

Constitutional Identity in the Modern States Practice

Vakhtang Surguladze¹, Natalya Frolova^{2,3,*}, Vladislav Panchenko^{4,5,6,7},
Andrey Gruzdev⁴, Ivan Makarchuk^{4,5}

¹S.T.C. Analytical Group, 108833 Moscow, Russia

²Russian Presidential Academy of National Economy and Public Administration, 119571 Moscow, Russia

³Diplomatic Academy of Russian Foreign Ministry, 119021 Moscow, Russia

⁴Siberian Federal University, 660041 Krasnoyarsk, Russia

⁵Krasnoyarsk State Agrarian University, 660049 Krasnoyarsk, Russia

⁶Federal Siberian Research and Clinical Center FMBA, 660037 Krasnoyarsk, Russia

⁷Research Institute of the Federal Penitentiary Service of Russia, 125130 Moscow, Russia

*Corresponding author. Email: frolova.rags@yandex.ru

ABSTRACT

In the context of globalization, intensification of international migration, growth of cross-cultural and cross-civilizational communications, there is an increase of the importance of socio-political and legal mechanisms aimed at supporting the stability of states as stable communities of people with similar sociocultural values and world view, and national identity of citizens is an important component of it. As a natural result, there is a rise of a need to reconsider the constitutional legislation of modern states from the standpoint of studying their constitutional identity as a link between the state order and political and legal institutions with the cultural context within which they appear and develop, as well as corresponding with identities, among which – national, religious and ideological ones. In complex multi-religious and multinational states, the main form of socio-political consolidation of society is the civil-legal understanding of a nation as a state — the community of its members. In order to ensure the social and political security of the state, it is essential to have a consensus in the society on a number of issues that are most significant for its members. State information and legal policy is key to formulating and maintaining public consensus. The state identity policy is fixed in the legislation of the countries of the world in different ways. Depending on a particular state, one can pay more or less attention to this issue in regulatory acts of different levels.

Keywords: *constitutional identity, national identity, self-consciousness, legal policy, national security, governance*

1. INTRODUCTION

The constitutional direction of the study of identity politics is complex and interdisciplinary and now it is gaining an increasing number of researchers [1–4], as evidenced by the increase of the number of publications devoted to this subject abroad and in Russia.

The intensification of global migration [5] and diverse integration processes in the modern world [6–8] led to an increase in the relevance of studying legal aspects of the identity policy and the number of scientific studies on the issues of constitutional identities [9]. At the same time, these studies are meaningfully closely related to a wider range of works devoted to various aspects of the identity.

Anna Śledzińska-Simon considers that the reason for the growing popularity of the concept of identity politics in legal practice is the fact that the use of this concept in judicial rhetoric is intended to legitimize the legality and authority of judges in the context of the emerging contradictions between different legal orders. Anna Śledzińska-Simon argues that the identity of a

constitutional subject may develop simultaneously in three dimensions as an individual, relational, and collective selves, which remain in constant interaction [10]. References to the constitutional identity and attempts to discover it are becoming a part of the daily practice of the constitutional courts in modern states [11].

The scientific literature raises problems of the role of peoples' expression of will when adopting constitutions and defining boundaries and criteria for their collective identity [12]. The phenomenon of constitutional patriotism is investigated [13]. The issues of the influence of judges' personal identity on the application of law and judicial practice [14], including the value-based approach related to personal identity [15], are analyzed in legal practice.

In the socio-political and legal researches of the Western countries, much attention is paid to the protection of citizens' constitutional rights from threats caused by the processes of globalization and the clash of cultures and traditions [16]. The question now arises of whether constitutional identity is necessary at all and whether it is essential to fix it in the basic law of the state [17]. Increasingly, the Constitution serves as a battleground on

which discussions about national identity are flaring up [18].

The intensification of public and scientific discussions about the significance of identity led to the emergence of research related to the problems of protecting the constitutional rights of citizens in the information age. In particular, in the context of the development of modern technologies, legal scholars consider the individual rights to replace identity [19].

The gradual recognition of the concept of constitutional identity by Russian legal science is evidenced by a policy essay published in October 2018 by the chairman of the Constitutional Court of Russia V.D. Zor'kin, one of the key parts of which was called "Constitutional Identity of Russia". The Russian lawyer notes: "The desire of different states to uphold and defend their constitutional legal identity is clearly expressed in recent years - ultimately, due to globalization, like most of the modern political and legal trends. Globalization leads ... to tectonic shifts of the entire world order system. At the same time, the fact that the changes generated by globalization are far from benefit, that they carry enormous risks and already quite obvious costs in various spheres of human life - from economy to social life and from politics to culture - in all regions of the world. Hence, a natural desire arises to oppose the elemental processes of sociocultural globalization to the understanding of one's own specificity that cannot be universalized. At the level of the collective consciousness, it is manifested in the aspiration to formulate their religious, national, or regional (for example, European) identity, to preserve and strengthen the traditional values of the family, culture, life, etc. And at the level of the state power, this is manifested in the aspiration to prevent the erosion of national-state sovereignty and to approve the constitutional-legal identity of the state" [20]. Thus, there is reason to about a serious theoretical and practical development of the doctrine of constitutional identity in modern Russian law [21, 22], which is in line with the global growth of scientific interest in this issue [23–25].

