APPLYING A DECOLONIAL APPROACH TO POST-SOVIET CONSTITUTIONALISM

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Abstract

Western worldviews and beliefs constitute a significant part of modern knowledge. Legal knowledge is also part of this worldview and belief system. Modern constitutions first emerged in the West and then travelled to the rest of the world. Imperialism and colonialism played an essential role in the export of these ideas.

Today, mainstream constitutional law theory offers a comparative analysis of constitutions and their main concepts and principles. Nevertheless, the role of the colonial and imperial past and its influence on constitutionalism in the former colonies are often neglected and less spoken.

In this thesis, a decolonial approach to constitutional law is researched and analysed. The project covers different decolonial approaches to constitutional law and applies these theories to the example of Russian/Soviet colonialism in post-Soviet countries. First, the Russian Empire and later the Soviet Union colonised these countries. Nowadays, these countries have challenges in forming stable democracies. These similarities were the primary reason for choosing the comparators.

The main research question of the work is how colonialism affected the origins and development of constitutional law in post-Soviet countries. By linking this historical overview with the current developments, the author investigates how or whether this factor continued to take place after the rupture with the former empire, for example, in the form of new constitutions or the rule of law and development programs.

The primary methodology to make this research possible is a comparative constitutional analysis of constitutionalism in most similar cases. The overall purpose of the thesis is to decolonise the legal knowledge system, offer an alternative interpretation to the comparative constitutional law theory and contribute to the research from the post-Soviet region.

Acknowledgements

This thesis is my first attempt at conducting individual academic research. As Karl Marx said, “there is no royal road to science, and only those who do not dread the fatiguing climb of its steep paths have a chance of gaining its luminous summits.” This road to writing my first solid research was challenging, sometimes discouraging, and sometimes very intense. Nevertheless, it was a valuable learning process and constant self-reflection and critique.

Here, I would like to thank my supervisor, professor Mathias Möschel for his valuable feedback and professor Renata Uitz for her guidance and eye-opening academic discussions during the year. Finally, I am infinitely grateful to my dear friends Oleh Protsyk, Nijat Eldarov, and Sruthisagar Yamunan for not letting me down on the steep roads of my very first academic endeavour.

Table of Contents

Abstract……..…….…….....iii

Acknowledgements.....iv

Table of Contents.....v

Introduction.....1

Chapter I. Establishing theory and literature review: critical theories in comparative constitutional law.....10

Critique of comparative legal methodology 10

The main principles of post/decolonial theories 12

Post/decolonial theories as a critique of comparative constitutional law 15

Conclusion 23

Chapter II. Russian/Soviet colonialism and its legal features.....24

Distinct features of Russian/Soviet colonialism 25

Characteristics of the Russian/Soviet legal system.....30

Chapter III. Comparative analysis of postcolonial constitution-making in post-Soviet Republics 33

Conclusion 42

Bibliography 44

The primary aim of the critic is to see the object as it is really not

Wilde in Ellmann (1988) in Peter Fitzpatrick, Mythology of Modern Law (1992)

Introduction

Background

We live in a world that has been formed and shaped by colonialism. Today, despite the formal decolonisation, the logic of colonialism continues to influence our life not only on a grand geopolitical level but also every day. Apart from physically colonising the lands and bodies,[1] empires have also colonised the knowledge. Controlling knowledge is a source of power, and one of the means to such control can be a law.

Law is a specific form of knowledge that, adequately controlled, can create long-lasting and hard-to-resist power structures. Fields of law such as international law, human rights law, and humanitarian law have been long criticised as being pure products of the colonial era,[2] shaped and formed to correspond to imperial interests. These fields are usual suspects when it comes to decolonial studies in law. Constitutional law is extensively under-researched from this perspective and usually is not considered among the usual suspects. However, if carefully analysed, the emergence of modern constitutionalism can be traced back to the origins of modern nation-states in Western Europe, which later travelled to other parts of the world through colonisation.[3]

The interest in the decolonial approach to legal studies and particularly constitutional law, is rapidly increasing in recent decades.[4] This scholarship is theoretically informed on decolonial and post-colonial theories and is applied to legal studies in order to decolonise the

[1] Enrique Dussel, "Eurocentrism and Modernity (Introduction to the Frankfurt Lectures)" (1993) 2, 20 (3) Boundary 65

[2] Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40 Harv Int'l L J 1

[3] Daniel Bonilla Maldonado, Michael Riegner, "Decolonization" (2020) Max Planck Encyclopedia of Comparative Constitutional Law <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e43> accessed on 28 May 2022

[4] Lena Salaymeh and Ralf Michaels, "Decolonial Comparative Law: A Conceptual Beginning." (Research Paper Series) (2022) Max Planck Institute for Comparative and International Private Law 86 (1) 186

current legal discourse. The abundance of literature increases the need to move from usual suspect categories such as international and human rights law and focus on fields such as constitutional law and explore the potential for decolonisation here.

Hence, inspired by this movement, I would like to explore the applicability of decolonial theory to comparative *constitutional* law in the post-Soviet region.

Authors working on the decolonisation of constitutional law are engaged in tracing the links of colonial heritage in various aspects of the field, starting from constitution-building and continuing with the preference of specific political systems and types of judicial review.

First, they identified two types of rupture with imperial power. One is the revolutionary enactment of the constitutions, such as in the US, Haiti, and Algeria cases. The second is the peaceful or negotiated transition of power, which took place in many former British colonies. Initial constitutions of Ghana or Kenya were drafted by British officials and imposed by the empire.[5]

Importance of the research and its objectives

An interdisciplinary approach to the field of comparative constitutional law, building the inquiry on the socio-legal methodology and bringing the discourse from under-investigated regions such as post-Soviet republics, outline the importance of this research.

Comparative constitutional law is a field that engages in research of the constitutional systems of different countries. This field has the potential to fall into the trap of the modernity/enlightenment false dichotomy approach. This dichotomy is reflected in the analysis of the constitutional systems either from a Eurocentric perspective or based on cultural relativism argumentations. Therefore, introducing a decolonial approach to comparative constitutional law can contribute to the analytical inquiries of the researchers.

[5] Maldonado (3)

Second, the reason behind choosing this region is that while speaking of decolonisation, the academia primarily focuses on Latin America, Africa and South Asia. In the decolonial scholarship, authors created a West-centric approach by focusing only on Western empires.[6] The colonising impact of the Russian/Soviet or even Ottoman empires rest unnoticed and therefore, voices from these regions are particularly muted in relation to colonial impact. Russian and further Soviet imperialism and their colonial heritage in the former colonies are hardly researched. Very few authors attempted to apply a decolonial analysis to this part of the world, such as Madina Tlostanova, whose works are mainly cited in this thesis.

Hence, inspired by decolonial theory, I would like to investigate the influence of Russian colonialism on the constitutional developments in former republics. Despite the apparent differences among former Soviet republics, a common feature uniting them is Russian/Soviet colonisation.

Based on the importance of the topic, I would like to categorise the objective of this research as the following:

a. Identify the traces of coloniality in the constitutional law of post-Soviet countries.
b. Contribute to the comparative constitutional law field by situating it within the decolonial critique.
c. Contribute to decolonial critique by situating it within the post-Soviet realm.

Methodology

Before discussing the methodology, I would like to situate this research in the expanding literature on comparative constitutional law. Ran Hirschl identifies the rapidly growing field of constitutional studies, which he describes as a field "complementing the legal and normative approaches to the study of constitutions, by deploying more social-scientific approaches and

[6] Madina Tlostanova, "Postsocialist ≠ postcolonial? On post-Soviet imaginary and global coloniality" (2012) Journal of Postcolonial Writing 48 (2) 130

methods to the study of constitutions and constitutional development more broadly." Such scholarship analyses constitutions as an integral part of the ideological, political, institutional, societal and material context.[7]

Finally, he classifies the scholarship based on case selection into the following categories:

> "(i) the 'most similar cases' principle (comparison of cases that, as much as possible, are identical but for the factors of causal interest); (ii) the 'most different cases' principle (comparison of cases that are different but for the factors of causal interest); (iii) the 'prototypical cases' principle (the studied cases feature as many key characteristics as possible that are found in a large number of cases); (iv) the 'most difficult case' principle (if a theory passes a 'most difficult' test case, our confidence with its predictions increases; conversely, if a claim or hypothesis does not hold true in a 'most likely' or a 'most favourable' case, its plausibility is severely undermined); and (v) the 'outlier cases' principle (studying case or cases that are not adequately explained by extant theories."

