

CONSTITUTIONAL REVOLUTIONS UNDER AUTOCRACY

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ABSTRACT

Gary Jacobsohn and Yaniv Roznai's (2020) book *Constitutional Revolution* offers a sophisticated conceptual framework with a fascinating description of empirical occurrences of substantive revolutions in the practice and understanding of constitutionalism in Germany, India, Hungary, and Israel. While the conceptualization in the book and its empirical illustration clearly draw from regime transformations or substantive changes within democratic regimes, we know little about the extent to which substantive constitutional reforms are possible and meaningful in autocratic regimes. As their concept of constitutional revolution is ambiguous and requires a substantive engagement with an individual case at hand, we cannot simply expect concept equivalence when expanding its use beyond a transitory or democratic context. Hence, in this contribution I ask, What constitutes a constitutional revolution in an autocratic regime? To shed light on this question, I rely on the expectation that we do not find important differences in the substance of autocratic constitutions compared to democratic constitutions. Autocratic elites, also, understand the possibilities of constitutional change and respond to them as they offer regime stability and simply more power, but that is not a revolution. Therefore, I argue that the substantive meaning of an amendment must be a departure from the inherent logic of the constitution, especially outside the standard procedures for autocratic ruling. Thus, in this paper I discuss the theoretical implications of a

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constitutional revolution under autocracy without a regime transition and provide empirical evidence from various constitutional amendments and de facto reforms in Russia. I show that a constitutional revolution is not always the most important or most discussed constitutional change—at least, not in an autocratic context. This discussion has important implications for understanding constitutionalism and autocratic stability and the largely overlooked relationship between substance and process in nondemocratic settings.

KEYWORDS: *constitutional revolution, autocracy, Russia, federalism*

I. A CONSTITUTIONAL REVOLUTION

What is a constitutional revolution in an autocratic regime without a transitory context? Jacobsohn and Roznai (2020) understand constitutional revolutions as a type of change that results in a substantial departure from constitutional practice and identity in any given country. By weaving theoretical argument, empirical observation, and critical reflection, the authors of *Constitutional Revolution* take us as reader through the development of a new theoretical concept and its real-life occurrences. By emphasizing the well-known flaws in the logic of *Rechtspositivismus*, they do not differentiate between the legality or illegality of constitutional changes.² Instead, they show that “[c]hanging the substance of a constitutional trajectory through the amendment process may arouse legitimacy issues even in the absence of the irregularities” (Jacobsohn and Roznai 2020, 7). They rather point to an “amendment-induced constitutional transformation” (Jacobsohn and Roznai 2020, 8). Hence, they argue, that in order for constitutional changes to be understood as a constitutional revolution, researchers have to focus on substance over process. This argument is particularly convincing in the authors’ case study on the Lisbon decision of the German Constitutional Court.

The key “engine driving such change” (Jacobsohn and Roznai 2020, 21) is a certain disharmony of the constitutional order. In his earlier work,

2. Yet there is the clear tension between proceduralist like Hans Kelsen or authors with a more substantivist approach toward constitutional amendments. Kelsen emphasized that a constitution is only “a certain legal form which may be filled with any legal content” (1999, 260), and he argues that “the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated” (1999, 117). Conversely, “it does not matter how fundamental changes in the substance of the legal norms are if they are performed in conformity with the provisions of the constitution” (Paczolay 1992, 563). See also Roznai (2017) for this discussion.

Jacobsohn (2010, 16) stresses that “disharmony” in constitutional design can be a valued asset in the necessary process of renegotiation and recalibration. His idea is that inconsistency, disharmony, or a “bricolage” (Tushnet 1999, 1287) in constitutional designs may be more helpful in the democratic development of countries than harmonious or consistent constitutional solutions. A harmonious constitutional design in this conceptualization matches its individual parts in a consistent way with “structural integrity” (Tushnet 1999, 1287) or parts that fit together (Horowitz 2000, 121). This is clearly related to an argument by Hanna Lerner, who recommends the inclusion of contrasting provisions in the constitution to allow the state to actively appreciate the societal differences that are at the core of its foundation (Lerner 2010). Yet, Lerner’s assumption is that this applies only for “the constitution’s symbolic and foundational facets” (Lerner 2010, 74) and explicitly emphasizes a consistent design when it comes to the institutional features. However, other research has pointed to the positive effect of inconsistency—for example, in the type of government—on liberal democracy, horizontal accountability, and the rule of law (Fruhstorfer 2019).

