



THE CULT OF THE WRITTEN CONSTITUTION AND THE DILEMMAS OF CONSTITUTIONAL CHANGES: SCIENTIFIC APPROACHES AND PRACTICE OF DELIBERATIVE CONSTITUTIONALISM**

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The subject. The article discusses the scientific foundations of the cult of a written constitution, the relationship between the principles of the supremacy of the constitution and fidelity to the constitution, on the one hand, and the forms and methods of constitutional changes in modern democratic states, on the other hand.

The aim of the article is to reveal the dilemmas of legal constitutionalism in the context of the formation of doctrinal foundations and the practice of applying deliberative and dialogical constitutionalism in modern jurisprudence and the practice of constitutional development. Methodology. The author uses deliberative and epistemological approaches, methods of formal-legal, concrete-historical, comparative constitutional-legal and complex analysis.

Main results, scope of application. A special field of knowledge is being formed, which is called “comparative constitutional changes”. The scientific school of constitutionalism proposes to see the purpose of this field of knowledge in the development and improvement of forms and methods of participation of the people, citizens, civil society, professional and expert opinion in constitutional changes. The study provides a critical constitutional analysis of the peculiarities of the nature of all-Russian voting and the legal positions of the body of constitutional justice in Russia on the issue of all-Russian voting, prospects for improving the principle of popular sovereignty and the institutions of citizen’s participation, civil society, professional and expert opinion in the Russian constitutional doctrine and in legislation. Conclusions. The cult of a written constitution dominates in the contemporary world of democratic constitutional states that differ in socio-economic and political-legal indicators of their development on the geopolitical and legal map of the planet. In the practice of contemporary states, except for the adoption of a draft new constitution, the most common practice is to express individual preferences (“for” or “against”) citizens regarding the content of each amendment or several interrelated amendments. The theory of deliberative constitutionalism is multifaceted and is intended to scientifically substantiate the prospect of expanding the constitutional basis for democratic decision-making and creating a democratic basis for constitutional change. Deliberative constitutionalism, as a theory of engagement in constitutional communication, serves the purpose of seeking collective wisdom in matters of constitutional design and constitutional change. The cult of a written constitution is combined with an inclusive constitutional paradigm for the development of democratic states, which involves the development of deliberative and imperative forms of citizen’s participation. Russian constitutionalism needs to further expand popular participation in the development and discussion of decisions of a constitutional nature.

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'...the subject matter and characteristic of the fundamental laws of the state is to define how the forces of the state combine and act in their combination' [1, p. 5].

M.M. Speransky

'Let me nevertheless mention one obvious objection to the idea of singly authored constitutions, namely that in the absence of a reliable procedure for finding a person with the requisite wisdom, the proposal is too fragile to be taken seriously.' [2, pp. 148-149].
J. Elster

1. Introduction

Modern constitutionalism is based on a *combination of the principles of supremacy and amendability of the constitution* in the context of the impact of constitutionalisation processes on the legal system, in which sectoral regulators should be under the '*normative umbrella*' of the constitution. In domestic and international studies, this issue has been repeatedly reflected either through the procedure of ensuring the supremacy and direct action of the constitution [3, 4], or through the discussion of the meaning and working parameters of the principles of the rule of law enshrined in the current Constitution of the Russian Federation adopted in 1993.

The doctrine of constitutionalism addresses the *problem of constitutional fidelity* in the context of the hard-to-reconcile principles of supremacy of the constitution and supremacy of international law and treaties. Approaches to the correlation of the two supremacies (of the constitution and of international law) have been significantly updated after the 2020 constitutional reform in Russia; now the supremacy of the constitution is prioritised in the correlation issues.

The theory and practice of constitutional change in the modern world are multidimensional and highly diverse. First, there is a developing theory and practice of organising and carrying out constitutional reforms (in domestic and comparative experience [5, 6]). Second, in the doctrine of comparative constitutional law and comparative constitutionalism, a special field of knowledge is emerging, which has been *called 'comparative constitutional change'*. This was the name given to a subdiscipline within the

framework of comparative constitutional law, in which the issue of the *role of citizens, civil society and experts in constitutional change* began to attract special attention [7, p. 3].

2. Problem Statement and Methodology

The *cult of the written constitution* prevails in the modern world of democratic states, which differ in socio-economic and political-legal indicators of their development on the geopolitical and legal map of the planet.