The current research is situated in the constitutional studies field, as this study aims to understand how constitutions were developed in colonial settings and what kind of imprint the colonisation left on the constitutional law of colonies. This study attempts to understand the genealogical emergency of the constitutions in the former post-Soviet regions, group and label their significant similar patterns and characteristics that show the imprint of the colonial past. To fully correspond to the genealogical analysis, this study also employs the genealogical approach from social sciences. Colin Koopman describes genealogy as the following:

> Genealogies articulate problems. But not just any problems. Genealogies do not, for instance, take up those problems that come with supposed solutions readily apparent, or those problems that appear difficult to many but are simple for those few who are in the know. Genealogies are generally not targeted at problems that are themselves readily apparent to everyone or even just to everyone who ought to know them. Genealogies are concerned, rather, with submerged problems. The problems of genealogy are those problems found below the surfaces of our lives – the problems whose itches feel impenetrable, whose remedies are ever just beyond our grasp, and whose very articulations require a severe work of thought. These submerged problems are those that condition us without our fully understanding why or how. They are depth

[7] Ran Hirschl. "Comparative Methodologies" (2019) Cambridge University Press

> problems in that they are lodged deep inside of us all as the historical conditions of possibility of our present ways of doing, being, and thinking.[8]

To simplify this explanation, he gives an example from Foucault's work on sexuality. Foucault saw sexuality as a problem that should be studied. However, he was not the first scholar investigating this question. His difference from others was that instead of offering one single response to the solution of the problem, in contrast, he offered to deconstruct all historical explanations for the phenomenon which formed it as the problem that we see in the present. Therefore, genealogy as a method is the historical and philosophical inquiry into the problems that we see in the present.

Columbian scholar Castro-Gomez modified and applied the genealogical method in decolonial studies. He used the Eurocentric genealogy of Foucault and applied it to the non-European settings. By introducing this, he assured that genealogy as a method can be used in different fields with certain modifications deriving from the specificity of the context.[9]

Finally, in terms of case selection, this research employs the methodology of (i) the 'most similar cases' principle (comparison of cases that, as much as possible, are identical but for the factors of causal interest). By choosing most similar cases, such as former post-Soviet republics, this research responds to the question of how the colonial past influenced the constitution-building and what kind of similar patterns it left in the constitutional systems of these countries.

Thus, during the current research, I attempted to present a genealogical analysis of the most similar constitutional systems, traditions and some aspects of constitutional law in the former Russian/Soviet colonies. By applying genealogy, I analysed the constitution-building

[8] Colin Koopman, "Genealogy as Critrique. Foucault and the Problems of Modernity" (2013) Indiana University Press 1

[9] Amy Nigh and Verena Erlenbusch-Anderson, "How method travels: genealogy in Foucault and Castro-Gómez" (2020) Inquiry - An Interdisciplinary Journal of Philosophy

process not only for taxonomic purposes but also from the perspective of power dynamics between empire and colonised and how these dynamics affected the process.

Due to the theoretical character of the project, the research is comprised of work with secondary literature, including theoretical pieces as well as constitutional texts. The research consists of work with several concepts and then analysis of the texts and their comparison based on the principle of power dynamics.

Research questions and key concepts

Having identified the comparators and methodology, I would like to discuss the research question and limitations of this project.

In this research, I try to understand how colonialism affected the origins and development of constitutional law in post-Soviet countries. As a sub-question, I investigate how the effects of colonialism continue to take place after the independence, for example, in the form of new unions or the rule of law and development programs.

The key concepts that need to be highlighted for the objectives of the research are the following:

Genealogy is a methodology introduced by Michel Foucault and further appropriated and modified by decolonial scholars such as Santiago Castro-Gomez. Genealogy allows researchers to reconstruct the hidden knowledge that has been covered during the logical construction of the present. It also allows comprehending how specific knowledge due to conflict or repression between certain groups has been suppressed and not spoken of.[10]

Power dynamics/relations is yet another term coined by Foucault. He looked at the power dynamics as non-hierarchical relations that can occur even in everyday life. According to him, the reason for choosing certain clothes during the day can be explained by many factors

[10] Albert Mills, Gabrielle Durepos and Elden Wiebe, "Encyclopedia of case study research" (2010) 1 (0) SAGE Publications 417

such as current fashion trends, our group membership, school requirements etc. He saw the individuals and groups as sources of power who have reciprocal power influence on each other.[11] In the context of this research, the power dynamics between the Russian/Soviet Empire and former colonies are the main focus.

Coloniality/colonial logic means the continuing influence of the former empire on the subalterns despite of physical decolonisation. This includes epistemic violence or epistemic hegemony of imperial discourses in the former colonies. It can manifest in continuous administrative, legal, academic and other forms of soft influences.

Limitations

By researching the colonial influence and heritage on constitutional systems and traditions in post-Soviet republics through the decolonial lens, I hope to understand, first, how Russian imperialism influenced the constitution-building process and second, whether the coloniality or colonial logic still takes place in this region and in which form.

However, there are certain limitations to these objectives. First, to comprehensively analyse the imperial influence on the current regimes the ideal research approach would be to investigate colonial influences from several different empires on the current colonies. For example, some empirical research suggests that colonial heritage has little influence on the current constitutions[12]. While I disagree with this statement, as scholarly works investigated in this research contribute to the questions of colonial influence on the political and constitutional models of modern polities, the scope of the current research is very limited to Russian colonialism due to the time and space constraints of the thesis. Therefore, this work, by focusing on Russian colonial influence on the former colonies and what kind of role it played

[11] Diana Taylor (ed), "Michel Foucault: Key Concepts" (2010) Acumen Publishing 2010
[12] Tom Ginsburg, Mila Versteeg, "Why Do Countries Adopt Constitutional Review?" (2014) The Journal of Law, Economics, and Organization 30 (3) 587

in the forming of constitutional systems, attempts to explain the problem from one angle and start the discussion on this issue.

Another limitation to this study is the insufficient resources on both Soviet constitutional influence and second on the constitutional law of particular post-Soviet countries in the Caucasus and Central Asia. It is hardly difficult to find any legal analysis of the constitutional system, not speaking of socio-political analysis. However, I substituted literature focused on post-Soviet democratic transition and the rule of law and development and attempted to approach information in these academic works critically.

The thesis structure

The research is divided into three chapters. First, I establish the theoretical framework for the research by discussing existing scholarship. In this chapter, the critical approach to comparative constitutional law is analysed. One of the principles of critique to comparative constitutional law comes from the outer fields such as sociology. Subsequently, the importance of investigating the sociological reasons for the constitutional formation as one of the decisive factors for their emergence and avowal is considered. Further, the chapter discusses the post and decolonial theories and their application in legal studies. The chapter closes by establishing the distinct character of the current research in presenting the decolonial sociological approach to comparative constitutional law.

These discussions are followed by describing Russian colonialism and the importance of epistemic decolonisation of subalterns from former colonies. This chapter considers the unique features of Russia and then the Soviet Union as empires with constant inferiority complex vis-a-vis Western empires and distinct character of law imported from the West via Russia to the colonies. The chapter further discusses how this distinction affected the colonies and especially their legal systems.

The final third chapter is dedicated to comparing current constitutions in independent republics. The chapter covers the common problematic legacies from the colonial past, such as the problem of presidentialism, sovereignty, legitimacy, and how current constitutions try to address these issues. Especially important to mention that the research tries to understand the central discourse and socio-political context around the constitutions during the adoption of the original document after the collapse of the Soviet Union. The chapter closes by discussing the continuing colonial influences of Russia and Western liberal systems after the rupture with the Soviet Union.

Chapter I. Establishing theory and literature review: critical theories in comparative constitutional law

Critique of comparative legal methodology

In his monograph *Comparative Law as Critique,* Frankenberg argues that comparative law fought for its 'space under the sun' as an academic discipline and credible legal methodology.[13] According to him, comparing legal norms and social facts from various jurisdictions and driving sources of information worldwide makes the law a genuinely scientific discipline. Agreeing with this argument, I would like to add that investigating and conceptualising law as a scientific discipline only by engagement in one jurisdiction is limited and incomplete.

Frankenberg further introduces the deficiencies of this methodology and emphasises the importance of critique and critical approaches both to law and its methodology. He mentions that comparative law is dominated by Western (in the face of Anglo/European common/civil law) tradition, which generalises the legal tradition and applies it to the rest of the world. The author further argues that the critical approaches to comparative law can demystify the Western hegemonic thought, which is celebrated as the only accurate comparator for the rest. He concludes his thought by referring to Foucault's argument that by being critical, comparatists refuse to be governed by the dominant discourse and stand in opposition to challenge these ideas.

This research will employ the critical comparative methodology as a primary method in comparing constitutional systems, traditions and influential factors for their emergence. Even though it is hard to define the underlying principle of critical approaches to comparative law, I would like to refer to the definitions introduced by Frankenberg.

[13] Gunter Frankenberg, "Comparative Law as Critique" (2016) Edward Elgar Publishing chs 3 and 4

Generally, the critique can be distinguished into inner and outer. Inner critique assumes the critique of significant postulates of the law from a legalistic perspective of traditional legal schools such as positivism or natural law school. An outer critique is an approach from outer disciplines such as sociology, political science, or anthropology. Both approaches' major significance is that they oppose the traditional or hegemonic discourses established in the field. Preferably, they also present an alternative approach to the problem. Such critique emerged in response to the formalist and objectivist claims of the traditional legal philosophy.

