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Roman Petrov and Peter Van Elsuwege

Post-Soviet Constitutions and Challenges of Regional Integration

Adapting to European and Eurasian
Integration Projects

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and **Peter Van Elsuwege**

 **Routledge**
Taylor & Francis Group
LONDON AND NEW YORK

First published 2018
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing-in-Publication Data

Names: Petrov, Roman, 1973–, author. | Elsuwege, Peter Van, author.

Title: Post-soviet constitutions and challenges of regional integration : adapting to European and Eurasian integration projects / Roman Petrov and Peter Van Elsuwege.

Description: New York : Routledge, 2018. | Series: Routledge research into EU law | Includes bibliographical references and index.

Identifiers: LCCN 2017038224 | ISBN 9781138101593 (hbk) | ISBN 9781315656847 (ebk)

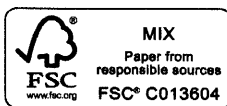
Subjects: LCSH: Constitutional law—Europe, Eastern. | Constitutional law—Eurasia. | International and municipal law—Europe, Eastern. | International and municipal law—Eurasia. | Law—Europe, Eastern—International unification. | Law—Eurasia—International unification.

Classification: LCC KJC4445 .P48 2018 | DDC 342.4702—dc23
LC record available at <https://lcn.loc.gov/2017038224>

ISBN: 978-1-138-10159-3 (hbk)

ISBN: 978-1-315-65684-7 (ebk)

Typeset in Galliard
by Apex CoVantage, LLC



Printed and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY

Contents

<i>Notes on contributors</i>	vii
<i>List of abbreviations</i>	xi
<i>Acknowledgements</i>	xiii

Introduction	1
ROMAN PETROV AND PETER VAN ELSUWEGE	

PART I	
European and Eurasian integration initiatives: constitutional challenges	3

1 The evolution of constitutionalism in the post-communist countries of Central and Eastern Europe: some lessons for the post-Soviet space	5
PAUL BLOKKER	

2 Protecting the rule of law in post-Soviet states: the relevance of European and Eurasian integration	28
OLGA BURLYUK AND VERA AXYNKOVA	

3 The Eurasian Economic Union: balancing sovereignty and integration	48
RILKA DRAGNEVA	

4 The Association Agreements between the EU and Georgia, Moldova and Ukraine: constitutional issues of sovereignty and legitimacy	71
RILKA DRAGNEVA	

PART II

Constitutional orders of the post-Soviet countries and their adaptability to European and Eurasian integration	89
5 The constitutional order of Ukraine and its adaptability to the EU-Ukraine Association Agreement	91
ROMAN PETROV	
6 The constitutional order of Georgia and its adaptability to the EU-Georgia Association Agreement	105
GAGA GABRICHIDZE	
7 The constitutional order of Moldova and the challenge of multi-vector integration	118
MIHAELA TOFAN	
8 From EU integration process to the Eurasian Economic Union: the case of Armenia	131
NARINE GHAZARYAN AND LAURE DELCOUR	
9 The constitutional order of Belarus and its adaptability to the Eurasian Economic Union: a 'living constitution' workaround	153
MAKSIM KARLIUK	
10 The constitutional order of the Russian Federation and its adaptability to European and Eurasian integration projects	168
PAUL KALINICHENKO	
11 The constitutional order of Kazakhstan and its adaptability to the Eurasian Economic Union	182
ZHENIS KEMBAYEV	
Concluding remarks	198
ROMAN PETROV AND PETER VAN ELSUWEGE	
<i>Annex 1: rule of law provisions in the Constitutions of post-Soviet states</i>	202
<i>Annex 2: constitutional provisions on the protection of national sovereignty</i>	222
<i>Table of cases</i>	226
<i>Index</i>	231

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10 The constitutional order of the Russian Federation and its adaptability to European and Eurasian integration projects

*Paul Kalinichenko**

Introduction

Immediately after the collapse of the Soviet Union in 1991, the Russian Federation (Russia) showed an interest in European integration. Russia was one of the first post-Soviet countries to sign a Partnership and Cooperation Agreement (PCA)¹ with the EU and to join the Council of Europe.² In the beginning of the 21st century, the Russian political establishment was captivated by the concept of the Four Common Spaces that provided a new agenda for legal approximation and economic convergence between the EU and Russia.³ Russia was seriously committed to getting involved in the European integration process as an equal and reliable strategic partner.⁴ However, following the Ukrainian crisis, the evolution of close EU-Russia relations has come to a halt.⁵ In the meantime, the EU-Russia bilateral relations have been effectively frozen. As a result of the EU's restrictive measures (sanctions),⁶ the negotiations on a new bilateral framework agreement replacing the PCA have been stopped. Moreover, the effective application of the PCA has been significantly limited due to public security reasons (application of diplomatic, political and economic restrictive measures against Russian companies and nationals).⁷

