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CONSTITUTIONAL PATRIOTISM

*Four European Reincarnations
and the Russian Version*

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This study examines the theory of constitutional patriotism with respect to the interests and needs of constitutional and legal development of Russia. The author pays special attention to the views of German legalists and philosophers as originators of this legal theory. Thoroughly analyzing foreign documents that define the content and purpose of constitutional patriotism and give examples of countries using this concept as a basis of their national development, as well as shaping of the European Union's common identity, the author explores its relevance for the legal doctrine of the Russian Federation and other countries.

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Introduction

“Constitutional principles can take roots in the hearts of citizens, if they already have positive experience of democratic institutions and are used to political freedom. In this way they learn—in a dominating national context—to comprehend the republic and its Constitution as an achievement. Without such historical, conscientiously developed vision no patriotic bonds deriving from Constitution and linking to it will appear. Because such bonds may be caused, for example, by pride in the achievements of the civil rights movement.”

J. Habermas¹

“The sharpest impression ever was produced on me by our Constitution recited on the radio—it thrills and makes a true man out of you. It is more powerful than Chekhov or Dostoyevsky... Reading a work of fiction, you can applaud, enjoy, admire or even consume it, but you cannot claim for it... To achieve what the Bible says, you have to aspire, cleanse your soul, improve yourself, and still you will always be in the very beginning of the journey. Whenever you open it and at whatever page. For the Bible, you must change. For the Constitution—No. No! No!”

M. Zhvanetsky²

Among the objectives of overcoming the uncertainties of Russia’s national development, the search for a national idea is one of the top priorities. Typically, it is boiled

¹ *Habermas J. The Burdens of the Double Past//Dissent. V. 41. No 4. Cit. ex: Fliberg B. Habermas and Foucault—Theoreticians of the Civil Society//Sociological Studies. 2000. No 2. P. 130.*

² *Rossiyskaya Gazeta, December 12, 2006.*

down to lamenting over the lack of a state ideology, the blame for which is put on the Constitution of the Russian Federation of 1993. Seeking to prove the uselessness of any efforts aimed at identifying an ideological platform for national development or principles of interaction between the state institutions and the civil society, those lamenting refer to the constitutional entrenchment of the ideological diversity and constitutional ban on imposing by the state of any mandatory ideology (Article 13, Constitution of the Russian Federation).

It is commonly understood that, having destroyed the Soviet system and rejected all the Soviet symbols, ideological values, cultural legends and social myths, the new elites that came to power in the early 1990's along with the intellectuals who had granted them their support could not offer the society a relevant ideological alternative. Despite the numerous discussions concerning a new national idea, Russia has failed to come up with a set of values capable to compete against the values of the consumerist society in the new economic circumstances. Realistically speaking, it is very difficult to oppose the call to buy more cars per one thousand per annum or to eat more ice-cream, or meat, or vegetables (pick any goods from the stock list to continue).

Ironically, having embraced the idea of consumption, the Russian society is still unsatisfied and keeps on looking for new goals. The goal of putting in place new national values has not been attained. Slogans like "For the Motherland! For Stalin!" being no longer an option, Russia, for reasons beyond control, is unable to get back to the "Orthodoxy, Autocracy, and Nationality" triad³. And it is not in the tradition of our country to live and die for the values of Constitution, Republic, Democracy, Human Rights or Civil Society.

This truth is clearly proven by the study of the Institute of Sociology under the Russian Academy of Sciences entitled "What the Russians Dream About". One of the main moral bearings of the Russian society is justice⁴. Moreover, the authors of the study note that Russians perceive

³ "Going deep into the subject and looking for the pillars that underpin the palladium of all Russia (every country, every people has such a palladium), it becomes obvious that we have three such key pillars, without which Russia cannot thrive, gain in strength, or live — 1) Orthodox Faith, 2) Autocracy, and 3) Nationality." This is the way the three main principles of the Russian state ideology were defined by Sergei Uvarov in his report "On some general principles that can serve as guidance on how to manage the Ministry of Public Education" presented to Nicolas I of Russia on the day of taking the office of the Minister of Public Education (November 19, 1833).

⁴ "What the Russians Dream About (Sociologists' Reflections). Analytical report (prepared in cooperation with Friedrich Ebert Foundation in the Russian Federation)// Institute of Sociology, RAS, M., 2012. P. 30–41.