According to this argument, I would like to establish that my approach to comparative constitutional law in this thesis is based on the outer critique. I would like to focus on a sociological perspective on constitutional law problems, which also includes a decolonial approach to the field.

Furthermore, as mentioned in the previous paragraphs, the problem of comparative constitutional law is the myth of Western Anglo/European tradition being the central reference point for comparison. The myth of Western Anglo/European law is the long-standing tradition of accepting Western law as universal and civilising. The critique of comparative law warns that the political motives of the universalising mission of the Western civilisation can not be taken for granted.[14] To demystify such an approach, a critical appeal to postcolonial and decolonial theories and approaches in comparative constitutional law play a crucial role.

Hence, it should be established that various schools of thought employ critical perspectives in comparing law traditions of a different jurisdiction, which can be classified as critical legal studies, critical race theory, feminist approaches to law and postcolonial and decolonial perspectives to law.

[14] Frankenberg (13), See also Robert Young, "White Mythologies : Writing History and the West." (2022) Routledge.

This research will employ critical comparative methodology through postcolonial and decolonial approaches to law to achieve its purpose. Although it appears to be a complex technique, I believe the theory should be complex to tackle the challenges of the post-modern world. Complex approaches to challenges should be introduced to reflect the issue without reducing its core problem to one root and by that distorting the multifaceted reality.

Consequently, in my opinion, researching the constitutional phenomenon in the post-Soviet region should be approached not only from a traditional legal perspective but also from decolonial aspects. Responding to the questions of what influenced the formation of certain constitutional systems and ideas of constitutionalism without referring to the colonial past is a one-sided approach.

The main principles of post/decolonial theories

Robert Young explains the colonial and imperial rule in the following terms:

> "Colonial and imperial rule was legitimized by anthropological theories which increasingly portrayed the peoples of the colonized world as inferior, childlike, or feminine, incapable of looking after themselves (despite having done so perfectly well for millennia) and requiring the paternal rule of the west for their own best interests (today they are deemed to require 'development'). The basis of such anthropological theories was the concept of race. In simple terms, the west-non-west relation was thought of in terms of whites versus the non-white races. White culture was regarded (and remains) the basis for ideas of legitimate government, law, economics, science, language, music, art, literature - in a word, civilization."[15]

As a result, for most of the 19th and 20th centuries, the colonised people demonstrated the struggle in the anti-colonial fight to put an end to the chains of colonialism and gain independence. Even though after the second world war, most of the former colonies gained independence, the scars of colonialism have carved a deep trace in the psyche of the colonised people.[16]

[15] Robert Young, "Postcolonialism. A Very Short Introduction" (2003) Oxford University Press 2-3
[16] Alpana Roy, "Postcolonial Theory and Law: A Critical Introduction" (2008) 29 Adel L Rev 315

As a result, there was and still is a need for intellectual movement along with the social anti-colonial movements. Such intellectual inquiries emerged from the works of Gayatri Spivak, Edward Said, Homi Bhabha and other movement representatives, now labelled as postcolonial studies. Further authors such as Walter Mignolo, Enrique Dussel, Achille Mbembe, Ramon Grosfougel, Madina Tlostanova and others are known as scholars of the decolonial movement.

Both post and decolonial theories emerged as a critique of imperialism, colonialism, racism, inequalities and exploitation by the Western countries of the rest. Despite the fact of attacking the same unequal and unjust outcomes which was the result of colonisation, these theories have differences in intellectual inquiry.

Postcolonial and decolonial encompass a wide range of ideas and factors with different methodologies, which intricate the scholars to name these movements as theories.[17] There are also specific differences between these two movements, which I would like to discuss below briefly.

Postcolonialism was used after the Second World War when the formal decolonisation of the world started[18] and described the various principles and practices as in feminism or socialism.[19] In fact, Edward Said is considered one of the founders of postcolonial thought. He, inspired by the archaeological methods of Michel Foucault, argues that "any study of colonialism and imperialism must move from the economic and political to explore the deeply entangled relationships between knowledge, culture, and power."[20]

Further, Spivak and Said argued that the colonisation of the subaltern did not end with a formal or legal end of colonialism. Its effects continued on the colonised for an extended

[17] Roy (16) 316
[18] Roy (16) 317
[19] Young (15) 7
[20] Mawani Renisa, "Postcolonial Legal Studies" in Simon Stern, Maksymilian Del Mar, and Bernadette Meyler (eds), The Oxford Handbook on Law and humanities (2020) 106

period.[21] Postcolonial authors paid more attention to the humanistic approach and elements affecting human lives, psyche, trauma etc. and focused more on the cultural issues, even though they analysed socio-economic and material realms.

The decolonial turn in postcolonial studies starts with Latin American critique of English-speaking and British-centered postcolonial studies, which mainly derived the critique from Eurocentric knowledge and philosophy.

Ramon Grosfougel argues that to get from postcolonial to decolonial, there is a need for a decolonial epistemic turn.[22] He sees this epistemic turn in the critique of Western dominant intellectual thought and producing competing non-western knowledge that can engage and change with Western knowledge. Such a turn is essential because decolonial authors see the continuing colonisation not only in traumas on people but also in continuing the hegemonic epistemic system of the West, which has not been ended. Thus, decolonial authors argue that even in legal (or administrative) terms, colonisation does not end with the physical withdrawal of empire.[23]

They are more engaged with structural and systemic issues. Most of their works were linked to the world-systems theory and the critical Frankfurt school.[24]

This thesis builds on the ideas of both movements. However, in particular, the focus of the thesis is on the origin of the constitutions as an epistemic product of colonisation, which in certain parts needs a decolonising lens. Therefore, even though the authors of both movements are cited in this work, the thesis focuses on the application of decolonial analysis to comparative constitutional law.

[21] Roy (16) 318
[22] Ramón Grosfoguel, "Preface. In From Postcolonial Studies to Decolonial" (2006). Review (Fernand Braudel Center), 29 (2), 141
[23] Ramón Grosfoguel, "The Epistemic decolonial turn" (2007) Cultural Studies 21 (2-3) 211
[24] Gurminder K Bhambra, "Postcolonial and decolonial dialogues" (2014) Postcolonial Studies 17(2) 115

Post/decolonial theories as a critique of comparative constitutional law

In recent years, the postcolonial approach to comparative law has been increasing. However, this is a field yet to be explored. Postcolonial studies have a broad spectrum of theoretical concepts on coloniality, collected under the umbrella of the postcolonial term. The underlying point and consistent pattern in postcolonial and decolonial theory are to present the radical approach to the traditional mainstream discourse and research the effects of colonialism on the developments in social life by exploring alternative possibilities of enriching the knowledge system dominated by Western experience.

Comparative law as a discipline has much potential to engage with postcolonial theories. However, the potential of this approach has not been fully investigated in comparative law. As a result, the significant feature of traditional comparative law is to fall into the trap of the ethnocentrism/cultural relativism dichotomy.[25] Comparative scholars either investigate other countries from an ethnocentric approach, prioritising the legal tradition of one country over another, or reject comparison as a method per se due to cultural relativism and the impossibility of understanding and comparing the other cultures.

In addition to these methodological disputes, there are also liberal constitutionalism discourses which propose the compatibility of liberal constitutionalism with postcolonial theory and diversification of the Global North discourse by learning and including Global South experience. [26] However, such an approach also has its deficiency. The main critique that is derived from post and decolonial theory is, first, there is a need to decolonise the knowledge production in the Global South, which is dominated by universal Western ideas. Without proper decolonisation of the constitutional concepts, the diversification and inclusion of the Global

[25] Judith Schacherreiter, "Postcolonial Theory and Comparative Law: On the Methodological and Epistemological Benefits to Comparative Law through Postcolonial Theory." (2016) Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 49 (3) 291

[26] Maxim Bönnemann, Michael Riegner, Philipp Dann. "The Southern Turn in Comparative Constitutional Law." (2020) Oxford University Press

South experience into liberal constitutionalism would be yet another universal approach to constitutional law.

Postcolonial theory helps to avoid these traps and engage with the Other in a dialectical form.[27] Along with postcolonial theory, the more radical critique of the traditional knowledge system comes from decolonial authors, such as Grosfougel and Mignolo, whom I will use as my reference point in constructing the decolonial theoretical concept for this thesis.

