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The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism

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THE STRUGGLE FOR THE CONSTITUTION IN RUSSIA AND  
THE TRIUMPH OF ETHICAL INDIVIDUALISM

KEY WORDS: Russian constitution, civil society, rule of law, constitutional reform, 1993 constitution

INTRODUCTION

The making of constitutions in post-communist countries has often been likened to overhauling a ship in mid-ocean. This somewhat understates the problem: in most other countries at least the destination or purpose is known, whereas in Russia there is no consensus over the type of polity that is to emerge out of the constitutional process. In other words, there is no agreement over what precisely constitutes an ethical state or sustains the moral attributes of the citizen living in this state. As far as the patriots are concerned, Western liberalism is subversive of the bonds of community and consensus, while for national-patriots the state subsumes within itself all that is required to make the good life. Advocates of Western-style individual rights and the separation of powers, however, were in the ascendant in the first post-communist years. While the liberal intellectual hegemony might have been flawed and their grip on power tenuous, liberal views, despite numerous shortcomings and ambiguities, nevertheless triumphed in the Russian constitution adopted on 12 December 1993.

The Decembrist uprising of 1825 marks the intensification of the struggle for the constitution in Russia. Decembrist thinking, however, is highly ambivalent and contradictory, with the Southern Society represented by Pavel Pestel favouring a strong but republican state to achieve the aim of modernisation, while the Northern Society's views on constitutionalism were more liberal and federalist while at the same time monarchist. For the rest of the century, moreover, constitutionalism in Russia tended to take second place to

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an appeal to the people: “democracy” took precedence over liberal constitutionality,<sup>1</sup> a prejudice against constitutionalism and liberal parliamentarianism that was particularly deep among the Populists. In a paradoxical way, both left and right in late nineteenth-century Russia criticised constitutionalism, considering a basic law as somehow alien to the political and legal culture of the country and its social fabric.<sup>2</sup> This element in Russian philosophy remains, and even today many ask why Russia needs a constitution.<sup>3</sup> While organic notions of community remain strong, the liberal tide has gathered strength in Russian political thought and is now the dominant force, albeit with its own peculiarities.

The nineteenth century saw the autocracy placed on a more ordered basis. The 1832 first volume of the “Collected Laws of the Russian Empire” vested all power in the monarch, giving him control over the legislature, executive and the judiciary. In the words of Article 1: “The Emperor of All the Russias is an autocratic (*samoderžavnij*) and unlimited (*neograničennij*) monarch; God himself ordains that all must bow to his supreme power, not only out of fear, but also out of conscience.”

The late Tsarist period was marked by an important debate by legal scholars and others over the concept of *pravovoe gosudarstvo* (a “law-based state”). The Russian notion of *pravovoe gosudarstvo* is derived from the German concept of a *Rechtsstaat* and thus differs from the Anglo-American concept of the “rule of law”. As Donald D. Barry has noted, “The concept of *Rechtsstaat* is based on the positivist assumption that the state itself is the highest source of law.”<sup>4</sup> Thus a *pravovoe gosudarstvo*, as Harold J. Berman put it, “is rule *by* law, but not rule *of* law”; the latter is sustained by the theory of natural law suggesting that there is a law higher than statutory law governing the normative acts of society.

Many of the more notable Russian moral philosophers and legal scholars condemned the positivist tradition, so strong in Germany. Vladimir Solov’ëv, indeed, developed the notion of a type of social liberalism based on the idea of the “right to a dignified existence” within the context of a society and state formally ordered by law, a view that sharply distinguished him from the revolutionary socialist challenge to Western liberalism but that brought him closer to Bismarck Germany’s *Rechtsstaat* liberals.<sup>5</sup> Strong echoes of

Solov'ëv's thinking can be found in Russia's new constitution. At the turn of the century the name of Boris Chicherin is most strongly identified with the idea of a constitutional legal order and restraints on monarchical power, condemning the positivist tradition while calling for a type of defensive liberalism which he came to call "liberal conservatism". His views, also, are particularly resonant in the new constitution, as in his notion of "liberal measures and strong government,"<sup>6</sup> a formula adopted enthusiastically by Eltsin's "government of reforms". Above all, his defence of the ethical attributes of the juridical sphere encompassed by civil society and the notion of freedom that it represents went far beyond Hegel's rather grudging acceptance of this sphere of conflicting private interests and firmly rejected Marx's critique, views that in effect make Chicherin the intellectual "godfather" of Russia's new constitution.