Despite seeking closer rapprochement with the EU, Russia never dropped its ambitions as a spearhead of political, economic and legal integration within the post-Soviet area. Since the fall of the Soviet Union, Russia led the evolution of regional integration within the post-Soviet area: from the CIS, the Eurasian Economic Community, the Single Economic Area and the Custom Union, the Russia-Belarus Union State to the contemporary Eurasian Economic Union (EAEU).⁸

Against this backdrop, this chapter aims to study the constitutional dimension of Russia's participation in various regional integration projects. First, a short description of the constitutional foundations of the Russian political system and concepts of sovereignty in the Russian Constitution of 1993 will be discussed. Special emphasis will be placed on the application of international law in the Russian legal order. Second, this chapter will focus on the impact of the EAEU *acquis* on the constitutional system of Russia. It will be argued that the

EAEU project is more likely to become a political imitation of integration than an attempt to establish a genuine supranational economic union within the territory of the former Soviet Union. Finally, this chapter addresses the issue of Russia's participation in the European Convention on Human Rights (ECHR) and its new approaches to implementation of the European Court of Human Rights (ECtHR) judgments in the Russian legal order on the ground of the latest decisions of the Constitutional Court of the Russian Federation.

The constitutional system and the concept of sovereignty in Russia

The Russian Constitution was adopted by a nationwide referendum on 12 December 1993 as the basic law of Russia. It was inspired by Western constitutional traditions and internationally recognised democratic and human rights values.⁹ Undoubtedly, this document laid down a firm foundation stone for the Europeanization of contemporary Russian law.¹⁰

The constitutional order of Russia is characterised by three features. First of all, some provisions of the Russian Constitution are immune from further amendments. It concerns the provisions on fundamentals of the constitutional system, on human rights and on constitutional review. If these provisions are to be amended, the Constitution requires the summoning of a Constitutional Assembly or a referendum.¹¹ Secondly, the Constitution of Russia integrates international law acts into its national legal order and recognises the priority of duly ratified international agreements above conflicting domestic laws.¹² Thirdly, the Constitutional Court possesses the exclusive competence to interpret the Constitution. Its legal positions are binding¹³ and are considered as judicial precedents within the Russian legal system.¹⁴

Notwithstanding the ongoing academic debate on the Russian approach of sharing European common values,¹⁵ it must be acknowledged that the Russian Constitution laid down the basis for a principally new Western-style legal system in post-Soviet Russia. The major breakthrough of the Constitution of 1993 is the decisive departure from the Soviet legal heritage, in particular, with regard to the implementation and application of international law within the national legal order.¹⁶ It is noteworthy that, at the time of its adoption, the Russian Constitution had the most liberal provision regarding the application of international law within a national legal system among all former Soviet countries. Consequently, the provisions of the Russian Constitution on application of international law gave greater opportunities for Russian judges to apply and interpret international law in accordance with their constitutional acts than any other judges from the former USSR.¹⁷

Moreover, the Russian Constitution is the only in the post-Soviet area which contains a so-called 'integration clause', authorising the transfer of sovereign powers in order to participate in the functioning of international organisations.¹⁸ According to the Federal Law 'On International Treaties of Russian Federation' of 15 July 1995, Russia can join any international organisation on the ground

constitutional provisions.⁶¹ Nevertheless, the Constitutional Court proposed a quite original way of enforcing the *Yukos* judgment. In particular, it suggested the selling of 'identified property of the Yukos company and its management' in order to ensure the payment of the compensation and legal costs.⁶²

Hence, the recent case law of the Constitutional Court reveals how it is gradually turning the international-friendly provisions of the Constitution to a defensive shield against supranational decisions of international institutions and organisations and judgments of international courts.

Concluding remarks

Our study indicates that, arguably, the Russian Constitution of 1993 is the most international law-friendly constitution among the countries of the post-Soviet area. It is the only Constitution with an explicit 'integration clause' (Article 79). Nevertheless, despite the initial openness to international law and a favourable attitude towards the Europeanisation of the Russian legal order, recent constitutional developments in Russia shifted towards a completely different direction. In particular, the case law of the Russian Constitutional Court regarding the enforcement of decisions of the ECtHR reveals an increasingly defensive and isolationist position justified by the objective of guarding the national sovereignty and protection of the domestic constitutional principles against the influence of international law. Obviously, this trend creates increasing and worrying tensions with regard to Russia's participation in the Council of Europe and the ECHR and its commitment to common European values. In this respect, the recommendations of the Venice Commission are of crucial importance to restore the fragile balance between the ECHR and the Russian constitutional order and to ensure the effective protection of fundamental rights in Russia.