As Walter Mignolo and representatives of decolonial and postcolonial schools posit, the history of modernity has started from colonisation.[28] To elaborate, modern geopolitical dynamics observed today can be traced back to the beginning of the colonisation era when Western empires started to expand. The colonial logic has not ended with the independence of former colonies. Lena Salaymeh and Ralf Michaels, in their article, argue that "decolonial theory begins with the recognition that the formal end of colonial states did not end 'coloniality'."[29] They proceed that colonialism expresses itself in the domination of territory both physically and socio-politically, while coloniality is an epistemic legitimation of colonialism and neo-colonialism and universalisation that accompanies them. Based on this premise, they further argue that decolonisation is necessary both in empires and colonised regions. The argument concludes with a reference to Catherine Walsh that coloniality is: "a matrix of global power that has hierarchically classified populations, their knowledge, and cosmological life systems according to a Eurocentric standard."[30] In other words, coloniality is a system of knowledge about colonialism and neo-colonialism. This definition fits the approach to the law proposed in this thesis as a discursive part of the epistemic system.

[27] Schacherreiter (25) 307
[28] Walter Mignolo, "Coloniality at Large: Knowledge at the Late Stage of the Modern/Colonial World System" (1999) Journal of Iberian and Latin American Research 5 (2)
[29] Salaymeh (4) 177
[30] Salaymeh (4) 177

Further, Grosfougel discusses that the decolonisation of the subaltern has not been finalised with the physical retreat of the empires from colonies. The domination of empires has been successful due to epistemic domination. He argues that being from oppressed groups and speaking on behalf of them does not constitute the fact of speaking the language of the subaltern. The problem here is that Western philosophical thought detached the racial/gender/ethnic/epistemic factors from the bodily and geopolitical location of the subject and claimed that universal and objective knowledge is possible to achieve, meaning that the observer is out of the knowledge system and does not have an effect on the produced knowledge. Thus, this view on science has become the main standpoint for mainstream knowledge-producing.

Having this in mind, I would like to link the postcolonial and decolonial theories to legal studies.

In Grosfougel's terms, the decolonisation of the subaltern is not over with the physical retreat of the empires. The heterogeneous and multiple global structures put in place over a period of 450 years did not evaporate with the juridical-political decolonization of the periphery over the past 50 years.[31]

According to Renisa Mawani, "law was not merely a set of rules, signs, or an instrument of control. For some, it was also a 'potent mechanism' and a knowledge-producing regime that was used to extract and compile information on colonial territories and populations, thereby creating 'taxonomic states'."[32] She further argues that "though their effects did not always produce intended or desired results, they were informed by political imaginaries that were premised on the presumed superiority of British legal culture. The knowledge regimes generated by colonial and imperial laws grew out of patterns of racial management and became

[31] Grosfoguel (23)
[32] Renisa (20) 110

central to institutions and processes of legal enforcement in colonial and metropolitan regions. These discursive regimes carried serious material consequences for indigenous and colonial populations, ones that remain central to political struggles over land, resources, and nationhood today."[33]

Further referring to Fitzpatrick she writes, "the colonized are relegated to a timeless past without a dynamic, to a 'stage' of progression from which they are at best remotely redeemable and only if they are brought into History by the active principle embodied in the European." It was through this myth of civilization and progress that "the European created the native and the native law and custom against which its own identity and law continued to be created." The line between East and West, European and Native sanctioned British territorial expansion through the legal violence of imperialism." [34]

Further, Upendra Baxi in his article on *Colonial Heritage*, argues that "…the colonial juristic mindset survives even as colonies have disappeared. The dominant tradition of doing comparative law still reproduces the binary contrasts between the 'common' and 'civil' law cultures or the 'bourgeois' and 'socialist' ideal types, thus reducing the diversity of the world's legal systems to a common Euro-American measure. In every sphere, the 'modern' law remains the gift of the west to the rest. The large processes of 'westernization', 'modernization', 'development' and now 'globalization' of law present the never-ending story of triumphant legal liberalism despite the recent powerful stirrings of the internal post-socialist, post-modern critiques of the 'modern' law and messages from the worlds of legal pluralism. The only history that can guide the future of law is that of the 'modern law; our common juristic future resides in a world without alternatives. The 'law' is modern or post-modern; it was not and cannot be anything else…"[35]

[33] Renisa (20), 110
[34] Renisa (20), 111
[35] Upendra Baxi, "The Colonial Heritage." (2003) In Pierre Legrand and Roderick Munday (eds) *Comparative Legal Studies: Traditions and Transitions*. Cambridge University Press.

Upendra Baxi assumes that "much of the business of 'modern' constitutionalism was transacted during the early halcyon days of colonialism/imperialism. That historical time-space marks a combined and uneven development of the world in the processes of early modernity. This, in turn, registers the perfectibility of modern notions of constitutionalism in metropolitan societies while at the same time constituting a complete denial of its tenets in the juristic and juridical terra nullius constituted by colonies. The formation of epistemic legal racism, combined with cruel felicity, establishes the patterns of perfection for fractured growth of the liberal rule of law notions in the metropolis with a reign of terror elsewhere."[36] Here, he argues that many colonies experienced the constitutionalism from early years of colonialism, therefore, for many colonies this notion was related to colonial and imperial violence and therefore perceived negatively or rejected.

In his other article, Upendra Baxi also elaborates that constitutionalism and colonialism are contradicting notions because the very fact of the emergence of constitutions proves the fact of rupture with the empire. "Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance… The history of evolution of modern constitutionalism is a narrative of growth of asymmetries in the structures of state-formative practices of domination and the form of resistance… All this needs to be stated in order to cure the modern superstition which suggests that constitutional forms and ideals constitute a legacy of colonialism. In the reality Colonialism and constitutionalism were always strangers. And the very act of enunciating a constitution marks a historic rupture."[37]

[36] Upendra Baxi, "Constitutionalism as a Site of State Formative Practices"\ (2000) 21 Cardozo L Rev 1183
[37] Upendra Baxi. "Postcolonial Legality: A Postscript from India." (2013) Verfassung in Recht und Übersee. 45 178

However, Baxi accepts that colonialism has also influenced the formation of constitutions. "Even so, it would remain true at a broad level to say that colonial legal cultures did affect forms of constitutions. Thus, the civil law and the common law traditions render difficult the third choice in the making of postcolonial constitutions. They often structure the apparatuses of governance: this contrast may, for example, be studied fruitfully through how concentrations of the supreme executive power, especially through the Imperial Presidency in most parts of 'Francophonic' and 'Anglophonic' Africa or in the structuration of the adjudicatory powers. Even more fundamentally, the language of the law established, at least initially, the reach of eclectic mimesis."[38]

Thus, the legal systems that have been put in place by the imperial administrations do not change overnight. Moreover, the postcolonial constitutions were influenced by the legal vocabulary and grammar of the colonising empire. Most of this vocabulary, such as separation of powers, bill of rights, judicial review, people, individual autonomy etc. were formed before many colonies gained independence. Therefore, the constitution-makers in former colonies after independence dealt with constitutions in different ways: mimesis, poiesis and hybridisation.[39]

Mimetic methods reproduce the European constitutional forms and substance.[40] This is the method that post-Soviet countries chose in their constitution writing. They also borrowed from constitutional experiences of other empires and had other specificities, which I will elaborate in the third chapter.

Poietic postcolonial methods attempted to break with the colonial past and return to the pre-colonial period or construct a new one. The only example of such polity can be Iran. The

[38] ibid, p.181
[39] Maldonado (3)
[40] Maldonado (3)

other examples, such as pan-Islamic or pan-African constitutions, were not entirely successful.[41]

The last is the example of hybridisation. Some polities adopted the constitutional norms from former empires but adjusted and transformed them according to the local context and needs.

Challenges of the form are one of the problems that were left by empires. The second issue is the forms of statehood. After the rupture with the former empire, colonised people was at the crossroad of deciding which form of statehood to adopt. The Western model of statehood was the only option to adopt and adjust if the former colonies wanted to achieve independence. However, at a conceptual level, alternative models were possible, such as anti-colonial anarchism or class-based communist internationalism. For example, Mahatma Gandhi in India advocated for a decentralised model of village self-government.[42] It is hard to determine what could be the alternative model to statehood if not Russian colonisation, but it is worth noting that, for instance, before colonisation, the territory of Azerbaijan was divided into small khanates, with self-government. Some of them were practising community-based decision-making processes. Another example is the nomadic form of self-organisation in Central Asia or self-governance and the more democratic nature of governance in Ukraine and the Baltic states.

In this research, I would like to apply this theoretical framework and research how Russian colonialism affected the constitution-building process in post-Soviet republics.

It has to be said that along with the colonial rupture with the Soviet Union, these countries have not been freed from foreign influence, which in most cases takes the neocolonial form under the development and the rule of law scheme. Such influence continues with the

[41] Maldonado (3)
[42] Maldonado (3)

legal assistance programs of the European Union, Council of Europe or United Nations, which through standardised legal reforms influence the legal systems of the rest of the world. Through this assistance, such organisations engage in comparative law. However, their legal influence does not occur with post and decolonial approaches to the legal norms' migration.

For example, the constitution-building process for countries of interest in this thesis has been heavily influenced by Soviet imperialism, which the continental legal system influenced. In importing the constitutional norms to these societies, the engagement from subalterns and their reflections have been seriously omitted.