It is noteworthy that the problem of understanding and preserving the constitutional identity of a sovereign state is the object of scientific and professional practical interest on the part of representatives from other countries of the former Soviet Union. The article of the judge of the Constitutional Court of the Republic of Belarus S.P. Chigrinova is dedicated to constitutional identity and trends in constitutional development in the 21st century [26].

2. MATERIALS AND METHODS

Research on various issues of constitutional identity in the practice of modern states requires a comprehensive methodological approach and the use of relevant legal frameworks and concepts. Therefore, in this paper, the authors employed a number of special juridical methods (such as the method of interpreting the norms of national constitutional law, normative dogmatic and formal legal

methods) in order to investigate constitutional identity in the practice of modern states. A broad methodological approach and the use of an extensive regulatory framework allowed us to reach scientifically sound conclusions and enabled us to make inferences that have practical and predictive potential. A thorough review of the relevant literature discusses some fundamental studies on constitutional law, as well as the works of foreign scholars on the theory and practice of constitutional construction.

3. RESULTS

3.1. Reflection of the Policy of Identity in the Constitutional Law of Modern States

Quite often the state policy of identity is fixed in the constitutional legislation of the states. 80 constitutions of modern states were analyzed by the authors of this article from the standpoint of identifying the directions of the state policy of identity in the basic law, and not all of them were accompanied by appropriate instructions. At the same time, one can distinguish individual directions of the policy of identity, which are found in the constitutions as documents defining the basic principles of the state's existence and formulating the value narrative in which its citizens are supposed to exist [3].

3.1.1. Religious Community: Religious Identity

There are states in which the confessional character of the cultural-historical and civilizational matrix of the state is fixed in the constitution. For instance, such indications present in the modern constitutions of Armenia, Greece, and the legislation of some other Christian states [27].

The Constitution of Armenia points to the role religion played in shaping the Armenians' national identity: the Church is separated from the state yet "the Republic of Armenia recognizes the exclusive historical mission of the Armenian Apostolic Holy Church as a national church, in the spiritual life, development of the national culture and preservation of the national identity of the people of Armenia".

The Constitution of Greece, likewise, points to the basic role of religion and the Church in shaping Greek identity and the development of the Greek state. It was enacted "In the name of the Holy and Consubstantial and Indivisible Trinity". The Greek Constitution says: "The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodic canons and sacred traditions". National self-consciousness of the Greeks is identified as

Orthodox and is also associated with a wide Christian community, members of all other Orthodox churches of the world. The reference to Constantinople is a link with the times of great Byzantine Empire and widely even with Byzantine Commonwealth of nations as Dimitri Obolensky put it [28].

Quite often, the role of Islam for society is fixed in the basic laws of Muslim states. At the same time, in the case of the Arab world countries, attention is drawn to the presence of a supra-governmental all-Arab community as a reference point of self-consciousness. For example, in the modern constitutions of Kuwait and Mauritania, it is stated that these countries are integral parts of the Arab world.

3.1.2. Common Fate: Historical Identity

From the point of view of the implementation of the modern policy of identity in states with a centuries-long history and nationhood, strengthening a consensus view of a common historical fate in society is an established actual aspect of national self-awareness in its civil-legal understanding. Thus, for example, the preamble of the Constitution of the Russian Federation states: “We, the multinational people of the Russian Federation, united by a common fate on our land, establishing human rights and freedoms, civil peace, and accord, preserving the historically established State unity, proceeding from universally acknowledged principles of equality and self-determination of peoples, revering the memory of ancestors who have passed on to us their love for the Fatherland and faith in good and justice, reviving the sovereign statehood of Russia and asserting the firmness of its democratic basis, striving to ensure the well-being and prosperity of Russia, proceeding from the responsibility for our Fatherland before present and future generations, recognizing ourselves to be a part of the world community, do hereby adopt the Constitution of the Russian Federation”.

The pre-cited indications of the common historical fate and the multinational character of the Russian Federation imply the identity policy aimed at implementation the strengthening of the common civil identity.

The aspect of people’s self-determination and historical unification in a single state found its place in the preamble to the Constitution of the Federal Republic of Germany: “Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. Germans in the Länder of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people”.