This cult requires the development and full support of the written norms of the constitution, their protection and enforcement within the framework of various systems of constitutional oversight and control (European, American, mixed, Iberian). The *idea of cultivating adherence* to written constitutional norms and provisions can be combined with a certain convergence of secular and religious principles and rules, resulting in such phenomena as *Islamic constitutionalism (in the countries of the Arab East with the inclusion of Islamic rule in constitutional texts)* [8] or *Buddhist constitutionalism (for example, in Thailand, Sri Lanka)* [9]. Modern democracies are in a situation of *international diversification of constitutionalism models*, pressured by both international and domestic developmental factors. As a consequence, there is an expanding set of forms, methods and practices of constitutional changes, which are applied in different states and challenge some of the most important principles and values of legal constitutionalism due to the application of not only formal but also informal methods of constitutional change, as well as new technologies in the era of the information society.

This article attempts, first, to correlate M.M. Speransky's views on 'fundamental laws' (constitution) and the participation of the people in constitutional *law-making* in modern constitutionalism; second, to identify the *dilemmas of legal constitutionalism* in the international scientific discussion and practice of constitutional change, and to determine the parameters of their influence on the cult of the written constitution.

3. M.M. Speransky's 'Fundamental Laws' and Public Participation in Modern Constitutionalism

M.M. Speransky was a statesman during the reign of Alexander I, rightly called the great reformer of the early 19th century in Russia; when writing 'Introduction to the Code of State Laws (Plan of state reform of Count M. M. Speransky)', he deeply doubted the generative law-making abilities of the people, although he gave credit to the people as the source and the origin of the three forces that 'move and govern the state ("the legislative, executive and judicial power")' [1, p. 4]. In his opinion, 'these powers are dispersed' and they 'are dead powers' ('they produce neither law, nor rights, nor duties'). And, obviously, only the sovereign power can unite these forces and bring them into balance ('To make them operative, it was necessary to unite them and bring them into balance'). The very fact that these forces are combined and acted upon 'constitutes sovereign power.' However, M.M. Speransky did not specify how these forces could be united, what legal procedures are necessary for this. From the standpoint of the modern doctrine of popular constitutionalism, constitutional design should (as one can assume according to M.M. Speransky's views) be in the hands of the emperor (the power of the state), who entrusts a leading statesman (with deep knowledge) with the development of such a project.

M.M. Speransky's views on the constitution were formed in the period of preparation of state reforms of the early 19th century led by Alexander I and reflect his *monarchical and great-power preferences with a significant share of patrimonial and paternal concern*. 'The Russian constitution', he wrote, 'will owe its existence not to the inflammation of passions and extreme

circumstances, but to beneficent inspiration of the supreme power, which, having arranged the political life of its people, can and has all the ways to give it the most correct forms' [1, p. 15]. Obviously, the octroy method of enacting a constitution was not the only possible way for Russia; however, there was a lack of knowledge of comparative constitutional design, legal realism, and of the legal procedures that had already been applied in the process of drafting and adopting constitutions by the early 19th century.

The plan for state transformation of Russia developed by M.M. Speransky by 1809 was only partially implemented, but the supposed variant of its implementation (by the 'beneficent inspiration of the supreme power') more than 214 years later makes us think about the continuity of *patriarchal and patrimonial consciousness in the country*, which is *partially democratised* by the experience of enactment of the Constitution of the Russian Federation of 1993 and the all-Russian vote of 2020 (on the Law on Amendment to the Constitution of the Russian Federation), but still places the responsibility for the initiative, development and substantive parameters of the constitutional reform mainly on the *head of state*.

4. International Debate on Understanding Deliberative and Dialogical Constitutionalism

The theory of constitutionalism in modern democratic states is based on the *principle of popular sovereignty* and the various options of its textualisation. The Constitution of the Russian Federation of 1993 belongs to the type of basic laws that establish the formula of popular sovereignty with a reference to the multinational people of the Russian Federation. The principle of popular sovereignty is the basis of the constitutional system of Russia and an important legitimising basis for elected public authorities. During the implementation of the constitutional reform of 2020, an appeal to the principle of popular sovereignty was necessary to justify the nationwide vote as a way of democratic legitimisation of the reform in an effort to 'gain the political and social support of the citizens of the Russian Federation' [10, p. 815]. The Constitutional Court of the Russian Federation in its opinion of 16 March 2020 No. 1-3,