Considering the above-mentioned theoretical concepts, I would like to establish the theory for this research in below terms.

Colonialism has formed the modern world and the postcolonial era continues to be influenced by neo-colonial ideas. Along with it, the academic scholarship in comparative analysis has continued to impose this thought by making universalising comparisons where the comparator has been treated as the Other, which could be studied only from the prism of the Self.[43] Even though the enunciation of the constitutions has been the first achievement of decolonisation, the epistemic decolonisation of constitutionalism or constitutional thought is not there. This project aims to make the first small attempt to start this dialogue in the post-Soviet region and especially in less researched and less heard countries.

Another form of Western domination in academic thought was the research of usual suspects in constitutional law, such as the established democracies United States, Germany, and France. More recently, new democracies such as India, Colombia, South Africa, Japan and South Korea were added to the list for diversification and representation. Such dynamic left other countries underexplored and less understood.

[43] Frankenberg (13)

Therefore, this work, while engaged in comparative constitutional law research, will be primarily guided by a decolonial approach to comparative law. In other words, the understanding of constitutional law comes from a person from this region. Along with it, ideas and postulates of constitutions will be questioned from the perspective of decolonial theory.

Along with the statement mentioned above, this project is influenced by decolonial theory as constitutions of comparator states, their point zero[44] rarely have been analysed from a critical perspective. Therefore, in order to decolonise the episteme of subalterns, it is essential to apply this theoretical lens to research how constitutions emerged in these states and how they have been influenced by Soviet/Russian colonisation.

Conclusion

It is essential to look at the comparator countries researched in this thesis to conclude the ideas proposed in this chapter. All of them were colonised by Russia and later the Soviet Union and became independent in the 1990s. Currently, all of them experience challenges in democratisation and constitutionalism and their constitutions fail to offer a powerful constraint mechanism for elite groups.

To conclude, it is important to underline that this research aims to look at the colonial influence on the constitutions in these societies. By investigating the emergence of constitutions from a decolonial perspective, I aim to understand how the colonial past influenced and shaped the constitutional system and concept of constitutionalism.

[44] Jiří Přibáň, "A Social Theory of Constitutional Imaginaries: Beyond the Unity of topos-ethnos-nomos and its European Context." in Uladzislau Belavusau, and Aleksandra Gliszczynska-Grabias (eds) *Constitutionalism under Stress.* (2020) Oxford University Press

Chapter II. Russian/Soviet colonialism and its legal features

Unfortunately, the emergence of this thesis coincided with the tragic war in Ukraine. Nevertheless, once again, it led me to think about how little we reflect on Russia as an imperial state and how it continues to hijack the decolonial discourse by showcasing itself as a victim of Western hegemony and liberator of colonised nations which also fall victim to the same hegemon.

In his article, *The Rise of Illiberal Democracy*, Fareed Zakaria argued that "a striking connection between a constitutional past and a liberal democratic present."[45] He pointed out that as of 1983, "every single country in the Third World that emerged from colonial rule since the Second World War with a population of at least one million (and almost all the smaller colonies as well) with a continuous democratic experience is a former British colony. British rule meant not democracy - colonialism is by definition undemocratic - but constitutional liberalism. Britain's legacy of law and administration has proved more beneficial than France's policy of enfranchising some of its colonial populations."[46]

Zakaria's conclusion is worth attention. Empirically speaking, there is a difference between the legal systems of the former British and French colonies. British colonialism left behind a system of constitutional liberalism, which was reflected not only in the text of the constitution. Here to cite Andras Sajo, the constitution is understood "beyond a formal document that is deemed the supreme law of the country, its interpretation, related practice, and also those elements of public law, which are decisive for the operation of political power in the state are considered."[47]

[45] Farid Zakaria, "The Rise of Illiberal Democracy." (1997) Foreign Affairs 22
[46] ibid, 29
[47] András Sajó, "The Constitution of Illiberal Democracy as a Theory About Society." (2019) Polish Sociological Review 208, 395

Alpana Roy argues that Russians as colonisers took the French model of colonisation, which was guided by the principle of assimilation. Unlike the British system of association, which was based on the racist premise that colonised can never understand the European way, the French assimilation system assured that overseas colonies are treated as part of the French administrative and legal system.[48] Thus, it is interesting to analyse what Russian colonialism left behind in terms of the constitutional system. However, first, there is a need to discuss Russian colonial differences.

Distinct features of Russian/Soviet colonialism

The literature still has little research when it comes to the Russian Empire's colonialism and is ambivalent about the nature of the Soviet Union as a colonial empire, referring to the affirmative actions of the Soviet Union towards the conquered nations.[49] Affirmative actions of the Soviet Union consisted of policies such as nativisation *(korenizatsiya)* and promoting the national consciousness of its ethnic minorities and establishing various institutions for their development.[50] However, it has to be said that these affirmative action policies toward building the nations were egressing from the imperial ambitions and modernisation/civilisation projects towards the colonised because, even among the parts of the empire, not all union members were regarded the same. The people of the Caucasus and Central Asia were deemed inferior to the Slavic brothers requiring modernisation and evolution to the modern world.[51] This logic continues till these days and can be traced to discursive relations of Russia with these countries.

Consequently, in this chapter, I would like to discuss the scholarship that theorises the Russian/Soviet experience as colonial and distinguishes the main features of this colonialism.

[48] Roy (16) 333
[49] Terry Martin, "Affirmative Action Empire: Nations and Nationalism in the Soviet Union, 1923-1939." (2001) Cornell University Press.
[50] Martin (49)
[51] Madina Tlostanova, "The South of the Poor North: Caucasus Subjectivity and the Complex of Secondary "Australism."" (2011) *The Global South, 5* (1), 66

It is important to discuss Russia as an imperial power in order to understand how its legacies affected the constitutional democratisation of the former colonies.

Madina Tlostanova argues that the Russian (and at the same time Ottoman) empire is a schizophrenic empire, suffering from an inferiority complex next to Western first-class capitalist empires and at the same time trying to fulfil a civilising mission towards the people of the Caucasus and Central Asia who they deemed less civilised.[52] Thus, Russian Empire and subsequently the Soviet Union have been placed in the category of second-class empires.

Russian colonisation in these territories was particularly painful, lasting in the period from XVIII to the XIX century, where it faced significant resistance. After the conquest Russian modernisation mission started, meaning that it took the mission of bringing civilisation to these areas. In *Learning to Unlearn* Tlostanova makes an interesting proposition:

> "People of the Caucasus and later Central Asia were also reclassified by the Russian Empire within the frame of the racist logic imported from the West and superimposed onto the existing religious frame. From the "Busurman" of the first modernity (a term originating arguably in the word "Musulman" – Muslim), coming to gradually embrace all non–Orthodox Christian people, the Russian construction of otherness came to the concept of "inorodets" (usually translated as "alien" but literally meaning the one who was born an other), in the early nineteenth century, when the religious difference was replaced with a racial, ethnic, and civilizational one to be essentialized. Thus, in the second modernity, the Muslim confession of Central Asia and partly the Caucasus was turned into the color of skin. So that, on top of the legal term "inorodets" (which included the Pagan nomads, the Muslims, and the Jews alike), there was also the term "Tatar" in use to define all Muslims, similarly to the West, where the Muslims were called Arabs or Turks regardless of their ethnicity. The topographic and ethnic renamings intensified and acquired a more planned strategic element in Soviet nation building in the remapped borders, invented ethnicities and languages, and erased histories. As a result of the Soviet modernization, the religious difference was completely translated into race and the Caucasus and Central Asian people acquired the common name of "Blacks" that they still carry."[53]

Russia established its own Orient in the face of the Caucasus and Central Asia and started its civilisational mission. With this, Russia mimicked the Western civilising agenda and

[52] Tlostanova (51)
[53] Madina Tlostanova and Walter Mignolo "Learning to Unlearn. Decolonial Reflections from Eurasia and Americas" (2012) The Ohio State University

transplanted European values to the Caucasus and Central Asia. This, in its turn, leads to double colonisation, as Tlostanova rightly describes.