The German Constitution enumerates the feudal units which formed united Germany. A similar description of

the historical process can be found in the Constitution of Switzerland, which arranges the cantons according to the dates of their joining the Confederation. This makes it possible to trace down the process of the development of common Swiss self-consciousness. Very much like the Constitution of Germany the text of the Constitution of Switzerland clearly traces down the historical genesis of the nation through gradual unification of territories.

Detailed conceptual speculations on the significance of a common historical and cultural heritage for the national identity are presented in many constitutions of foreign states, among which, for instance, Albania, Andorra, Belarus, Georgia, and Kazakhstan.

3.1.3. Culture Community: Civilizational Identity

The indication in the constitutions of a number of states of their civilizational identity and uniqueness may be considered as a completely different level of the policy of identity, associated with emphasizing the peculiarities of the historical fate of a state. The Constitution of Cambodia is an example of such an approach to the justification of its state unity: “We, the people of Cambodia having known a grand civilization of a prosperous, powerful, and glorious nation whose prestige radiates like a diamond, having endured sufferings and destructions and having experienced a tragic decline in the course of the two decades, having awakened, stood up with a resolute determination to strengthen the national unity, to preserve and defend Cambodia’s territory and its precious sovereignty and the prestige of Angkor civilization, and to restore Cambodia into an “Island of Peace” based on a multi-party liberal democratic regime guaranteeing human rights and the respect of law, and responsible for the destiny of the nation always evolving toward progress, development, prosperity, and glory, with this resolute will we inscribe the following as the Constitution of the Kingdom of Cambodia”.

The aspect of the cultural uniqueness, although not so vivid as in the Cambodian Constitution, is also recorded in the Constitution of China, in which the PRC is positioned as one of the most ancient states in the world, and also in the Constitution of Vietnam.

In modern conditions of the intensification of international contacts and intercultural interaction, problems of sociocultural and civilizational identity increasingly arise when considering the balance of individual rights and freedoms and minority right [29], in conditions if their rights and freedoms contradict the constitutional identity of the state and society in whole.

3.1.4. Community of the Socio-Political System: Socio-Political Identity

An indication of the common historical fate and cultural and civilizational affiliation of citizens can be

supplemented in the texts of constitutions by examples of socio-political consolidation. The policy of identity in this case acquires the features of an active state policy of memory associated with the examples of the struggle of ancestors for the political unity of the modern state, which is fixed in the main law. The PRC Constitution provides a fairly detailed description of the formation of the modern state since 1840 when China was in a semi-colonial position. The social aspect of the state policy of identity fixed in the Constitution of the People's Republic of China gives the instruction for building a socialist system in the country [30]. In this respect, the text of the Chinese Constitution naturally invokes associations with the Constitution of the USSR of 1977 and the Constitution of Cuba of 1976, since the fundamental laws of these states also noted features of revolutionary transformations and corresponding tasks of social and political development. Socialist states' Constitutions, adopted during the period of global confrontation during the Cold War, are distinguished by an emphasis on the progressive direction of social development and social aspects.

3.1.5. Territorial Community: Geographical Identity

The protection of the territorial integrity of the state is a necessary condition for its sovereignty and political existence. In this regard, the consolidation of geographical ideas about the borders of the state is widely represented in the basic laws of the modern states. As a rule, this is associated with an indication of following the principle of territorial integrity. In some cases, there are references to specific territories. Usually, this circumstance is due to the presence of territorial conflicts. In the preamble to the Constitution of the PRC, for example, the indivisible affiliation of Taiwan to China is noted: "Taiwan is part of the sacred territory of the People's Republic of China. It is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland".

The historical continuity in relation to the territory of the state is fixed in the Constitution of Laos: "The multi-ethnic Lao people have existed and developed on this beloved land for thousands of years. Starting from the middle of the 14th century, during the time of Chao Fa Ngum, our ancestors founded the unified Lane Xang country and built it into a prosperous land. Since the 18th century, the Lao land has been repeatedly threatened and invaded by outside powers. Our people enhanced the heroic and unyielding traditions of their ancestors and continually and persistently fought to gain independence and freedom".

3.1.6. Self-determination: Common Self-identity

Special attention should be paid to the factor of national self-determination as a key principle for the consolidation of society. As an example of it, we can mention the French

Constitution, which emphasizes the openness of the state to those who are ready to join the French Republic and shares its inherent values of freedom, equality, fraternity, and democratic development. The proposal fixed in the preamble to the Constitution of France to share its sociocultural and political values is addressed to people from the overseas territories - the population of the former colonial possessions of the French Empire.