The long struggle for constitutionalising state power in Russia finally bore fruit when, threatened by worker and peasant unrest, Nicholas II conceded the principle in his Manifesto of 17 October 1905. However, many scholars have criticised the constitution (Basic Law) that finally emerged on 23 April 1906, deliberately adopted on the eve of the convocation of the first State Duma. Max Weber called the process "sham constitutionalism" (as many call today's constitution) because the Tsar's power was not reduced, and in any case he refused to be bound by the provisions of the constitution.<sup>7</sup> In fact, the constitution of 1906 was not a sham but introduced a constitutional monarchy, albeit a monarchy with considerable legislative privileges.<sup>8</sup> The attempt by the monarch to retain the earlier concept of "unlimited" (*neograničennij*) power failed. As V. Leontovič pointed out, the only grounds on which the accusation of sham constitutionalism could be justified is to attack not the document itself but its social context, above all the absence of a developed civil structure, "something that is essential for any liberal constitution." It was the lack of civil freedom, Leontovič insisted, that led to the disappearance of political freedom and the destruction of the constitutional system in Russia.<sup>9</sup>

The eight months between the fall of tsarism in February 1917 and the Bolshevik coup in October of that year saw the foundations of a democratic republic established with extraordinary speed. However, one of the reasons underlying the frailty of this great democratic

experiment, quite apart from the problems generated by the war, was the tension between democracy and liberalism, a tension that was to haunt the post-communist experiment. In 1917 free vent was given to the long-suppressed democratic aspirations of the people, but the liberal (legal and constitutional) foundations of the state remained weak. The postponement of the Constituent Assembly might have been justified by perfectly good technical reasons but proved politically disastrous, leaving the Provisional Government to hang in the air and to be cut down with relative ease.

The Soviet regime adopted constitutions in 1918, 1924, 1936 and 1977, but the concept of “sham constitutionalism” might be more appropriate here than for the earlier period. The Communist Party placed itself above constitutional constraints and its Statutes were in effect more important constitutional documents than the constitutions themselves. The Soviet polity was marked by a huge gulf between the *pays légal* and the *pays réel*. The question remains of quite why the Soviet regime felt the need to appear to adhere to the rules of constitutionalism. Part of the answer lies in the fact that the Soviet system, despite its repudiation of liberalism, felt constrained by its appeal to a democratic legitimation.<sup>10</sup>

In the last years of the Soviet regime Gorbachëv sought through *perestrojka* to achieve the renewal of the soviet representative system, the reorganisation of the higher bodies of state power, the reform of the electoral system, and to change the judicial-legal process in its entirety. In short, Gorbachëv’s programme represented a profound constitutional reform but one that was to be constrained by the concept of the “socialist legal state.”<sup>11</sup> Elements were incorporated in the constitutional amendments of 1 December 1988. Following the elections of 26 March 1989, the First USSR Congress of People’s Deputies, meeting from 25 May to 9 June 1989, established on 9 June a Constitutional Commission headed by Gorbachëv.<sup>12</sup> In the event, the dissolution of the communist order and the disintegration of the USSR in late 1991 led to the unceremonial abandonment of the Soviet constitution and the gradual reform process as a whole. Thus a precedent was set for constitutional transformation to take place in unconstitutional, indeed revolutionary, ways.

*The Genesis of the New Russian Constitution*

The birth of the new constitution has been a long and painful process. The aim was to replace the Soviet-era constitution adopted for the RSFSR on 12 April 1978 and amended over 300 times in its final years. Four days after the revolutionary Declaration of Sovereignty of the RSFSR of 12 June 1990, the First Russian Congress of People's Deputies on 16 June established a Constitutional Commission to prepare a document that would reflect Russia's new juridical and political status. The commission, made up of 102 deputies, was nominally chaired by Boris Eltsin with Ruslan Khasbulatov as its vice-chairman, but the main work was carried out by a smaller working group of some 15 deputies chaired by the commission's secretary, Oleg Rumjancev.