Imposing on newly conquered territories ideas copied from the West resulted in the complete muteness of the people inhabiting these areas. As a result, after the collapse of the USSR, people from this region do not dare to voice their oppression. It is not only about daring to speak after such colonisation, but there is also nothing else to speak about, as most of the indigenous knowledge has been forgotten or suppressed. Tlostanova describes the post-Soviet condition in the below terms:

> The post-Soviet space can enter neither the world of capital nor the company of world proletariat…The post-Soviet subject does not feel passive guilt upon consuming the fruit of other people's labor, nor does he/she experience Caliban's anger. The post-Soviet intellectual elites until very recently have continued to see the Western tradition as their own; they were brought upon Western culture and were identifying with it (sometimes through Russian mediation). There is one recurrent sensibility, namely that of the present community of fate of the millions, the ex-subalterns and their masters, who all of a sudden found themselves in a similar situation of being thrown out of history/modernity. What is at stake here is the private miserable life of a common individual in the situation of physical survival, the inability to solve the most elementary problems against the background of dark, sinister, and irrational forces of history. Due to historical cataclysms of a gigantic scale, the global forcefully penetrates one's private life, connecting it to the millions of other subjects of the (ex)empire, suddenly thrown out of their usual social existence, deprived of their status, work, citizenship, ability to survive, self-respect, and prospects for the future. Here the moral sphere is acting not in the form of guilt and self-justification but in the form of resentment, resulting in the lack of action or, in some rare cases, transcendence of the post-Soviet sublime towards a decolonial option.[54]

She argues that for the former colonies of the Soviet Union, such as the Caucasus and Central Asia, its new Orient, it is challenging to deliver their voices. Russian complex of inferiority is imposed on its subjects as well. The struggles of Russia to become an empire equal to the Western companions turn her into a Janus-faced beast. She is not civilised enough to be equal with the West, but simultaneously, she conquers and civilises other people. Thus, the Caucasus and Central Asia become Russia's own Orient.

[54] Tlostanova (53) 68

Moreover, Russia took on a mission of bringing knowledge to the colonised, in this difficult environment. The law and legal system were part of this knowledge system. It is important to understand that the legal system Russia imposed on colonies was borrowed and mimicked from the Western countries.

For analysis, it is important to distinguish the Russian colonial system into three parts: Russian Empire, the Soviet Union and independence. During the period of Russian Empire, the legal system was newly emerging, and it was heavily influenced by its European counterparts. This is exactly the period when Russian schizophrenia and inferiority complex develops.[55] Russia as an empire was trying to reach its Western counterparts and these aspirations were reflected in the building of the legal system. Adoption of laws such as the criminal code and judicial system reforms all say how Russia tried to mimic the Western fellows. However, it was still deemed inferior and lagging behind as these modernising reforms took place too late compared to the West.

After the collapse of the empire, the USSR attempted to build its own world based on the Marxist ideology, which was built on the instrumentalist understanding of law in the hands of the bourgeoisie. However, the issue was that the Soviets had to build this Marxist ideology on the premises of the former empire. USSR inherited the colonised territories of the Russian empire and attempted to manage these territories with a new ideology. The most obvious challenge in this way was the problem of nationalities and nation-states. Terry Martin, in his book *Affirmative Action Empire* argues that the Soviet Union was one of the first of the oldest European empires to address the issue of nationalities.[56] However, this issue was addressed primarily due to serving the interests of the Soviet Union, the logic of which was the logic of coloniality. Thus, even though the Soviets tried to acknowledge the nationalistic differences,

[55] Tlostanova (53)
[56] Martin (49)

the logic of coloniality that was adherent to the imperial past was silted through the policies and actions of the communist party.

This logic was reflected in the 'developmental' mission of the USSR. This meant that USSR was developing not only as a whole Union but also as a centre that had to assist the development of the peripheries in achieving its economic, social and civilisational parity.[57] To put it simply, if peripheries received development assistance, this also meant that they were more exploited resource and labour-wise.

In one of the party meetings of the communist party, Lenin was arguing with Bukharin that Russian imperial chauvinism was not eradicated: "Scratch any communist and you find a Great Russian chauvinist…He sits in many of us and we must fight him."[58] In the early periods of the USSR, the question of imperialism was taken seriously and publicly discussed and attempted to be addressed to end up with another form of the Russian Empire. However, as history showed, the fear of 'Great Russian chauvinism' overcoming the Marxist ideas became true and later periods of the USSR were a pure manifestation of empire rather than the equal union of independent states.

To manage such an empire, ideologists of the Soviet ruling party realised that for effective management, they needed an effective constitutional system. This is when they started to build their own legal tradition. First Constitutions are adopted during this period and member states copy the main constitution into their states.

In the next part, I analyse this constitutional system and what kind of heritage it left for colonies. I will attempt to uncover the problems of Soviet constitutionalism, its ineffectiveness and how it influenced the constitutional systems of former colonies.

[57] Scott Newton, "The Constitutional Systems of the Independent Central Asian States." (2017) Hart Publishing.
[58] Martin (49) 3

Characteristics of the Russian/Soviet legal system

First, it has to be mentioned that the constitutional system does not develop in a vacuum and is influenced by the political dynamics, international influences and historical path dependencies. This part focuses on what kind of colonial heritage post-Soviet republics took to their independence and how after the independence the constitution-building has been influenced by the international rule of law and development programs.

Henderson argues that Russia has a long history of legal nihilism. She cities Alexander Herzen in describing the nature of legal nihilism:

> "The legal insecurity that has hung over our people from time immemorial has been a kind of school for them. The scandalous injustice of one half of the law has taught them to hate the other half; they submit only to force. Complete inequality before the law has killed any respect they may have had for legality. Whatever his station, the Russian evades or violates the law wherever he can do so with impunity; the government does exactly the same thing."[59]

Alena Ledeneva also highlights the cavalier approach to the formal law and how legal rules can be manipulated, and strategically misused for enforcement or non-enforcement.[60] She further elaborates that legal rules are used to sabotage legality. All of these extra-constitutional factors contribute to forming real power and degrading the rule of law culture.

Thus, Russian and later Soviet cultural and historical background did not create positive expectations for law[61], which later became a constitutional legacy for the post-soviet states. Furthermore, Henderson adds that there was a constant distrust between the population and government, restricting the channels for the expression of political aspirations. Citizens had little chance to influence the governance positively. Therefore, they have learned to overcome, subvert and ignore the legal rules. Such a system of circumvention of legal rules rather than

[59] Jane Henderson, "The Constitution of Russian Federation. A Contextual Analysis" (2011) Hart Publshing, 9
[60] Alena Ledeneva, "How Russia Really Works: The Informal Practices That Shaped Post-Soviet Politics and Business. (2006) Cornell University Press
[61] Henderson (59)

abiding them has become a significant factor in the legal culture of Russia. This culture, in my opinion, passed over the colonies.

Moreover, the constitutional system of the comparator countries has been heavily influenced by the Soviet colonial past. For example, Armen Mazmanyan argues that Soviet constitutionalism lacked the most important tenant – putting the limit on government. The lack of this important element led to the development of sham constitutions or constitutions without constitutionalism.[62] This legacy also passed to the post-Soviet countries, especially to the Central Asian Republics and I would also add Azerbaijan.

To decolonise the understanding of the constitutional systems of these republics, it is important to understand how and in which ways their constitutional system depends on the colonial legacies of Soviet constitutionalism. To make this possible, the first inquiry to be taken is the analysis of Soviet constitutionalism and understanding of whether it was perceived as an effective piece of paper or, on the contrary, a sham document and how this perception passed through the generations to the independent post-Soviet states.

The first Soviet Constitution was adopted in 1924 (Lenin Constitution), followed by 1936 (Stalin Constitution) and ended in 1977 (Brezhnev Constitution). All of these constitutions were influenced and developed according to Marxist ideology. Such influence made the Soviet Constitution weak and unable to become a true document that, along with ideological guidance, also has a practical applicability element. I will elaborate on this premise later in the chapter.

The literature argues that the main problem of the Constitution was that it did not explicitly acknowledge the Communist Party as the main constituent power in the USSR until the adoption of the 1977 Constitution. Communist Party became the main source of power. It

[62] Armen Mazmanyan, "Failing Constitutionalism: From Political Legalism to Defective Empowerment" (2012) 1 GlobCon 313

was both constituent and constituted power at the same time. This, in its turn, created a paradox of sovereignty, when the sovereign can not decide on the exception and be bound by the rules at the same time.[63] Thus, the existence of the Communist Party as the guarantor of the Constitution and the sovereignty resulted in the adoption of rules and regulations by the Party which functioned as a constitution. Such division created sources of informal power. Such power was not only inherent in the Communist Party, but it was also shared with 'security services' (currently known as 'siloviki' in the Russian political context) which also had a certain power to adopt their own regulations and rules which served as the main legal restricting documents for them.

Thus, the Constitution became an ideological document, instrumentalised in the hands of the party and did not have legal applicability. In 1977, it was attempted to operationalise and revive the Soviet Constitution. However, it did not result in anything tangible. Therefore, the problems inherent in the Soviet Constitutional order have been passed to the former colonial states.

[63] Newton (57)

Chapter III. Comparative analysis of postcolonial constitution-making in post-Soviet Republics

It is essential to mention that scholars distinguish between four waves of decolonisation in constitutional history. The American and Haitian revolutions influenced the first wave in the 19th century and actually gave a push for the emergence of the first modern constitutions. The second wave was characterised by the fall of the Russian and Ottoman Empires after the First World War. This period is not always considered a genuine decolonisation phase as it took place from a top-down perspective by signing the treaties of Versailles and Sevres, however, as a result of this process several independent polities such as Czech, Polish and Finnish emerged. The third wave, which is actually considered the main wave of decolonisation, took place after the Second World War and until the 1970s. This is the period when most African and Asian countries gained independence. The fourth and final wave of decolonisation took place with the collapse of the Soviet Union.[64] This is the period when fifteen republics gained formal independence and established their independent constitutions.