With the premise that constitutional revolutions are a type of change that results in substantial reorientation in constitutional practice and understanding, Jacobsohn and Roznai (2020) create a sufficient condition for a constitutional revolution. Because the authors do not emphasize a necessary condition for the concept of constitutional revolution, by default they choose a family resemblance approach to concept formation. So, while there are other possible characteristics that apply when we observe constitutional revolutions (e.g., disharmony or reference to the historical past), every constitutional change that substantively changes the core constitutional logic and identity is, in their approach, a constitutional revolution:

All constitutions are crafted over time in the sense that their meanings and identities evolve gradually in ways determined by a dynamic fueled by their internal tensions and contradictions and by their confrontations with a social order over which they have limited influence. In time, a constitutional order is constructed and shaped, and the ambitions inscribed in, or attributed to, the constitution are realized or not—or more likely, approximated to a greater or lesser degree. And that is the moment for assessment of the constitutional revolution. (Jacobsohn and Roznai 2020, 58)

And while this concept inherits a certain ambiguity,³ with the in-depth descriptions of individual cases, Jacobsohn and Roznai (2020) forestall much of

3. Something the authors readily admit and even cherish: “This ambiguity—inevitable, it should be said, in what is an essentially interpretative presentation” (Jacobsohn and Roznai 2020, 21).

the expected criticism. Therefore, when we want to expand and understand the concept of a constitutional revolution under autocracy, we rely on in-depth descriptions of individual cases and occurrences. This in-depth analysis has to consider the characteristics of individual autocratic regimes, the diversity within the autocratic regime types, and the substantive logic of the constitution in the respective country.

To do so, in the following sections I explain the logic of constitutional change and constitutionalism under autocracy.⁴ Based on this description of the different roles constitutions might have under undemocratic conditions, I provide a comprehensive analysis of the reform of the Russian Constitution changing center-region relations. The literature on this subject often claims that the balance between center and region “is subjected to continual review, and almost every generation of politicians has found it necessary to re-shape relationships between the center and regions to a certain degree and in certain spheres to resolve pressing problems” (Busygina 2018, 196). Yet, I posit that the constitutional amendment in 2014 and the de facto constitutional amendments by ordinary law in 2000 and 2004 constitute not only a step in the continual review of center-region relations but also a constitutional revolution, a substantial reorientation in the constitutional practice, and understanding of federalism and regionalism in Russia.

II. CONSTITUTIONALISM UNDER AUTOCRACY

The role of constitutions under autocracy is an enduring puzzle for political scientists and legal scholars. Constitutions can create stability and guarantee the endurance of autocratic regimes (Albertus and Menaldo 2012; Isiksel 2013; Tombus 2020). In theocracies, constitutions have bounds and offer opportunities (Hirschl 2010; Meriéau 2018). Constitutions help to legalize democratic backsliding masked as autocratic legalism (Scheppelle 2018; Uitz 2015), and they function differently when we move beyond a Westernized perspective on constitutionalism (Fruhstorfer and Frick 2019). While it is tempting to disregard the influence of constitutions in autocratic and hybrid regimes, and to treat them as shams (as described by Law and Versteeg 2013; Weber 1906), constitutions in these contexts cannot be dismissed so quickly. Researchers have taken enormous strides in the last years to establish this empirical fact. From a historical perspective, constitutions and more general law played a horrific role as devices to rule during the terrors of the Nazis. This experience of *legal positivism* drove a wave of scholars to work on ways to give law

4. “Autocracy” is here used as a term that includes several subtypes of authoritarian and hybrid regimes and that builds the opposite of a consolidated democracy.