“justice” as something much more important than “law”. Putting the main focus on two components of the “image of ideal future—1) the state, the government and the political order; and 2) the social and economic system, the civilizational and the cultural values,”⁵—the authors demonstrate their full inability to analyze important government and legal components only focusing on social and economic aspects. The term “constitution” is not mentioned by them even once, while the notion of “law” is only referred to in the context of “human rights” and “equal rights for all”. What can explain such disregard of constitutional and legal values, the very concept of the rule-of-law state? Is it the lack of understanding on the part of individual social scientists or their true irrelevance to the Russian Society?

It is widely accepted that constitution plays a stabilizing role. The Constitution of the Russian Federation as the main symbol of Russia’s contemporary history helped the country to find a way out of the profound political crisis of the autumn of 1993. Was the victory of one group of political actors over the other, as it is enshrined in the Constitution of 1993, flawless? It is unlikely. The adoption of the Constitution was supported by 58,43% of those who took part in the voting, while 41,57% voted against it. The Constitution received the “go-ahead” from 32,937,630 participants of the nation-wide voting, while the total number of the Russian electorate was 106,170,835 (58,187,755 took part in the voting or 54,81% of those entitled to vote). Was it an ultimate victory? No doubt. According to the majority principle, the winner took it all. It was the winner who on that very day of 12 December 1993 determined the future path of Russia in its contemporary history. It was the Constitution of 1993 that set the political and legal framework for the development of the country, its economy, civil society and democratic institutions.

By entrenching the political constellation of the early 1990’s, the Constitution of the Russian Federation defined the constitutional and legal basis for dealing with the key issues of the Russian statehood, including:

- 1) Inconsistency between the nature of the Russian state structure and the objectives of territorial integrity and uniformity of legal framework;
- 2) Lack of unanimity of views on both external frontiers of Russia and its internal administrative division;

⁵ Ibid. P. 42.

- 3) Insufficient integration of the Russian society at all levels—ethnic, political and social;
- 4) Imperfection of the system of government;
- 5) Lack of legal mechanisms ensuring unity of power within Russia.

In many ways, the contemporary constitutional history of Russia is about overcoming the above-mentioned problems.

As a framework political and legal document, the Constitution of 1993 fulfils a number of functions, which fall within its key domains. What is most important, it has fulfilled its constituent function in both of its meanings: first, new state institutions were established; and, second, some legacy institutions were legitimized and filled with new content.

Became apparent and enshrined in its Constitution the civilizational choice of Russia—to build a democratic social state governed by the rule of law. The Constitution of the Russian Federation of 1993 established a democratic government model based on the principle of division of power in its functional meaning, and put in place a framework of government institutions, which was necessary for the country's national development. As a constituent instrument the Constitution created and legitimized all the state institutions, as well as those of the economy and civil society.

The peculiarity of constitutional regulation is that a constitution in combination with the laws that underpin it entrenches constitutional doctrines and predominantly legal statuses and organizational structures. The constitution itself, as well as the constitutional order established by it, require a system of measures of government-wide, nationwide and civil support. Such a system of measures is envisaged by the theory of constitutional patriotism.

It may be interesting to discuss the adoption of the Basic Law for the Federal Republic of Germany as a historical parallel to the adoption of the Constitution of the Russian Federation in December 1993. Like Germany, Russia was adopting its Constitutions after a defeat in a war, albeit “cold” rather than “hot”, in the conditions of a collapsing thousand-year-old statehood, severe economic crisis and need to overcome the consequences of the totalitarian communist regime. This similarity of political and historical circumstances, in which the Basic Law for the FRG of 1949 and the Russian constitution of 1993 were adopted, along with the traditional linkages between Russian and German legal theories and models, explains our attention to the idea of constitutional patriotism as a compelling consolidating framework for both the Russian state and the citizens of Russia.

“Founding Fathers” of the Constitutional Patriotism Doctrine and Jurgen Habermas

The notion of constitutional patriotism was first articulated in post-war Germany, a country divided into zones of occupation and then into two mutually hostile states. A country, which developed a great state and legal theory, but had no possibility or courage to use any of its numerous statutory concepts.