firstly, linked such concepts as 'statehood' and 'state' with the political union (association) of the multinational people of Russia, whose power extends over the entire territory of the country; secondly, called the procedure of nationwide voting 'additional' to the already established mechanism for amending the Constitution of the Russian Federation and legislation; it has a 'special legal nature', 'meets the principle of people's power, which is one of the most important foundations of the constitutional system', such 'addition' is 'constitutionally justified'. According to the Court, 'the will of the participants in such a vote' cannot be considered 'a derogation from the requirements of Chapters 1 and 2 of the Constitution of the Russian Federation'¹. Although the Constitutional Court of the Russian Federation recognised the established regulation of nationwide voting as compliant with 'generally recognised democratic standards of expression of the will of the people', nevertheless, it did not note to what extent that the 'package' method of voting is consistent with the individual expression of the will of citizens in the exercise of their constituent powers. Meanwhile, in the practice of modern states (except for the case of adopting a new constitution draft), the most common practice is the expression of citizens' individual preferences ('for' or 'against') regarding the content of each amendment or several interrelated amendments (the procedure and practice of adopting

amendments to the Constitution of Ireland, to the Constitution of Switzerland).

The *phenomenon of collective wisdom* as a participating institution in constitutional change emerges in the contemporary debate on the optimal combination of forms of imperative and deliberative democracy in the implementation of constitutional change. The appeal to collective wisdom (or collective intelligence) can be made not only at the final stage of constitutional design, but also during the drafting and discussion of a constitutional amendment or drafting a new constitution (as the experience of Iceland has shown). New technologies (e.g., crowdsourcing in the digital and information space) can be used, which increase the scale of the collective mind (it can now include millions of people) [11, p. 2-3].

The institution of collective wisdom is developed in the doctrine of deliberative constitutionalism [12, p. 625], when discussing the democratic effect of citizen participation in the constitution-making process [13, p. 592] in modern constitutional theory and in the practice of constitutional construction. To develop social solidarity in Russia and maintain the democratic legitimacy of the constitution, the communicative function of the constitution should be promoted; it is capable of supporting a dialog between citizens and public authorities about the limits and possibilities of constitutional changes using the latest information and digital technologies. Meanwhile, one should also take into account the risks of '*populist constitutionalism*', which is becoming one of the trends in illiberal democracies whose constitutions enshrine the ideology of neoconservatism. An illiberal constitutionalism that relies on popular votes challenges liberal constitutional and political systems that have to turn to deliberative participation procedures for constitutional change in times of crisis. As M. Belov writes, 'the Western constitutional civilisation of the end of the second decade of the 21st century resembles elephants going to die alone in despair' [14, p. 2]. The *crisis of constitutionalism as an ideological paradigm* makes it necessary to seek new ways of deliberative participation.

5. The Cult of the Written Constitution and the Dilemmas of Legal Constitutionalism in the

¹ Conclusion of the Constitutional Court of the Russian Federation dated 16 March 2020 No. 1-3 'On compliance with the provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation of the provisions of the Law of the Russian Federation on Amendment to the Constitution of the Russian Federation "On Improving the Regulation of Certain Issues of Organisation and Functioning of Public Power" that have not entered into force, as well as on the compliance with the Constitution of the Russian Federation of the procedure for entry into force of Article 1 of this Law in connection with the request of the President of the Russian Federation'. URL: <https://legalacts.ru/sud/zakliuchenie-konstitutsionnogo-suda-rf-ot-16032020-n-1-z/> (accessed on 25 October 2023).

Panorama of Constitutional Change

Many constitutionalists see in the *cult of the written constitution* a modern phenomenon of worship of *legal constitutionalism*, which becomes a normative and ethical measure of social relations in the sphere of organisation and functioning of the system of public authorities, territorial organisation of the state, regulation, implementation and protection of fundamental rights and freedoms of the individual, as well as new types of social relations that develop between society, the individual and the state on the use and implementation of new technologies (information and digital technologies, biotechnologies, neurotechnologies). Modern legal constitutionalism is based on the cult of the written constitution, a kind of legal bible of humanity with various legal, territorial, cultural and socio-political dimensions. In the structure of modern constitutional law there appear relatively new forms of using the institutions of deliberative constitutionalism and deliberative democracy in the process of constitutional changes of modern states [15, p. 431; 16]. Such innovations include *constitutional crowdsourcing technologies* (in the drafting of the Icelandic Constitution), the *creation of citizen assemblies with Internet portals for preliminary discussion of constitutional amendments* (from the Irish experience).