a deeper meaning beyond a manual to organize societies. Yet, observing constitutionalism in current Turkey or Russia brings this logic of a described “semantic constitution” back to concrete assessment (Loewenstein 1969). In particular, Mark Tushnet (2013) and Ran Hirschl (2013) have argued that constitutionalism can be not only the limitation of power but also the opposite of arbitrary rule, as well as a way to increase the efficiency of politics. With this, they pluralize “the idea of constitutionalism” (Tushnet 2013, 39). Turkuler Isiksel (2013, 702) makes this explicit and formulates the concept of authoritarian constitutionalism “as a system in which the constitution rather than constraining the exercise of public power is coopted to sanction oppressive uses of it.”⁵ In this sense, constitutions are neither democratic nor autocratic; they legitimize and legalize the power of the ruling elite (Myerson 2008). Constitutions are certainly feasible and proper ways to organize modern societies and governance, even in settings that are not entirely democratic.

When we think about it, the shared commonality of all regime types is their urge to legitimize their rule. The work of Hirschl (2013) provides us with the insight that constitutions and constitutional amendments are primarily written by elites concerned about losing their power—in democratic as well as autocratic contexts. In line with the motivation to implement a constitution in the first place, by amending the constitution we expect that any autocratic leaders or leadership groups uses these amendments to legitimize their rule and strengthen the relation between leadership group and supporters (Albertus and Menaldo 2013, 55). Hence, a constitutional revolution should help elites to stabilize their rule. But what constitutional core needs to be changed, while remaining autocratic? A simple answer would be this: when we know who has access to power and how the authority it endows is exercised, we know what political regime we are observing (Kailitz 2013) and which constitutional core has to be changed, especially in a democracy-autocracy dichotomy. Yet, answers are seldom simple, even within a dichotomy. Instead, we find a world of regime types that can be distinguished along “the rules that identify the group from which leaders can come and determine who influences leadership choice and policy” (Geddes et al. 2014, 314). The formal and informal rules of decision-making in this setting derive from this logic and are largely influenced by the representation of specific interests (Geddes et al. 2014). Thus, changing this logic means we change the core function of this regime. And here, the book offers a straightforward answer for understanding this conundrum: “Revolutions can come in different shapes and sizes. Legal continuity must not be confused with regime

5. H. W. O. Okoth-Okendo (1972) describes constitutions along this line as power maps; for a similar description, see Albertus and Menaldo (2013).

continuity” (Jacobsohn and Roznai 2020, 98). Although the authors do not spell it out, in their understanding of a constitutional revolution it is possible to revolutionize an autocratic constitutional order— through amendment or interpretation— without a regime transition.⁶ Yet, as I argue, in an autocratic context without a regime transition, a constitutional revolution is seldom the most important or most discussed constitutional change we find.

III. RUSSIA’S FEDERALISM

What usually attracts the most attention when it comes to constitutionalism under autocracy, and even more so in the case of Russia, is the expansion of presidential power or the extension of presidential term limits. But other amendments that are less prominent in the public or scientific discourse also change or threaten core principles of the constitutional logic. The constitutional amendments pursued by President Putin in 2020 are far-reaching and decrease judicial independence, bolster the status of ethnic Russians for the sake of ethnic equality, and constitutionalize a “patriotic conservatism” (Pomeranz 2020). In addition, the 2020 amendments create uncertainty about Vladimir Putin’s future by pursuing different strategies. The amendment adopted in July 2020 resets the number of terms to zero for any current or former president of the Russian Federation and in Article 18 removes the word “*подряд*” (in a row), thus putting a halt on a possible repetition of the castling pursued between Putin and Dmitry Medvedev in 2008 and 2012. Establishing a different route forward (i.e., changing the presidential term years before the actual question of term limit compliance arises) while also proposing amendments guaranteeing him immunity for his time as prime minister is a perfect way for Putin to avoid the lame duck syndrome. These amendments are far-reaching and incredibly important for the future of the country and the future career trajectory of Vladimir Putin.

Yet, none of these amendments, as far-reaching as they may be, constitute a constitutional revolution, a change that substantially alters the inherent logic of the system. The extension of presidential term limits and the weakening of the Supreme and Lower Courts, as well as the increase of presidential influence over the composition of these courts, are a continuation of constitutional functions and a logic already present in the 1993 Constitution of the Russian Federation. As

6. This is conceptually different from a constitutional dismemberment (Albert 2019), an amendment that does not create a constitutional logic supporting the constitutional purpose but destroys the substantive core of a constitutional text.