The characteristic feature of all republics is that the partition with the empire took place on negotiated terms rather than on a revolutionary basis. The literature distinguishes two types of rupture with the former coloniser through violent revolution or elite negotiating the partition. The second option is prevalent in former British colonies, where elites negotiated the withdrawal of the empire. In such cases, the colonial legal and political system continue to prevail and, in many examples, the elite continues to rule based on the old imperial model.[65] In addition, after the immediate independence change of the ruling elite, or administrative cadres was costly and in some cases difficult due to a lack of professionally trained individuals.

[64] Maldonado (3)
[65] William Parlett and Herbert Küpper. "The Post-Soviet as Post-Colonial. A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire" (2022) Edward Elgar Publishing

Contrary to expectations that the rupture with the imperial past brings democracy and liberalism, the negotiated rupture in many cases led to authoritarianism and consolidation of power.

The negotiated rupture from the Soviet empire took the form of Independence Declarations which later became the basis for the new constitutions. Some of the declarations, such as the ones of the Caucasian Republics and Moldova indicate and discuss the colonial past and exploitation by the empire, while the others are more cautious in choosing the language. For example, the Independence Declaration of Azerbaijan identifies Russia as the coloniser and occupant.

> "On May 28, 1918 the National Council of Azerbaijan adopted the Declaration on independence, having renewed thereby centuries-old traditions of statehood of the Azerbaijani people. The Azerbaijan Republic, having in the territory all completeness of the government, pursued independent foreign and domestic policy. Institutes inherent in the independent state - parliament, the government, army, financial system of the Azerbaijan Republic were created and functioned. The Azerbaijan Republic was recognized as many foreign states and established with them diplomatic relations. But on April 27-28, 1920 RSFSR, having roughly trampled on the international precepts of law, without declaration of war entered parts of the armed forces into Azerbaijan, occupied the territory of the sovereign Azerbaijan Republic, violently overthrew duly elected authorities and put end to the independence reached at the price of the huge victims of the Azerbaijani people.
>
> After this Azerbaijan as well as in 1806-1828, it is again annexed by Russia. The agreement on formation of the USSR of December 30, 1922 was designed to fix this annexation. Further, for 70 years against the Azerbaijan Republic the colonialism policy was pursued, natural resources of Azerbaijan were ruthlessly operated and its national wealth was taken away, the Azerbaijani people were exposed to prosecutions and repressions, its national advantage was trampled. Despite it, the Azerbaijani people continued the fight for the state independence."[66]

The Georgian act of Independence shares the similar values:

> "The statehood of Georgia that dates back to ancient times was lost by the Georgian nation in the 19th century following the annexation of Georgia by the Russian Empire, which suppressed Georgian statehood. The Georgian people have never accepted the loss of freedom. The suppressed statehood was restored on 26 May 1918 by the proclamation of the Act of Independence. The Democratic Republic of Georgia was

[66] Preamble of Constitutional Act of the Azerbaijan Republic of October 18, 1991 No. 222-XII. Also see William Parlett. "Constitutionalism and State-Building in Post-Soviet Eurasia" (2021) Nagoya University Asian Law Bulletin Vol.6

> established, with the bodies necessary to represent state authority, elected on a multi-party basis and with the Constitution.
>
> In February-March 1921, Soviet Russia violated the peace agreement of 7 May 1920 between Georgia and Russia, and in an act of aggression, occupied the state of Georgia, previously recognised by Russia. This was subsequently followed by the *de facto* annexation of Georgia.
>
> Georgia did not join the Soviet Union voluntarily, and its independent statehood has persisted to this day, and the Act of Independence and the Constitution still have legal force, because the Government of the Democratic Republic never signed an agreement relinquishing its independence, and continued to work in exile."[67]

Similar preambles are present in Moldovan and Armenian acts of independence. At the same time, the declarations of Ukraine, Belarus, and Central Asian Republics demonstrate more cautious language without referring to a colonial past.

Further, even though there was an explicit reference to colonialism and occupation by Russia/Soviets and further a desire to distance and build stable institutions and state apparatus, the past heritage of ineffective constitutional system and government apparatus did not allow to pursue this end fully.

For example, a more authoritarian turn took place in many of the post-Soviet republics. In Azerbaijan, even though after the rupture, the nationalist block came to power, soon after failure to govern, the head of former Soviet Azerbaijan, Haydar Aliyev, who was the product of Soviet mentality, usurped the power.[68] This, in turn, resulted in the continuation of the same form of government similar to the Soviets, especially inclined to strong executive power. Similar developments happened in Uzbekistan, Turkmenistan, Kazakhstan, Georgia, and Ukraine either immediately after the collapse or later as a result of the internal struggle for power between old soviet and new national elites.[69]

[67] Act of Restoration of State Independence of Georgia, 9 April 1991. Also see William Parlett. "Constitutionalism and State-Building in Post-Soviet Eurasia" (2021) Nagoya University Asian Law Bulletin Vol.6

[68] Andreas Heinrich and Hannes Meissner. "The political system in Azerbaijan." (2011) Caucasus Analytical Digest No. 24

[69] For comprehensive analysis see Barnett R.Rubin and Jack Snyder (eds). "Post-Soviet political order. Conflict and State building." (1998) Routledge and Jeffries, I. "The Caucasus and Central Asian Republics at the Turn of

As argued in the previous chapter on the pillars of Russian/Soviet legal elements, one of the distinguishing features was the strong centralised power. Hence earlier years of independence from the Soviets are characterised by attempts to distance from the statist views on power, where the interests of the state are prioritised over the rights of individuals.[70] All constitutions of the independent republics contain a list of individual rights and guarantees for their realisation. For example, the constitution of Azerbaijan has a separate chapter with the list of individual rights, and a separate guarantee on the proportional limit of the rights.[71] In fact, the implementation of such provisions is highly contested and questionable. While other constitutions of the Baltic countries can be a good example of the guarantying and implementation of the rights of individuals. This is the reason why the literature groups the post-Soviet constitutions into several groups:

Strong Constitutionalism	**Instrumental/contested**	**Weak**	**Sham[72]**
Estonia Latvia Lithuania	Armenia Georgia Kyrgyzstan Moldova Ukraine	Kazakhstan Russia	Azerbaijan Belarus Tajikistan Turkmenistan Uzbekistan

While the Baltic countries exhibit the successful transformative example of constitutionalism after the collapse of the empire, the other countries struggle to perform and escape the legacies of the past. This struggle manifests in the form of frequent changes to the constitution, a preference for a strong executive branch and strong state, also preference for establishing a strong control over internal sovereignty and external independence and finally

the Twenty-first Century. A guide to the economies in transition" (2003) Routledge Studies of Societies in Transition

[70] William Parlett. "Constitutionalism and State-Building in Post-Soviet Eurasia" (2021) Nagoya University Asian Law Bulletin Vol.6

[71] ibid, p.40

[72] ibid, p.40

the mimesis of European constitutionalism in the process of distancing from Russia/Soviet past without proper contextualisation and comprehension of the transferred norms.

The literature identifies and frames the problems of the post-soviet states as within the constitutional legacies and opposes the discourse of mentality, which is mostly argued when talking about post-Soviet authoritarian states. It is argued that the authoritarian tendencies and lack of trust in the legal system and to the constitution as a supreme law derive from past legacies.[73] In my opinion, these are colonial legacies and, in some terms, such proximity in legal and administrative terms is the continuation of the logic of coloniality, because this is one of the ways of controlling the nearby states.

Further, the literature identifies several core problems of the soviet constitutionalism, which also have been passed to the independent states. These are the problems of instrumentalism, order, legitimacy and internal/external sovereignty, super-presidentialism and separation of powers. Another significant pattern of post-Soviet constitutionalism is the constant catch-up with modernisation and introducing the Western democratic constitutional norms. However, some scholars argue that the reason for the failure of such constitutional measures can be the historic origins of post-Soviet constitutionalism.[74]

The significant pattern that is inherent in the constitutional system of most post-Soviet republics is the problem of super-presidentialism. For example, Levent Gonenc, in his book, argues that:

> "There were some common characteristics in the constitution-making processes of the former Soviet republics. In this regard, one may point to the central position of the leaders in the creation of new constitutions. Most constitutions in the former Soviet republics appeared as "leader constitutions". That is to say, charismatic leaders in the republics not only directly influenced the constitution-making process, but also spent considerable effort to adopt new constitutions which usually established strong presidential systems. The Russian, Ukrainian, Azerbaijani, Armenian and Central Asian constitutions can be given as examples of leader constitutions. For the purpose of this study, the most important implication of such leader domination in constitution-

[73] Newton (57)
[74] Andrey Medushevsky, "Constitutional Transformations in Post-Soviet Region: Results of Previous Studies" (2017) Armenian Journal of Political Science 1 (6) 81

making would be the uncertainty of the future of these documents after the disappearance of the leaders who have tailored them to their needs."[75]

Another significant pattern common for the comparator countries is the frequent initiative to change the constitutions through referenda. During the short period of constitutional existence, there have been several referenda in these countries which aimed at strengthening the executive branch and lifting the limitations for presidential elections.