The first version, rejecting the whole notion of socialism and communism even though the Soviet Union was still in existence, was ready by November 1990.<sup>13</sup> The draft declared that "the Russian Federation is a sovereign, democratic, social and legal state of historically united peoples" (Article 1.1); broke decisively with Bolshevik traditions by defending the inviolable rights of the individual (Article 1.3); but also defined Russia as a "social state" guaranteeing extensive collective and welfare rights based "on the principles of social democracy and justice" (Article 1.8). Not surprisingly, the draft was attacked as being anti-Soviet and the Supreme Soviet did not place it on the agenda for adoption by the Second Congress of People's Deputies in December 1990.

Against the background of the "winter offensive" by the so-called conservatives from late 1990, the Communists of Russia faction in the legislature prepared an alternative and more traditional draft constitution.<sup>14</sup> Another draft was prepared by a group of legal experts from Saratov University's Faculty of Law. After much discussion the Constitutional Commission came out with a compromise draft in time for discussion by the Third Congress (28 March–4 April 1991); but by then the context had dramatically changed, with the 17 March referendum establishing the post of a Russian president and the Communists of Russia splitting and a reformist faction emerging led by Aleksandr Ruckoj, who went on to become vice president following Eltsin's victory in the presidential elections of 12 June 1991. In June 1991 the Fifth Congress (first convocation) consequently

rejected the compromise draft, insisting that it failed to formulate Russia's rights against the centre and that it was full of contradictions, and instructed the commission to prepare another version.

The August 1991 coup and the subsequent dissolution of the Soviet system added a new urgency to the constitutional question, and the commission rapidly produced a second version,<sup>15</sup> which was presented by Rumjancev to the Supreme Soviet on 10 October 1991.<sup>16</sup> Disagreements over ideological issues, such as individual rights, civil society and judicial reform, were no longer so contentious with the fall of Soviet power, but new bones of contention had emerged. These focused above all on the separation of powers on the horizontal level (between executive and legislative power), and on the vertical level (between the central authorities and components of the federation). The territorial organisation of the state proved particularly divisive since the draft sought to move away from Bolshevik ethno-federal principles towards a classic territorial federalism. As a result, the Supreme Soviet failed to muster the necessary 50 per cent majority of the total number to place the constitution on the reconvened Fifth Congress's agenda for approval.<sup>17</sup> In response, the Constitutional Commission met on 23 October and authorised Eltsin to place a slightly revised draft before the Congress "for discussion" (rather than adoption).<sup>18</sup> This he did on 2 November,<sup>19</sup> and Congress then instructed the commission to prepare yet another version in time for the Sixth Congress scheduled for spring 1992.

Work on the document was now torn between what appeared to be irreconcilable forces: on the one hand, most of the former autonomous republics rejected the Constitutional Commission's draft for failing to recognise their sovereign status; while, on the other, many of Russia's regions condemned it on the grounds that it gave excessive privileges to the republics. The working group sought to find a compromise, and on 2 March 1992 completed a third version which, after slight modifications following discussions with Supreme Soviet deputies, was published on 24 March.<sup>20</sup> This draft proposed a parliamentary republic but with broad powers for the president within the framework of parliamentary oversight and with the clear separation of powers between the three branches, the executive, legislative, and judiciary. As far as supporters of the legislature were concerned, "In the absence of a civil society in our

country, parliament and the Congress of People's Deputies are today virtually the only guarantors that can stop our country from plunging into a dictatorship of individuals."<sup>21</sup> The signing of the three-tiered Federation Treaty on 31 March appeared to resolve some of the sharpest conflicts over the shape of the federation.<sup>22</sup>

On the eve of the Sixth Congress of April 1992 alternative draft constitutions emerged, and at least two revised communist drafts. Sergej Shakhraj, Eltsin's legal advisor, put forward his own version which sought to subordinate parliament to presidential structures.<sup>23</sup> A second was concocted by Anatolij Sobčak, the mayor of St Petersburg and a former professor of economic law, together with Sergej Alekseev, both having been members of the commission drafting the new USSR constitution from the summer of 1989. Their version, presented on 30 March, gave strengthened powers to the executive.<sup>24</sup> Their work drew freely from Andrej Sakharov's proposed new constitution for the USSR.<sup>25</sup>