Many people wrongly believe that the only “founding father” of the theory of constitutional patriotism was the German philosopher Jurgen Habermas, who gave a detailed description of its elements in his work “Citizenship and National Identity”⁶. However, Jurgen Habermas himself, nobly and on reasonable grounds, yields the palm in the definition of the notion of constitutional patriotism

⁶ *Habermas J. Staatsbürgerschaft und nationale Identität//Faktizität und Geltung. Frankfurt am Main: Suhrkamp, 1992; Habermas J. “Citizenship and National Identity: Some Reflections on the Future of Europe”. In Beiner, R. (ed.) Theorising Citizenship. Albany: SUNY Press, 1995. P. 255–282; Habermas J. Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. Oxford: Polity, 1996; Habermas J. The Inclusion of the Other. Cambridge: Polity, 1998; Habermas J. “Reply to Symposium Participants: Benjamin N. Cardozo School of Law”. In Rosenfeld, A., and Arato, A. (eds.) Habermas on Law and Democracy. Berkeley and Los Angeles: University of California Press, 1998. P. 381–444; Habermas J. The Postnational Constellation: Political Essays. Cambridge: Polity. 2001; Habermas J. Why Europe Needs a Constitution. New Left Review. 2001, 11: 5–26. Habermas J. The Divided West. Cambridge: Polity. 2006; Habermas J. “A Political Constitution for the Pluralist World Society?” In Brown, G.W., and Held, D. (eds.) The Cosmopolitan Reader. Cambridge: Polity. 2010. P. 267–288.*

(*Verfassungspatriotismus*) to his two compatriots—Karl Jaspers (1883–1969) and Dolf Sternberger (1907–1989)⁷.

It is in the work by Karl Theodor Jaspers, a professor of philosophy at the University of Heidelberg (sometimes referred to as “*Praeceptor Germaniae*” or “Educator of Germany”⁸), (“*Die Schuldfrage*” (1946); “The question of German guilt” (1947))⁹ that the researchers find the derivation of the constitutional patriotism doctrine. Jaspers believed that Germany would not be able to restore its national identity without assuming a collective responsibility for its past. Jaspers identified “continuously contested memory” as the basis for new national solidarity of the Germans¹⁰.

Rejecting the possibility of “collective guilt” of the German people, Jaspers considered the question of guilt as “*a question which is crucial for the German soul. No other path can bring us to spiritual renewal <...> That the victors condemned us is a political fact, which has significant implications for our life, but this does not help us to deal with the main question—our internal spiritual resurgence. Here we are on our own.*”¹¹

In 1966, analyzing the outcomes of the two decades that followed Germany’s defeat in World War II, Karl Jaspers wrote:

“In 1945, we faced the moral and political task to establish a new state. This task has not been accomplished yet. The Federal Republic of Germany¹²,

⁷ Dolf Sternberger was a follower of Hannah Arendt (German-American philosopher of Jewish descent raised in Königsberg). Hannah Arendt studied under Karl Jaspers (during the Nazi regime he was deprived of professorship; moral leader of German philosophers of the post-war period) and Martin Heidegger (hardcore NSDAP member in 1933–1945; underwent denazification). After 1933, Jaspers insisted that he had nothing to do with Heidegger. The complicated relationship between German philosophers is confirmed by the romantic intellectual correspondence between Martin Heidegger and Hannah Arendt. See: “Arendt Hannah, Heidegger Martin. Letters (1925–1975) and Other Records” / Translated by A. Grigorieva. M., publication of the Gaidar Institute. 2016. P. 456.

⁸ In the German context, the unofficial title “*Praeceptor Germaniae*” belongs to Philip Melancthon (1497–1560), but, given the contribution of Karl Jaspers to the development of science, many of his peers find it possible to call him the same.

⁹ *Jaspers K.* The question of German guilt. New York. The Dial Press, 1947.

¹⁰ For more details see: *Müller J.*—W. Constitutional Patriotism.—Princeton: Princeton University Press, 2007. P. 16–18.

¹¹ *Jaspers K.* The question of German guilt. New York. The Dial Press, 1947. P. 28.

¹² One important linguistic detail is worth noting: before 1990, in the USSR, the FRG was officially called «Федеративная Республика Германии» (the Federal Republic of Germany), where the word ending «-ии» (to which the English preposition