Newton Scott gives an elaborate explanation of this phenomenon in his book. According to him, the phenomenon of super-presidentialism in the post-soviet countries is a legacy of Soviet constitutional tradition. He argues that the post-soviet concept of the presidential guarantor is the continuation of the soviet-style communistic party guarantor for the transition to communism. In other words, as the communist party was the guarantor to transition to communism – not an attainable ideal, the president in the post-Soviet states is a guarantor of the transition to democracy – an ideal of a new era, which eventually becomes a permanent state of transition.[76]

Further, apart from the internal sovereignty and separation of power challenges, international recognition became an important issue. The constant reference to international forms and the legal system is a form of shield from further annexation or invasion by the imperial powers. This language is present in most of the post-Soviet Constitutions.

For example, "the Kyrgyz Constitution constitutionalised its adherence to international law norms, committing itself to avoid expansion, aggression or territorial claims. The Kazakh Constitution adheres to the international law principles of the 'equality of states and non-interference in each other's domestic affairs', and the Tajik Constitution calls for 'respect of the sovereignty and independence of other states'. Similarly, Article 13 of the Armenian

[75] Levent Gonenc, "Prospects for Constitutionalism in Post-Soviet Countries" (2002) Martinus Nijhoff Publishers, 207
[76] Newton (57)

Constitution (1995) and Article 10 of the Azerbaijani Constitution (1995) bind the respective country's foreign policy to international law. In typical postcolonial language, the Tajik Constitution (1994) in its preamble links sovereignty and its guarantees to development."[77]

A further similar feature of these countries is that after independence the tendency and desire to distance themselves from past legacy rushed them to adopt European constitutional models without proper reflection and adoption of the context. Thus, as argued earlier, in some countries, even though the constitutional text looks similar to the liberal constitutional language of the West, in the practice it is not implemented.

While analysing these historical patterns, I concluded that decolonisation of the constitutional system of the post-Soviet republics never took place. I argue that after gaining independence, along with the remnants of the colonial heritage, the second colonial turn took place in these countries, which were dominated by the Western liberal rule of law and development projects.

For example, Armen Mazmanyan argues that:

> "Democratic constitutions emerged in the post-Soviet area following the demise of the USSR in 1991. Inspired by the democratic euphoria of the epoch, these constitutions embodied the most progressive ideals of the time, reflected in both the stipulation of rights and in the stipulation of institutions of governance. The rights' sections of these constitutions went to include a wide array of known freedoms and rights without a concern of the states' capacity to stand for these and most probably sometimes without even a proper comprehension of these rights beyond what their declaratory meaning was. The macro-political institutions, provided by the constitutions, came as transplants from existing Western constitutions, and in many cases they appeared non-demanded, irrelevant and non-functional."[78]

The post-Soviet countries in the early 1990s underwent turbulent political instability, which disabled them to went through a healthy constitution-building process. For example, some researchers argue that a more transparent, deliberative and participatory process of

[77] Parlett (65), p. 65
[78] Mazmanyan (62) 315

constitution-making "provides a legacy to future leadership and establishes a normative benchmark which garners legitimacy for various political institutions and processes."[79]

For example, after the independence, many post-Soviet countries experienced political instabilities such as ethnic conflicts, civil wars, military coups, and uncompromisable rivalry between political opponents, which created an adverse environment for the adoption of constitutions. Constitutions of Turkmenistan, Uzbekistan, Latvia, Estonia, and Lithuania were adopted in 1991-92, while in the case of Azerbaijan, Armenia, Georgia, Ukraine, Moldova, and Tajikistan, the adoption was postponed till 1995 due to the inability to establish the internal sovereignty fully.

In such an unstable period, the rule of law and development programs poured into the region as soon as the Soviet Union collapsed. Many of the Western projects were primarily concerned with transferring economic and commercial laws to secure their market interests. However, simultaneously, they were investing in constitution-building and democratisation projects. The significant character of the rule of law and development project was that without an understanding of the local context, they decided to transfer the liberal norms. The result of it in some contexts was a failure.

For example, Channell, in her article, explains the reasons why the rule of law and development programs have failed in the post-soviet region. According to her, one of the major failures was the lack of the ownership from the local governments, mistaken assumptions that new laws are the answer to the problems, the local governments are the key to implementing reforms, and cultural differences should not be central to legal reforms and finally, that process of legal changes is well understood.[80]

[79] Sudhir Kumar Suthar, "Postcolonial and Post-Soviet Experiences of Constitution-making: Comparing India and Russia." (2014) International Studies, 51 (1–4), 56

[80] Wade Channell, "Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries" (2005) Carnegie Papers (57) 4

The analysis of a local legal culture influenced by the colonial past suggests that the legal nihilism and distrust in the government and political bodies are well spread. Also, local governments in some of the post-Soviet countries such as Azerbaijan, Turkmenistan and Uzbekistan can be named as a simple continuation of the soviet nomenclature (bureaucracy) that later became the instrumental for the former coloniser.

In such context, the Western approach of bringing reforms, liberal values, constitutional democracy and market economy to the region without giving due analysis to the local political dynamics speaks only about the negligent attitude towards constitutional and legal values and more caring about their own economic and security priorities.

For example, according to Ian Jeffries, the U.S., after the 9/11 attack, turned a blind eye to Uzbekistan's human rights record because it was part of the combating terrorism program. Under such conditions then Uzbek President Islam Karimov managed to crush opposition members under the premise of fighting terrorism.[81] This is only one of the examples. The same kind of compromises took place both in Azerbaijan, Turkmenistan, Georgia, Armenia and Kazakhstan.

[81] Ian Jeffries, "The Caucasus and Central Asian Republics at the Turn of the Twenty-first Century. A guide to the economies in transition" (2003) Routledge Studies of Societies in Transition

Conclusion

This thesis, along with analysing decolonial approaches to comparative constitutional law, also examined the secondary literature on constitutional law developments in the post-Soviet region, especially in Russia and former USSR member states. The main thesis of the research was that for a holistic approach to comparative constitutional law, decolonial studies offer a methodology that can help constitutional scholars to avoid universalisation and Western-centric analysis of the constitutional law. Second, on the example of Russian colonialism in the post-Soviet republics, the constitutionalism in these countries was analysed from the decolonial perspective and some common patterns of colonial experience were identified.

The main findings can be summarised as the following:

a. First, the literature review established two views on the origins and roles of the constitutions. Constitutions can be both products of the revolutions and documents adopted in response to the rupture with the former empire. However, at the same time, the knowledge about constitutions is Eurocentric. Main concepts of classic liberal constitutionalism, such as separation of powers, bill of rights, secularism, judicial review, and statehood, are the products of the Western knowledge system. Therefore, diversification of the discourse by including Global South voices is not enough to achieve the decolonisation of constitutional law. A more radical analysis of the content of concepts, their origins, and how they were used and applied for many centuries should be conducted. The decolonial approach to constitutional law can offer such radical critique.
b. Second, Russian Empire and subsequently the Soviet Union are usually neglected among the decolonial and postcolonial scholars. Authors like Madina Tlostanova offer

a wide analysis of Russian imperial and colonial traits, especially how they took place in the colonisation of peoples of the Caucasus and Central Asia. According to the literature Russian Empire and subsequently the Soviet Union strived to be accepted by Western empires as equals, however, were always neglected. Therefore, she categorises them as second-category empires. Such alienation led Russia to create its own Orient in the face of the Caucasus and Central Asia. Russia imported Western modernity through its own adaptation to these regions, which led to a double colonisation of people living in these areas.

c. Finally, after gaining independence, post-Soviet republics inherited the colonial heritage of Soviet constitutionalism, which took the form of legal nihilism, and high-level distrust of the constitutional system. Another colonial influence was the preference for presidential system republics. These presidential systems further degraded into super-presidentialist republics with formal separation of powers. Another common feature for these states is the weak/instrumentalised or sham constitutionalism which does not have the full potential to transform the political system. One more factor that precluded decolonisation of the legal systems in the region and slowed down the development of constitutional democracies is the fact that as soon as these countries gained independence, they became a market for Western influence and import of rule of law and development projects to fragile and unstable local contexts without proper reflection.

This research offers the first step in the analysis of Russian/Soviet colonial heritage in the constitution-building process in the former colonies. There is a potential for a decolonial comparison of Russian colonial experience with Western colonial heritage in the constitutional models of current independent states. It is also interesting to further research how the choice of constitutional system depends on the colonial past.

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