The *cult of the written constitution* generates *dilemmas* of modern constitutionalism as a normative system, an institutional mechanism, and a set of ethical and legal values in the public and private spheres of life of an individual, associations of citizens, society, and the state. A constitution can 'work' in legal and political space *without constitutionalism* (as in the PRC) and constitutionalism can exist without a *written constitution* (as in the UK). The position that today the concept of constitutionalism has become 'an institution deeply rooted in its written nature' [17, p. 377] has become justified.

The *first* dilemma arises from the paired desire to ensure the *sustainability and stability of written constitutions*, on the one hand, and their *responsiveness to changes* brought to life by the needs of society and the state, and by advances in science and technology. This dilemma is in a state

of *perpetual resolution* and neither position can be ignored in the process of constitutional development and constitutional change. *Excessive stability* leads to *stagnation* not only of the constitutional text, but also of the real legal and political system, which ceases to receive normative impulses from the existing constitution if the latter does not ensure timely regulation of social relations. *Constant variability* poses the risk of degradation of constitutional principles of government; the political winds of rapid change can lead to their erosion, leveling constitutional principles and their underlying values. The *authoritarian* or *autocratic tendency* in constitutional change is countered by the procedure of democratic involvement, the participation of citizens in the creation and implementation of the constitution.

The *second* dilemma relates to the *factor of participation in constitutional change*. On the one hand, the current constitutions are guided by the political and legal tradition of the 18th-19th centuries in terms of establishing the subjects of the right to initiate constitutional amendments and revision of the Constitution, the list of which mainly includes state authorities (at the national level; in federal states it also includes state authorities of the constituent entities of the Federation as state entities). At the same time, the latest experience of constitutional development of states on the European continent (Ireland, Iceland, Switzerland), in Latin America (Brazil, Chile, etc.), in the CIS countries (Russia, Belarus, Kazakhstan, Kyrgyzstan) shows that the *trend of involving the people, civil society institutions, the institution of professional and expert opinion* in the process of constitutional changes is intensifying and spreading on the geographical map of the world. The boundaries of deliberative democracy are gradually being pushed: 'the most important governmental decisions are made by the authorities, while citizens participate in the mechanism of coordinating interests through voting' [18, p. 115].

A *sub-discipline* (belonging to *strategic jurisprudence*) is emerging that defines the *experience and prospects of constitutional transformation and constitutional change*, whatever the means and methods of implementation. An international group of scholars has developed a

comprehensive view of comparative constitutional change as a sub-discipline of comparative constitutional law and comparative constitutional design [19]. A scientific series of books united by the common theme of '*comparative constitutional change*' has been published². A special place in the study of comparative constitutional change is occupied by the *institution of participation of citizens, of the people, in the process of drafting, discussing and adopting amendments or constitutions*. Issues of enhancing the role of the people in constitutional change occupy a key place in the constitutional design paradigm [20, p. 1, 2-6].

There are various ways in which citizens can be involved in the process of creating and amending constitutions. It is important to ensure democratic procedures for the discussion and adoption of amendments, and therefore it is necessary to involve citizens and the professional and expert community at the early stages of development, and not only at the final stage. It seems important to regulate at the federal level (possibly in the form of a federal constitutional law) the issue of the use of forms of deliberative and imperative participation of citizens in the process of drafting amendments to the Constitution of the Russian Federation, drafting the new Constitution (through civic assemblies, constitutional monitoring, discussion through Internet portals and a dedicated website for the interactive constitution).