Simultaneously, the process of the Eurasian integration creates new challenges for the Russian constitutional order. In particular, the recent case law of the EAEU Court introducing the direct effect of the Astana Treaty within the legal orders of the EAEU Member States may potentially conflict with the Constitutional Court's attempts to restore the full and unquestionable supremacy of the Constitution over decisions of international institutions and organisations and judgments of international courts. In the end, this strategy may endanger the effectiveness of the Eurasian integration project within the post-Soviet area and beyond.

Notes

- * This contribution is based on results obtained within the framework of the state assignment of the Ministry of Education and Science of Russia 29.6607.2017/8.9 ('Science of the Future', Kutafin Moscow State Law University) on the topic 'Legal Aspects of Development of the Relations between Russia and the European Union in the Context of Russia's Priorities for Participation in Global and Regional Integration Taking into Account the Current International

Situation'. The author wishes to thank Maksim Karliuk for research support and valuable comments. The text is prepared with the support of the Erasmus+ programme of the European Union, Jean Monnet Chair, Project number 575077-EPP-1-2016-1-RU-EPPJMO-CHAIR

- 1 Sobraniye Zakonodatelstva Rossiyskoy Federatsii (Compilation of legislation of the Russian Federation – SZ RF), 1998, No 16, st. 1802; *OJ*, 1997, L 327/1.
- 2 Federal Law of 23.02.1996 Nj 19-FZ "On the Russian Federation accession to the Statute of the Council of Europe", SZ RF, 1996, No 9, art. 774.
- 3 P. Van Elsuwege, 'The Four Common Spaces: New Impetus to the EU-Russia Strategic Partnership?' in: A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations*, Cambridge: Cambridge University Press, 2008, pp. 334–359.
- 4 The concept 'Strategic Partnership' appeared for the first time in the Joint Statements of the EU-Russia Summits in 1999–2001. In 2010, the EU-Russia Strategic Partnership was supplemented by another initiative – the 'Partnership for Modernisation', which included a work plan with cooperation activities and common projects (Joint Statement of the EU-Russia Summit of 31 May 2010 and Work Plan on Partnership for Modernisation of December 2010). However, after the Ukrainian crisis of 2014, the concept of Strategic Partnership regarding Russia is no longer used by the EU institutions. The European Parliament in its Resolution of 10 June 2015 stressed that the EU cannot envisage a return to 'business as usual' and has no choice but to conduct a critical re-assessment of its relations with Russia. It highlighted that due to its actions in Crimea and in Eastern Ukraine, Russia can no longer be treated or considered as a 'Strategic Partner' (European Parliament resolution of 10 June 2015 on the state of the EU-Russia relations (2015/2001 /INI), point 2).
- 5 P. Kalinichenko, 'Some Legal Issues of the EU-Russia Relations in the Post-Crimea Era: From Good Neighbourliness to Crisis and Back?' in: D. Kochenov and E. Basheska (eds.), *Good Neighbourliness in the European Legal Context*, Leiden: Brill Nijhoff, 2015, pp. 334–353.
- 6 The EU restrictive measures in accordance with Article 215 TFEU against Russia were introduced in accordance with the Council Conclusions on Ukraine of 3–4 March 2014 (see: Council of the European Union Conclusions of 4 March 2014 "Relations with Ukraine", COEST 62, 7208/14). These measures include *inter alia* suspending negotiations on the EU-Russia New Basic Agreement, suspending visa-free dialog, cancelling EU-Russia summits, and other restrictive measures of political and economic nature.
- 7 See: Case C-72/15, *Rosneft*, EU:C:2017:236, paras 108–116 and Case T-262/15, *Dmitrii Kyselov v. Council*, EU:T:2017:392, paras 28–35. For comments, see: P. Van Elsuwege, 'Judicial Review of the EU's Common Foreign and Security Policy: Lessons from the Rosneft Case', *VerfBlog*, 6 April 2017, available at: <http://verfassungsblog.de/judicial-review-of-the-eus-commonforeign-and-security-policy-lessons-from-the-rosneft-case> (accessed 7 July 2017).
- 8 Z. Kembayev, 'Regional Integration in Eurasia: The Legal and Political Framework', *Review of Central and East European Law*, 41, 2016, 157–194.
- 9 J. J. Hesse and V. Wright (eds.), *Federalizing Europe? The Costs, Benefits, and Preconditions of Federal Political Systems*, Oxford: Oxford University Press, 1996, p. 353; S.E. Finner, V. Bogdanor and B. Rudden (eds.), *Comparing Constitutions*, Oxford: Clarendon Press, 1995, p. 17.
- 10 In fact, the adoption of the Russian Constitution coincided with the entry into force of the Treaty on European Union on November 1, 1993 (TEU).
- 11 Article 135 of the Constitution of Russia, available at: www.constitution.ru/en/10003000-01.htm (accessed 7 July 2017).