William Pomeranz (2020) put it, President Putin “relied and expanded on certain longstanding principles and values, and reformed a unified, autocratic, centralized, and highly personalized state.” Contrary to this, we see that other constitutional reforms that received much less attention constitute a constitutional revolution. The reforms of the central-regions relations in Russia under Putin offer a paradigmatic example of a constitutional revolution under autocracy. These reforms were a substantive departure from the constitutional core established in the 1993 Constitution of the Russian Federation, adjusting a salient issue in Putin’s efforts to hegemonize and “streamline” his power over the governors and to improve governance in the regions.

A. Historic Legacies

A large part of the formal constitutional amendments to the Russian constitution, since its adoption in 1993, were devoted to central state relations and the federal subjects. Obviously, federal relations are an important element of political control for the world’s largest country, stretching over nine time zones. Hence, it is no surprise that power and effective governance over the different parts of this country are a contested prize among its political elite. Part of the historic czarist (Russian) identity is rooted in the pursuit of territorial expansion, which culminated in the Soviet industrialization attempts of Siberia. But while this created a large empire with a high level of urbanization—in 2020, 74.8 percent of the total population (World Fact Book 2020)—these urban centers are scattered, obviously with a concentration in the western oblasts (e.g., Nizhny Novgorod, Astrakhan, or Penza). The Russian Federation, as the name implies, is a federal state of eighty-five subnational units (since 2014), most of which are ruled by a governor-type executive and a directly elected legislature.⁷ Usually the legislative organs are a cross-section of regional elites sustaining the regime. O. J. Reuter and D. Szakonyi (2019, 557) describe them as “the most prominent regional figures—directors of large enterprises, representatives of state corporations, and the heads of major hospitals and research institutes.” Control over and support within these elites is a substantive part of stabilizing the Russian autocratic regime. Yet, theoretically, “[f]ederative relationships are essentially an intertwining of mutual dependencies: Regional politicians are granted powers to act independently, at least in some areas, while they serve as dependent agents of the federal center in others” (Busygina 2018, 196).

7. The Constitution of the Russian Federation (Art. 5) distinguishes between territory, regions, autonomous areas, and federal cities (also named as *oblast*, republic, *krais*, and autonomous *okrugs*).

These mutual dependencies were, however, a significant challenge in post-Soviet constitutional development. Although the federal structure of Russia has a long *de jure* tradition (also legally the Union of Soviet Socialist Republics [USSR]), the last Soviet president Mikhail Gorbachev pointed to a discrepancy between the legal provisions in the Soviet Constitution and *de facto* experiences: “Up to now our state has existed as a centralized and unitary state and none of us has yet the experience of living in a federation” (Gorbachev 1989, quoted in S. Kux, “Soviet Federalism,” *Problems of Communism* (March–April, 1990), 2). Alfred Stepan (2000, 169) summarizes this as follows: “In the early 1980s, most power in the USSR emanated from Moscow.” Yet, this quickly changed in the course of the dissolution of the Soviet Union. In particular, in the last year of the Soviet Union the Russian provinces profited from the conflicts between the Soviet president Mikhail Gorbachev and the Russian president Boris Yeltsin and moved toward a confederation as an organizational model and more autonomy (Sharafutdinova 2013, 359). Yeltsin as Russian president urged the regional representatives “to take as much sovereignty as they could swallow” (Alexander 2004, 233) and initially profited from this conflict in winning independence for Russia. Yet, this strengthening of the regions came back to “haunt” him in the course of creating the new Russian Federation. The weakness of the executive and legislative center toward the federal units became even more apparent after the dissolution of the Soviet Union and under Yeltsin’s presidency. Some authors point to the Kremlin’s politics of “appeasement” toward the regions (Sharafutdinova 2013, 358), or even call it “anarchy” (Ross 2005, 355). This resulted in powerful regional elites with “personal fiefdoms” (Sharafutdinova 2013, 359; Ross 2005, 355) in a negotiated form of authoritarian federalism based on intimidation and human rights abuses. The conflicts before the adoption of the Russian Constitution of 1993 did not create a stable ground for a new federal logic; rather they emphasized the inherited Soviet form of “ethnoterritorial form of federalism” and the differences in the legal status and power of different regional subjects (Ross 2005, 350).

