia formally ratified in the preamble of its 1960 constitution – created a status for the satellite states similar to the protectorates of overseas colonialism and since in studies on colonialism and decolonialisation protectorates are treated as colonies in a material sense, one might even formally consider Mongolia to have been in a status of colonial dependency from the Soviet Union.

In the former metropolis, Russia, decolonisation did not affect the state as such. The needs of state-building after 1990/91 were not due to the loss of the colonial empire, but due to the changes necessary after the demise of socialism. Nevertheless, the Russian constitution and Russian law contain numerous provisions which on the one hand deal with the legal consequences of this loss, e.g. in the field of nationality laws, and which on the other hand show that that loss is considered not only a tragedy but also illegitimate, i.e. that Russia claims to have a right to gain back the lost territories. One instrument to do so are the numerous international organisations under Russian control that Moscow created to unify the post-Soviet space.

Anna Gritsenko's paper can be read in this light, too. After the loss of its empire, Russia decided to find its new role in the world by integrating into international structures including international law. Now that the initial shock of being reduced to a middle-power with only a few colonies left is over, Russia reverts to assert its national sovereignty and returns to the idea of the "strong state" which has a meaning not only domestically, but in foreign politics as well: Russia tells the world what to do, not vice versa. Therefore, it is quite logical to stop the high position that international law enjoyed in the Russian legal system. From now on, Russia will apply international law to the extent it thinks it fit, and not to the extent international law claims to be applied.

In this, one might find an interesting parallel with the Brexit. After having lost its colonies in the 1950ies and 1960ies, Great Britain had to redefine its new role in the world. The Commonwealth of Nations, NATO membership and the much-quoted "special relations" with the US mitigated the disorientation but were insufficient for the country to find a new role. In this situation, Britain entered the European Community, as the European Union was called in those days. Now that this post-decolonisation shock and disorientation seem to be over in Britain, the country feels it no longer needs the EU membership to define its role in the world, and thus it decides to leave the EU.

The former colonies in the post-Soviet space had to engage in state-building which was all the more difficult because the end of the Soviet Union and state independence had come quickly and unexpectedly. Some countries such as the Central Asian republics of the USSR had to engage in a parallel effort of nation-building as well. Although state-building as a challenge was similar in the former colonies, its details were starkly different. The former Soviet republics had an insufficient state apparatus because of Moscow's strategy of direct rule in Central Asia and therefore they had to start quite from scratch. Mongolia, on the other hand, profited from having been a formally independent country so that it did not have to build institutions from zero but "merely" had to reorganise the existing ones and to create those that the old system had not had, e.g. a Constitutional Court. This difference may explain why the former Soviet republics opted for a centralist or even hyper-centralist system. Such a system is constructed more quickly and more easily and thus fills the vacuum of decolonisation in a way that may seem advantageous in the moment of gaining independence. Mongolia, on the other hand, could indulge in the "luxury" of debating about centralism and of opting for a compromise that resulted in a mixed system.

Under the paradigm of decolonisation, Aziz Ismatov's paper on Uzbekistan can explain why human rights came to that country quite lately. Only when the state was felt to be sufficiently consolidated by hypercentralist policies could one venture to decentralise it by opening to human rights. This is not necessarily in line with decolonisation strategies in other parts of the world where endeavours to strengthen the human rights of the local population were used to reduce the influence of the colonial power; Gandhi's fight for India's independence is an example for such a strategy. However, in Uzbekistan, there was no movement for decolonisation prior to the sudden independence, and after independence state-building took priority over human rights. Only recently was this prioritisation put into question.

Mongolia is a state with few inhabitants and a vast territory locked in between the big neighbours Russia and China. Understandably, independence in the sense of a material sovereignty from the neighbours is a predominant feature in Mongolia's constitutional development. Mongolia tried to move from dependence to independence. It is not by chance that the paper of Gangabaatar Dashbalbar defines the end of the Soviet Union as a "window of opportunity" for Mongolia and its material independence. The special features of Mongolia's protectorate-like statehood before 1990 constitute a framework different from the Central Asian Soviet republics. The latter group had to see to a very quick state-building, sometimes accompanied by the necessity of nation-building. Mongolia needed

neither, but could limit itself to reforming the existing state structures. Insofar, Mongolia is more comparable to the former Soviet satellites in Eastern Europe than to its Central Asian neighbours.

III. Conclusion

Under both paradigms of centralism and decolonisation it is difficult to identify genuinely “Asian” features.

All political systems have to define to what degree they wish to be built on centralism, and to which extent they want to decentralise. One may say that “Western” systems put more trust into decentralised solutions whether Asian states prefer centralised systems. Yet, the delimitation between the two is far from equivocal but is vague and blurred, in practice mixed systems are more common than dogmatically “pure” ones, and in many states the degree of centralisation and decentralisation is a question of continuous political debate. The unending rebalancing between the federal and the state level in the federal systems of the world is just one example for the fact that the degree of centralism is rarely fix but open to constant discussion and political bargaining.

The same is true for the extent of decentralisation that human rights bring about. The communitarianism of the “Asian” or “Oriental” values of the Uzbek debate on human rights are merely a label for debates which every political system faces that respects human rights as viable rights and not just as a façade. In every such system the human rights have to find their place in the triangle individual – society – state, and how individual human rights (and duties) are limited with view to the rights of others and to other constitutional values is a question that all these systems have to answer on a day-to-day basis. The bulk of the case-law of the German Federal Constitutional Court, just to give one example, is on how to draw these limits in individual cases and in abstracto.

In the question of decolonisation, we can find even less specific “Asian” elements. The individual features of the situation of any given country before, during and after decolonisation are much more important than any geographical or cultural belonging of that country. This is clearly shown by the Russian, Uzbek and Mongolian examples. If we were to widen the analysis to other post-Soviet and post-socialist countries this finding would be confirmed.

Still, even if we cannot find much of genuinely “Asian” features, we can establish striking similarities in the post-Soviet and, more broadly, in the post-socialist space. These spaces are not limited to Asia, but range from European Minsk and Yerevan (post-Soviet) or Prague, Tirana and Sofia (post-socialist) as far as Asian Ulaanbaatar and Vladivostok. The common recent past and the

sometimes comparable and sometimes individual strategies of overcoming its various legacies still allow to define this space as a unit which makes the application of certain tools of analysis both possible and meaningful.

And another thing becomes clear from the papers resp. presentations of this panel. The “transition” of the post-socialist space is more or less over. Although not all of the problems inherited from the past are solved, the new systems are now consolidated to an extent that the adjective “transitional” sounds wrong. Russia’s new self-assertion, expressed by a re-centralisation and a “strong state” in foreign relations, just as well as Uzbekistan’s more relaxed stance on decentralisation by human rights and Mongolia’s readiness to experiment with degrees of centralism and decentralisation show that the systems as such are no longer perceived to be in a transitional, pending and therefore fragile state. This does not mean that no more reforms are necessary. The necessity to reform is acknowledged in the post-socialist countries, too. But these are now reforms in established systems and no longer in the abeyance of a more or less undefined (and perhaps undefinable) in-between space between systems. So, in order to define this geographical-cultural area, “post-Soviet” or “post-socialist” – as the case may be – is more appropriate than “transitional”.