The principle of national self-determination is one of the most difficult problems of implementing state policy of identity and legal policy, as it involves a lot of difficult issues of interethnic and interfaith relations, especially in cases of multinational and multi-religious states [31, 32]. In the presence of numerous, often contradictory, local collective identities in society, the state needs to pursue information policies aimed at maintaining and developing the consensus points of general state identity, formulate categories of patriotism that allow citizens with a different hierarchy of identities to find common points of view and social and political values.

As a rule, the issue of self-determination of nations in multinational states is attempted to be solved by fixing in the Constitution the rights of all citizens, regardless of their origin, race, or religion. The problem of incorporation of national minorities in the nation-wide space in legal terms is in constitutional consolidation of their rights to develop their cultures, traditions, languages, and institutions.

At the same time, it is typical that, with considerable attention to the rights of the national minorities, the basic laws of the modern states do not stipulate the right to secession. Indirectly, the indication of such a possibility is presented in the Constitution of Belgium, in which it is noted that the borders of the state and its administrative territorial units may be changed or clarified.

The struggle of regions with a strong local identity for changing the Constitutions of the states to which they belong [33] is one of the key contemporary political problems for many states of the world, often being the source of not only domestic but also international tensions.

Self-determination is a key aspect of the state policy of identity aimed at consolidating a political nation as an "imagined community" [34], and it is the most relevant, prospective and important direction of the active information policy of the state, implemented in order to ensure social and political consolidation of society and inclusion new members in it. However, at the same time, it can be extremely dangerous, as in the face of growing socio-political, economic, and different ideological conflicts between the regions and the center it can be a breeding ground for separatism and political separation as an independent state.

3.1.7. Community of State: State-political identity

The state can be considered in the constitutional law as an independent socio-political value and a key factor of the

identity of the community, which provides the basis for the formulation and maintenance of the state identity. The emphasis on political unity and the common state as the most important principle of the consolidation of society is clearly represented in the text of the Constitution of Macedonia. It is noteworthy that the historic fact that took place at the beginning of the 20th century — the proclamation of independence of the Krusevo Republic in 1903, which existed only ten days and emerged during the uprising against the Ottoman Empire — was chosen by the authors of the basic law of the state to justify the Macedonians' right to their own state.

The rebels managed to knock out the Turkish garrison from the city of Krushevo and form a Council of the Republic, which included representatives of each ethnic community: Bulgarians, Greeks, and Vlachs. The manifesto of the government of the Krushevo Republic called on the entire population of Macedonia, including Albanians and Turks, to forget about ethnic and religious differences and to take part in the fight against the sultan's tyranny [35].

The next important element of the historical formation of Macedonia as an independent multinational state in the Constitution are the decisions of the Anti-Fascist Assembly on the National Liberation of Macedonia of 1944, proclaiming the equality of Macedonian citizens regardless of ethnic origin: "Macedonia is established as a national state of the Macedonian people, in which full equality as citizens and permanent coexistence with the Macedonian people is provided for Albanians, Turks, Vlachs, Roma and other nationalities living in the Republic of Macedonia".

The civil aspect of identity is also fixed in the Constitution of Moldova, proclaiming "striving to satisfy the interests of citizens of a different ethnic origin who alongside with the Moldovans constitute the people of the Republic of Moldova".

Article 10, Unity of People and Right to National Identity of the Constitution formulates the citizenry-legal understanding of the nation: "(1) The unity of people of the Republic of Moldova constitutes the foundation of the State. The Republic of Moldova is the common and indivisible motherland of all its citizens. (2) The State recognizes and guarantees all its citizens the right to the preservation, development, and expression of their ethnic, cultural, linguistic, and religious identity".

The civil and political understanding of the nation is fixed in the Constitution of Afghanistan: "The nation of Afghanistan is composed of all individuals who possess the citizenship of Afghanistan. The nation of Afghanistan shall be comprised of Pashtun, Tajik, Hazara, Uzbek, Turkman, Baluch, Pachaie, Nuristani, Aymaq, Arab, Qirghiz, Qizilbash, Gujur, Brahwui, and other tribes. The word Afghan shall apply to every citizen of Afghanistan".

An indication of civil identity is also present in the preamble to the Constitution of Bosnia and Herzegovina and the basic laws of other multinational states.

4. CONCLUSION

The political and legal analysis of the constitutions of the modern states gives a clear idea of which areas of the state policy of identity are the most commonly used in legal practice. The constitutional identity, as well as the state policy of identity, are complex sociocultural phenomena, the origin of which is due to historical reasons and are distinguished by its uniqueness in each specific society and state. Thus, the constitutional identity of the state as an aspect of the consensus ideas of society about itself and the state policy of identity, aimed at preserving its autonomy, independence and identity are essential components of the national security of the state in terms of protecting and preserving its constitutional, informational, spiritual and value sovereignty.

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