The 1993 Constitution was the first of many attempts to balance this asymmetry by declaring all regional subjects equal (Art. 5, 1993 Constitution of Russian Federation). Yet, the provision concerning the federal-center relations as well as the federation-subject relations did not establish a clear power distribution, offering ambiguous language instead. While Article 4, Section 2, and Article 15 stated the supremacy of the Federal Constitution over the laws on the regional level throughout the whole territory, Article 11 emphasized the applicability of the Federation Treaty and its inherent push for federal asymmetry, giving significantly more power to ethnic republics than to other regional subjects. When we follow Robert Dahl’s definition of a federal state, “a system in which some matters are exclusively within

the competence of certain local units—cantons, states, provinces—and are constitutionally beyond the scope of the authority of the national government; and where certain other matters are constitutionally outside the scope of the authority of the smaller units” (Dahl, 1986, 114), Russia is not an ideal case. It is, however, a federation with eighty-nine elected officials, with control over their territory and its resources, and with substantial influence in the center as *ex officio* members of the Federation Council—and thus over budget (Stepan 2000, 169). This regional representation on the central level was constitutionalized; that is, the constitution stated that the Federation Council is constituted by two representatives from each constituent entity of the Russian Federation—one from the legislative and one from the executive state government body (Art. 95, Sec. 2). While the first election was nationwide, “[f]rom 1996 until 2000 the heads of the legislative and executive branches of government in each region were granted *ex officio* membership of the Council” (Ross 2003, 32). This provided the potential for power struggles between region and center. Even more important was the election of the regional heads/executives that was not constitutionalized and was pursued in different modes ranging from a model combining elections and appointment as well as universal elections under President Yeltsin to presidential appointments—after a constitutional revolution—under President Putin (Blakkisrud 2015).

All in all, the Yeltsin era can be characterized as one of decentralized politics with both *de facto* and *de jure* autonomy yielded by regional legislators and governors. This was in line with the logic of the 1993 Constitution of the Russian Federation. However, this changed under President Putin, who quickly established control over the regions and created a “top-down power pyramid [...] strengthened the Kremlin, and the central state vis-à-vis the regions” (Sharafutdinova 2010, 672).

B. Putin’s Reforms

Despite a formal power distribution in the logic of mutual dependencies, the efforts to centralize power were already observable during Putin’s first presidential term. After the terror attack on a school in Beslan, the revision of center-region relations intensified. Several ordinary laws with substantive impact on the constitution as well as formal constitutional amendments created a significant change in the logic of the federal system of Russia. The 2004 federal law on the “basic principles of the organization of legislative and executive branches of the government in the subjects of the Russian Federation” abolished the popular election of the governors; instead “legislative branches were to elect candidates proposed by the president” and allowed “the president to dismiss any governor if he or she lost his

trust” (Petersen and Levin 2016, 534). Helge Blakkisrud (2015, 105) describes the abolishment of elections for governor as a “critical juncture in the development of Russian center-regional executive relations.” These de facto constitutional amendments through ordinary laws serve as a case allowing a “disintegration between form and substance” (Petersen and Levin 2016, 521). A change of this kind that Petrov et al. (2010, 3–4) describe as “overmanaged” governance, enabled the president to dictate the election of candidates for regional governor. While this gives the center enormous influence over the region and the Federation Council (as they in turn appoint its representatives), this overmanagement also had disadvantages, like the lack of a “reliable mechanism for selecting people appropriate for such crucial positions” (Sharafutdinova 2010, 673), and indeed, the rearrangement of the specifics of the election or appointment of regional governors continued. After protests in 2011, the broader participation of the regions in gubernatorial elections was reconsidered, reintroduced, and after the first round of elections in October 2012 quickly amended to guarantee centralized control. The constant in all of this was Putin’s goal of remaining the “ultimate arbiter” over the selection of regional executives (Blakkisrud 2015, 115).

