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Approaches to the definition of constitutional traditions

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Abstract

The author of the article analyzes the definition of constitutional traditions under the influence of various legal cultures; It also considers the various existing approaches to the definition of constitutional traditions and, at the same time, proposes its own approach to understanding these traditions in their particular context. The results show that constitutional traditions are formed over several generations, therefore, they always reflect the fundamental specificities of a sociocultural system. The author also highlights the factors that influence the perception of constitutional traditions in different legal-constitutional cultures. For the rest, the article studies the most widely disseminated approaches to understand constitutional norms that do not always fully coincide with the canons of constitutional and legal culture. Methods of scientific and general philosophical cognition are used to explore the constitutional tradition from different perspectives of analysis. It is concluded that constitutional traditions, as a whole, can be characterized as elements of the constitutional legacy that preserve the fundamental values of democracy, the constitutional order, the mechanism of state power and the constitution-based political system, as well as the constitutional forms of government enshrined in law.

Keywords: constitutional tradition; constitutional and legal culture; constitutional law; cultural factor; legal norm.

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Aproximaciones a la definición de tradiciones constitucionales

Resumen

La autora del artículo analiza la definición de tradiciones constitucionales bajo la influencia de diversas culturas jurídicas; además se consideran los diversos enfoques existentes para la definición de tradiciones constitucionales y, al mismo tiempo, propone su propio enfoque para comprender estas tradiciones en su particular contexto. En los resultados se demuestra que las tradiciones constitucionales se forman a lo largo de varias generaciones, por lo tanto, siempre reflejan las especificidades fundamentales de un sistema sociocultural. La autora también destaca los factores que influyen en la percepción de las tradiciones constitucionales en diferentes culturas jurídico-constitucionales. Por lo demás, el artículo estudia los enfoques de mayor divulgación para entender las normas constitucionales que no siempre coinciden plenamente con los cánones de la cultura constitucional y jurídica. Se utilizan métodos de cognición científica y filosóficos generales para explorar la tradición constitucional desde diferentes perspectivas de análisis. Se concluye que las tradiciones constitucionales, en su conjunto, pueden caracterizarse como elementos del legado constitucional que preservan los valores fundamentales de la democracia, el orden constitucional, el mecanismo del poder estatal y el sistema político basado en la Constitución, así como las formas constitucionales de gobierno consagradas en la ley.

Palabras clave: tradición constitucional; cultura constitucional y jurídica; derecho constitucional; factor cultural; norma jurídica.

Introduction

In the first decades of the 21st century, a very ambiguous and flexible legal-political environment developed in Russian society due to both ongoing internal transformations and global transition processes. Dynamic social and legal processes become a stimulus for new research on Russian constitutionalism. After comprehending the existence of the Russian Constitution of 1993, we face important scientific questions regarding such a unique source of Russian constitutionalism as the constitutional tradition on the eve of its 30th anniversary. There is a growing interest in the balance between traditions and innovations in law, the real influence of law and constitutionalism on modern social life and the possible future of Russia.

There is a need to rethink some significant issues of state transformations at the turn of the 20th and 21st centuries that have been already described. In connection with the appearance of new states on the political map of the world instead of the former Soviet Union (USSR) at the end of the 20th century (mainly, the largest country – the Russian Federation), it is necessary to provide a clear definition of the legal basis and political structure of these states. In the legal sphere, the main challenge was associated with finding out what model the new legal system of Russia should be built on: either it should use the foundations of the Soviet legal system and become its legal successor, or it should form its own legal system according to other models, for example, the most developed states (the so-called Western countries).

1. Methods

Due to the widespread criticism of the legal foundations of the previous state (the Soviet Union) in the relevant scientific and journalistic literature and the demonstration of advantages of the Western way of life, some experts believed that the best way could be to build the new Russian legal system over the Western model, with a predominance of liberal and democratic values enshrined in an organized legal system, primarily in the country's constitution.

The other experts claimed that each nation has its own centuries-old traditions and typical forms of organizing social and state life, i.e. forming an appropriate legal system. In addition, there are convergent views, according to which the Russian Federation is the legal successor of the Soviet Union and should form its legal system, on the one hand, based on the previous Soviet experience and the evolution of the Russian statehood, on the other hand, it should adopt the Western experience of building liberal-democratic legal systems.

The latter approach was chosen. The legal system of the Russian Federation partially consolidated the experience of the Russian Empire, the USSR and the Western countries. The formation and development of the Russian state system underwent certain changes, during which it moved from the socialist system to the liberal and democratic one. Large transformations in public life, the adoption of a presidential system, an actively pursued course towards developing a market economy, overcoming the dictate of the previous single political ideology, forming a civil society and the rule of law entailed many changes in all the spheres of life, including economic, political, legal, socio-cultural, educational, etc.