The *third* dilemma arises due to the emergence of *new technological possibilities of constitutionalism* [21, p. 19], the influence of digital technologies on the transformation of the constitutional foundations of the Russian state [22, p. 25]. It is worth thinking about expanding the use of information and digital technologies in the discussion, adoption of amendments to the Constitution, possible drafting of a new Constitution, as well as in the field of constitutional monitoring (violations of the Constitution, its

regulations and provisions in the field of sectoral legal regulation and law enforcement practice). In this case, it is necessary to create an 'Open Constitution' Internet portal, create a civic assembly (with the participation of ordinary citizens), use deliberative tools to discuss possible constitutional changes on the Internet. The purposeful orientation of Russian constitutionalism, undoubtedly, should be associated with the expansion of social support and popular participation in the discussion and resolution of constitutional issues. The Constitution as an 'environment for legal innovation' [23, p. 209] implies the emergence of new forms of digital and informational participation of citizens and experts in the development and adoption of amendments to the Constitution.

The *fourth* dilemma is generated in the *depths of constitutional and legal values* reflected in the written text of the constitution and produced in the legal and political space of national jurisdiction. The *ideology of progressive constitutionalism* can be an officially recognised ideology in a democratic and rule-of-law state, as the Russian Federation is proclaimed in its target guidelines. It is a type of constitutional ideology that combines *fidelity to the ancestral values of freedom, equality, social justice, democratic participation and legal and political progress* through economic growth and increased social welfare, social protection and social security of the country's citizens. In our opinion, the *idea of constitutional progress* is important for overcoming stagnant and inert phenomena in the public-law sphere, which can lead to anomie of legal life, to the growth of absenteeism and political inertia of citizens.

Since the beginning of the 21st century, the appeal to the demos not only as a source of power, but also as a participant in the country's constitutional development process becomes an important scientific approach to institutionalise the social pillar of constitutionalism. The constitutional reform of 2020 in Russia in the context of comparative constitutional analysis showed the closeness of some post-Soviet newly independent states in addressing the issues of constitutional transformations (Russia, Belarus, Kazakhstan, Kyrgyzstan) and some commonality of state-legal tradition in the preparation and implementation of

² Routledge. BOOK SERIES. Comparative Constitutional Change.
<https://www.routledge.com/Comparative-Constitutional-Change/book-series/COMPCONST>
(accessed on 26 October 2023)

constitutional changes.

An international research project is being implemented in European states, the results of which were reflected in the collective monograph 'Deliberative Constitution-Making: Opportunities and Challenges' [24]. It assesses the role of deliberative procedures in constitution-making, analyses the nature of the links between participation, representation, and legitimacy; and examines the procedures of *deliberative constitutionalism as a political trend in different parts of the world* (from both theoretical and empirical perspectives). As experience shows, deliberative constitutionalism penetrates and works not only in established democracies with well-known cases of participation of the people or individual citizens in constitution-making, but more importantly, such practice is applied (with ambiguous results) in authoritarian and less consolidated democratic conditions [24, p. XV–XVI].

Dialogue between citizens and public authorities, between civil society institutions, the institution of professional and expert opinion and organisational forms of constitutional authority is an important social and legal tool to support trust in a society facing the problem of constitutional change. Such a dialogue leads to a certain transformation of the relationship between the constituent and constitutional authority in terms of amending and changing the constitution.

The unified system of public authority in Russia has a number of important problem areas of legal regulation, to which researchers pay attention [25]. From the position of the constitutional principle of popular sovereignty and doctrinal foundations of deliberative constitutionalism, it should be noted that there was a need to enshrine the principle of

people's sovereignty among the principles of activity of public authorities and forms of deliberative participation of the people at the level of constituent entities of the Russian Federation in Federal Law of 21 December 2021 No. 414-FZ (as amended on 4 August 2023) 'On General Principles of Organisation of Public Power in the Constituent Entities of the Russian Federation' (with amendments and supplements, effective from 15 August 2023). Thus, for example, Article 1 of this Law ('Organisation of Public Power in the Constituent Entities of the Russian Federation') does not contain any indication of the source of public power (the multinational people of the Russian Federation); to the same extent, the principle of people's sovereignty is not included among the operating principles of the bodies that make up the unified system of public power in a constituent entity of the Russian Federation (there are only 13 of them, including the principle of spreading the sovereignty of the Russian Federation over its entire territory).

6. Conclusions

The cult of the written constitution, typical of modern constitutionalism, is combined with the inclusive constitutional paradigm of development of democratic states, which implies the development of deliberative and imperative forms of participation of citizens, civil society and expert opinion in constitutional changes. Russian constitutionalism needs further expansion of popular participation in the development, discussion and adoption of constitutional decisions (including on the issues of amendments to the Constitution or drafting a new Constitution).

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