Another important step in rearranging center-subject relations was the reforms of the Federal Council. Darren Slider described the specific role of the Federation Council in the early 1990s as follows:

The Federation Council has most often acted to disrupt the development of a normal federation by seeking to retain and expand regional powers far beyond that envisioned in any effective federal system. Moreover, the members of the Federation Council have purposely created gridlock in the legislative process in order to stall legislation that would encroach on their considerable powers. One feature of the Russian constitution encourages a strategy of delay and gridlock: in the absence of federal legislation, regions are allowed to pass their own laws on any given area of policy. Rather than attempting to create the legislative foundations of a well-defined federal system, the goal pursued by most regional leaders is to preserve an informal system which distributes power and resources on the basis of individual lobbying of central government officials. (Slider cited in Stepan 2000, 161)

Influence over the powerful Federation Council was and is important. The Federation Council has an important role to play in legislation (e.g., legislative initiative and the adoption of federal laws). It has to give approval to changes in borders between subjects of the Russian Federation. It must also give approval to the

decree of the president of the Russian Federation on the introduction of martial law, states of emergency, and the use of the armed forces abroad, as well as the appointment of judges to the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, and the Higher Arbitration Court of the Russian Federation (Arts. 102, 104, and 105 of the Constitution of the Russian Federation).

To rearrange the power distribution in this particular institution was especially important to Putin and his goal of creating a more centralized and center-focused mode of governance. Therefore, shortly after Putin became president, he pushed for the separation between governorship (or more generally regional leader) and being ex-officio senator in the council (Ross 2005, 357). While this reform was strongly opposed by the regional representatives—considering the perks of living in Moscow, immunity, and substantive influence—it was successfully implemented after the threat of overruling any legislative veto by the Russian Duma (i.e., the lower chamber). The composition of the Federation Council was again part of a constitutional amendment in 2014. This amendment was formally initiated by State Duma representatives from different parties and confirmed by the State Duma, the Federal Council, and the regional parliaments (Art. 136 of the Constitution of the Russian Federation). Since this confirmation, the president is allowed to nominate 17 out of 170 senators, in a political institution that otherwise resembles the federal representative logic of the US Senate, with two senators per region (one nominated by the regional parliament, one by the governor and confirmed by the regional parliament). The president has thus far not used his power to nominate Federation Council senators, possibly keeping it as a token, aimed at weakening regional representation.

IV. CONCLUSION: WHEN AUTOCRATIC CONSTITUTIONALISM DOES NOT RULE OUT CONSTITUTIONAL REVOLUTIONS

A constitutional revolution in Jacobsohn and Roznai's conceptualization is a substantial departure from constitutional practice and identity, and while various constitutional amendments or court decisions lead to a constitutional transformation, they do not all substantially alter the core of a nation's constitutional understanding. The concept of such a revolution is, thus, ambiguous, and in some cases only history can offer a sound interpretation of whether a constitutional event actually constitutes a constitutional revolution. The idea presented here, of a constitutional revolution under autocracy, follows the same logic as in a transitory context or under a democracy. Yet, key aspects are different, and

a constitutional revolution in an autocratic setting does not address problems that might arise in what we consider key to autocratic regimes (executive succession, for example). With the example of Russia, we see that the overhaul of the constitution to further strengthen the executive and Putin's rule this year does not constitute a constitutional revolution. These changes are extensive and mark the "transition to a Great Presidency," and they provide the basis for a "unified systems of public power" (Petrov et al. 2020; Greene 2020). But they do not substantively change the logic of this autocratic constitution and Russia's constitutional identity. Despite its novelty, the federal system in Russia was a key characteristic of the new system developed after the end of the Soviet Union. The subjects of the federation were able to resist the federal center for quite a while, and the constitution was framed in a way that supported this autonomy. Yet, after Vladimir Putin became president, the relationship between center and region changed completely. The combination of the 2004 ordinary law on the nomination/appointment or election of the regional governors and the 1999 ordinary law and 2014 constitutional amendment rearranging how the Federation Council is composed and how Putin can influence its membership changed "the essence of federalism [as] a constitutional principle" (Petersen and Levin 2016, 535). Therefore, this constitutes a constitutional revolution sustaining the dominance of the center in this autocratic regime.

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