Both in theory and practice, different approaches, views and ways of social transformations collide. The legal sphere is no exception:

In 1992-1993, the sovereign statehood of Russia was forming. There were three types of power: legislative (the Congress of People's Deputies and the Supreme Council elected the former body), executive (the President and the Government appointed by the former) and judicial (the Constitutional Court). The process of choosing a specific form of statehood (either a presidential or parliamentary-presidential republic) was not easy (Kashchenko, 2009: 24).

Due to drastic social transformations, the Constitution of the Russian Federation was adopted in 1993 in a rather hasty manner. It constituted the milestone of political and legal reforms in renewed Russia (The Constitution of the Russian Federation, 1993).

2. Results

Currently, there are several approaches to the definition of constitutional traditions in the science of constitutional law.

Some supporters believe that constitutional traditions were formed and exist in those countries where the Protestant religion predominates. One of such advocates is K.V. Aranovskii (2003; 2004).

At the beginning of the 21st century, one of the most famous scientific studies on the constitutional tradition is K.V. Aranovskii's monograph dedicated to the spread of the constitutional tradition in Russia (Aranovskii, 2003; 2004). This research is practically the first to highlight and present scientific analysis in this area. The author analyzed state and legal traditions, which is necessary for understanding and characterizing the constitutional tradition. As a result, he defined the state-legal tradition as the historical and legal formation expressed in stable skills, conditioned by religious or secular beliefs, worldviews, feelings, the quality of information consumed and perceived, one's own understanding of law, power and statehood (Aranovskii, 2004: 26).

In general, K.V. Aranovskii regarded the constitutional tradition as a sustainable and holistic legal formation capable of renewing (Aranovskii, 2004: 26). The constitutional tradition is influenced by Protestantism, individualism, pragmatic rationality, traditional beliefs and images, equality and inalienable rights, which conditions certain behavioral patterns. It is characterized by the perception of legal conventions, the selection and control of feelings. Standardization and legal awareness are typical of the constitutional tradition (Aranovskii, 2004: 38).

According to the author, the constitutional tradition has a holistic and sustainable legal nature, when state and legal traditions share the features of a legal formation. However, he did not consider the historical impact on

constitutional traditions in the process of their formation since this feature is common only to state and legal traditions (Aranovskii, 2004: 38).

Answering the key question of his research about whether the Russian society can become constitutional, and if so, how this is achievable, K.V. Aranovskii believed that there were some similarities between the Russian environment and the environment with the dominance of constitutional traditions (for example, respect for law) but there were much more differences between them. This applies to both the ethical values that have developed over centuries and the practice of implementing power relations (Aranovskii, 2004: 38). In Russia, the ideals of conciliarism, collectivism and the common good were always fundamental. In the Russian environment, the triumph of truth and justice is the supreme value in contrast to the West, where more attention is paid to the correct and proper execution of laws (Aranovskii, 2004: 38).

It is worth mentioning that this study was conducted 10 years after the formation of the Russian Federation, therefore its objective and main tasks were fully justified. Since the country had a 70-year experience in building a communist society (diametrically opposite to the constitutional one), the results of this 10-year development show how the idea of constitutionalism was accepted in society and whether society wanted to further move in this direction. K.V. Aranovskii neglected the historical impact of Russian law on constitutional traditions in the process of their formation and development. He expressed the idea that such continuity can be inherent only in state and legal traditions. In his opinion, the constitutional tradition can be renewed in contrast to the Russian state and legal traditions.

Knyazev (2015) claimed that the constitutional tradition aimed at achieving a balance between individual freedom and public power. The essence of constitutional traditions is nothing more than a set of inalienable features of constitutional ideology that are understood as: the rule of law, recognition and respect for human rights and civil freedoms, democracy and popular representation, private property and entrepreneurship, the separation of powers and decentralization, equality before law and court, political and ideological diversity, multi-party system and freedom of association, independent judiciary and adversary proceedings (Knyazev, 2015). In general, the author discussed the constitutional tradition but did not define this phenomenon.

Another approach presented by Lafitskii (2013) provides that the constitutional tradition is formed under the influence of national legal systems, including Slavic, Romano-Germanic, Scandinavian and Latin American. In this regard, the scholar highlighted, for example, the Slavic constitutional tradition.

While describing typical features of the constitutional tradition, Lafitskii (2011) proposed to combine states with certain features into a specific group, for example, the features of the Slavic constitutional tradition. The scholar analyzed the constitutions of states with pronounced features of the Slavic constitutional tradition and referred to the basic laws as a source of such traditions. At the same time, he used the revealed patterns (including comparative jurisprudence) as a source of the Slavic (Russian) constitutional tradition. The classification of the Slavic constitutional features corresponds to the general structure of basic laws common to a number of the Slavic states. According to the scholar, Russia belongs to the states with pronounced features of the Slavic constitutional tradition (Lafitskii, 2011).

Lafitskii (2011) believed that the preambles of the Slavic constitutions (new basic laws of the Slavic world) contain the main features of constitutional traditions. All these preambles proceed from the need to restore the lost connection of times, preserve the heritage of ancestors, create a democratic, legal and social state (Lafitskii, 2011).

Special dictionaries (Avakyan, 2001; 2015; Arutyunyan and Baglai, 2006; Baglai and Tumanov, 1998; Tolkovi slovar konstitutsionnykh terminov i ponyatii, 2004; Azriliyan, 2007; Kutafin, 2003; Sukharev, 1987) contain legal vocabulary and summarize legal features, as well as constitutional terms, but do not provide any definition of the constitutional tradition. This only testifies to the fact that the term “constitutional tradition” is new and insufficiently studied within the framework of the science of constitutional law in Russia. Such a gap allows us to analyze this issue, discover interesting facts and answer the questions posed, as well as provide an original viewpoint.

3. Discussion

At the beginning of the 21st century, the scientific community repeatedly emphasized the need to amend the current Constitution of the Russian Federation, transform or even adopt a completely new Basic Law. Before 2020, several amendments were adopted in 2008 and 2014.

However, is such a regular “intervention” in the country’s Basic Law really necessary, or is it universal enough?

According to Zorkin, the deep legal meaning embedded in the constitutional text allows to adapt it to the changing social and legal realities within the doctrine of the “living Constitution” adopted in the world practice. The reliance on this doctrine helps identify its actual meaning in the context of modern social and legal conditions without distorting the legal meaning laid down in the Constitution of the Russian Federation (Zorkin, 2018).

Salikov noted that “evaluating the 25-year functioning of the Russian Constitution, it should be said that it has not exhausted its potential. Being a constitution, it contains considerable reserves that must be put into practice” (Salikov, 2019: 12).

At the same time, “the constitutional reform can hardly change the legal life in Russia and can only restore the current government to ease the existing social tension” (Ignatenko, 2020: 90).

The universality of the Constitution of the Russian Federation might mean that this law is based on significant national foundations of the Russian statehood and, as a consequence, traditional foundations of the Russian mindset. The fundamental principle of this Basic Law can be preserved through the spread and consolidation of constitutional traditions. Only this form of law can serve for the benefit of its citizens, accept and adequately respond to external factors for more than a decade while allowing positive transformations to be adopted.

However, not only political events affect the development and formation of Russian society. As 2020 has shown, the current situation connected with the COVID-19 spread and anti-coronavirus measures makes the global population reconsider the basic needs and rules of life to preserve their own health, the health of their loved ones and sometimes even their lives. Such prevention and control measures led to the closure of borders and restricted the movement of people across borders. We began to feel the need to study and perceive ourselves in this world. The question arises about basic human values, cultural origins and traditions.

In the course of the COVID-19 pandemic, the Russian citizens had another significant event, namely the all-Russian national voting to adopt amendments to the Constitution of the Russian Federation on July 1, 2020. These amendments should determine the further development of Russian society.

These factors also influence the scientific sphere that directs its vector towards the study of unique sources conditioning the development of Russian constitutionalism in the form of constitutional traditions. In Russian science, discussions about the concept of “tradition” and its role in the formation of modern Russia became more frequent, which indicates a growing interest in the new knowledge based on the specific Russian thinking and experience. A tradition is considered the most important factor in the stability and efficiency of any state (Chuvilkin, 2013).

In recent years, there has been an oversaturation of foreign ideas and views on the formation and development of a democratic society in Russia. We need to remember that Russia has a centuries-old history of state development and was able to preserve its sovereignty during this period. The unique experience of Russian statehood should be studied and used.

If the nature of legal traditions, their specifics and content are studied in detail in the relevant scientific literature (Marchenko, 2008; Medushevskii, 2014; Sulipov, 2013; Chuvilkin, 2013; Shatkovskaya, 2014), there is not enough research on the constitutional tradition. The existing references to the latter are mostly of an applied nature. Fortunately, the resulting discourse attracts the attention of scholars and contributes to the creation of new scientific works on this topic (but their number is still small). There are many applied publications about the constitutional tradition in connection with the classification and functioning of the main branches of law having their own specifics of legal traditions, for example, such phenomena as constitutional aspects of civil-legal traditions, state-legal traditions, etc. The “constitutional tradition” term is used in scientific literature as a comparative tool without considering this concept as an independent category.

Of course, the constitutional tradition originates from the legal tradition. However, the constitutional tradition should be regarded as an independent scientific category that has a definite role in the science of constitutional law. This is conditioned by the current relevance of the special constitutional formation and development of Russia, as well as the preservation of its unique traditions. Thus, it is relevant to study the constitutional tradition as an independent scientific category related to the legal field of knowledge and practice, i.e. constitutionalism, whose basis is the Constitution of a particular country as the main organizing center of modern constitutional and legal systems.

Currently, there are scientific studies concerned with the constitutional tradition in general, including the Russian constitutional tradition. In these studies, the meaning of the constitutional tradition does not reflect its special role in Russian society. Most scientific works in which authors mention the constitutional tradition are associated with their desire to show mental and ideological differences in its distribution. The significance of research on constitutional traditions as a scientific category of constitutional law, the theory of state and law is that the constitutional tradition ultimately receives a conceptual description, including a general definition, the identification of characteristics and distinctive features. Thus, it can become an independent category of jurisprudence and philosophy, consolidate its status in the development of Russian constitutionalism.

All this requires comprehensive analysis, the development of a scientific definition, a study of the essence, uniqueness and specific features of the national constitutional tradition.

Conclusion

Realizing that this article covers several scientific areas, we propose to use general scientific methods, as well as interdisciplinary methods of cognition (legal, cultural and philosophical).

We actively used comparative methods to view an object from diametrically opposite perspectives. We also referred to the historical method since the research object is characterized by a long development time.

The dialectical method helped us study different forms of the above-mentioned object from the standpoint of its unity and inner contradictions, as well as the struggle of opposites.

The stable constitutional construction of the state and the Constitution of the Russian Federation stipulates a thorough study of the constitutional tradition in Russia and its impact on the development of Russian constitutionalism in general.

There were certain preconditions (almost 30 years) for the development of constitutionalism in modern Russia. Indeed, this is a very short period if compared to the Western countries, where such history goes back centuries. At the same time, unique features that distinguish it from the other states are manifested in Russian constitutionalism. The traditions that existed in the Russian Empire and the Soviet Union are reflected in modern Russia, fit into its Constitution and state system.

While analyzing the above-mentioned scientific studies and guided by our own reasoning, constitutional traditions as a whole can be characterized as elements of the constitutional legacy that preserve the fundamental values of democracy, the constitutional order and the Constitution, the mechanism of state power and the political system based on the Constitution, the constitutional forms of government enshrined in the main the law of the state.

The constitutional tradition expresses an ingrained view and attitude prevailing in society towards constitutional values as the heritage of generations formed under the influence of various factors (including national mindset, religion, cultural and personal values, the values of state and law) and continues to be relevant in modern days. It has a long-term character, is preserved and passed on to generations.

We cannot dwell only on the general approach to the definition of constitutional traditions. This category should be considered not only in general but also from different perspectives. Assuming that the Western constitutional tradition means a tradition based on the constitution, the Russian concept has a slightly different meaning.

For example, the main democratic terms can be disclosed with due regard to the Russian mindset and experience, i.e. it is relevant to highlight the Russian constitutional tradition that greatly differs from the one that prevailed in Europe. Although Russia borrowed the ideas of democracy from the Western countries, they need to be interpreted exclusively in the “Russian” way.

We believe that it is necessary to distinguish between the Russian and foreign constitutional traditions. In this case, the foreign heritage formed within the framework of some constitutional tradition will influence the constitutionalism of another state. Despite long-term adoption, the constitutional tradition tends to succumb to influence and, as a result, change. Another question is whether the receiving party or the party influenced by a foreign constitutional tradition is ready for such an impact.

It is worth mentioning that the Russian constitutional tradition is based on its experience, transmitted and consolidated in constitutional norms, has unique legal and cultural features for citizens and compatriots living in this territory.

Based on the above-mentioned reasoning, we can conclude that there are two opposed approaches to the constitutional tradition. This opposition can be expressed in the form of a “traditional” constitutional tradition and an “anti-traditional” constitutional tradition (or a constitutional anti-tradition).

The “traditional” constitutional tradition should be understood as the constitutional tradition characterized by long-term constitutional culture and values. On the contrary, the “anti-traditional” constitutional tradition acts as an alien constitutional tradition, not inherent and opposite to the first one. This tradition influences the development of the “traditional” one from the outside and can be perceived in relation to the “traditional” constitutional tradition either negatively or positively. The constitutional anti-tradition is outside influence.

Different views about the constitutional tradition indicate that this category is being studied by scholars and arouses their interest due to the lack of sufficient elaboration. The discussion of this issue allows us to consider the constitutional tradition from different perspectives and reveal new non-specific features. A separate study should be concerned with unique features of the national constitutional tradition.

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