Sobčak subjected parliament's draft to scathing criticism, asserting that the parliamentary commission had worked in total secrecy and without the help of legal advice, resulting in a document that was "the former Soviet constitution with democratic phrases."<sup>26</sup> Their failure to understand the principle of the separation of powers allowed the emergence of dual power rather than cooperation between the various branches of power. Sobčak criticised the alleged extension of constitutional jurisdiction in the draft Basic Law, insisting that in spirit it remained close to Soviet concepts in claiming to regulate not only the state but also society, whereas for Sobčak "society has lived, is living, and will continue to live according to its own laws, which are not really laws but are only statements expressed in a legal form."<sup>27</sup> Sobčak thus defended a particularly impoverished version of the liberal ideal, one closer to Anglo-American neo-liberalism than to the social liberalism espoused by Solov'ëv, Chicherin and other pre-revolutionary thinkers. Ironically, the section on civil society (Chapter 3), of which Rumjancev and his associates were particularly proud, because it provided a theoretical basis for the rejection of the country's totalitarian past, was now condemned as "socialist" by Sobčak, a criticism that Eltsin came to share despite his earlier defence of the draft.<sup>28</sup>



The Supreme Soviet this time placed the constitution on the agenda, recommending that it be adopted at its first reading to avoid exhaustive debate over individual clauses. However, the Sixth Congress, while rejecting the Sobčak and communist drafts, merely approved the general outline (*za osnovu*) of the commission's version, calling for yet more revisions.<sup>29</sup> Against the background of a sharp deterioration in relations between the president and parliament, including fears that Eltsin might dissolve the legislature and put his (Shakhraj's) draft to a national referendum, the Congress somewhat moderated its assault against the president's economic policies and political prerogatives, extending his right to rule by decree to the end of 1992 but forcing him to step down as prime minister. The Congress went on to make numerous amendments to the "Brežnev" constitution, including the bodily incorporation of the Federation Treaty.<sup>30</sup>

The constitutional process had now reached an impasse. Only the Congress had the right to amend or adopt the constitution, and Eltsin's attempts to raise the million signatures necessary to hold a referendum did not offer a way out since adopting the constitution through a referendum was unconstitutional, and in any case required the approval of the Congress. The opposition in the Congress, on the other hand, used the right to make constitutional amendments with increasing boldness and for short-term political advantage. Of the 340 amendments made to the old constitution by early 1993, an astonishing 258 were adopted in 1992 alone.<sup>31</sup> The work of the commission continued, however, and issued a fourth version on 11 November 1992.<sup>32</sup> Work on the new constitution continued in parallel with amendments to the old allowing, according to Rumjancev, a gradual convergence of the two. He claimed that this allowed a "balanced and consistent modernisation of the legal space of the Federation" rather than a constitutional revolution,<sup>33</sup> an assessment that was too sanguine by far.

Fearing the loss of a powerful weapon in their struggle with the president, and hesitant about committing themselves to re-election, the Seventh Congress in December 1992 once again failed to adopt the ready draft of the constitution. According to Rumjancev this was a major mistake whereby parliament conceded the initiative and allowed the president to encourage other drafts which, accord-

ing to Rumjancev, were inferior to the parliamentary version in that they introduced numerous “conjunctural” elements. However long and convoluted the parliamentary version, Rumjancev insisted, it was nevertheless permeated by a democratic spirit that was in sharp contrast to the Soviet-era constitutions.<sup>34</sup> Agreement had been reached at the Congress on putting the basic principles of the new constitution before the people in a referendum, but Khasbulatov’s call in February 1993 for pre-term presidential and parliamentary elections ruptured the fragile compromise and once again opened up the question.

The president now sought to break the impasse by releasing details of his own, much more presidentialist, version devised by Alekseev, Shakhraj and Sobčak on the eve of the referendum of 25 April 1993.<sup>35</sup> An extended process of consultation followed this draft’s publication, in which the views of members of the federation were sought.<sup>36</sup> The results of the referendum were interpreted as supporting the president’s accelerated programme of constitutional change; and indeed, following the referendum the struggle between the executive and the legislature now focused on the constitution.<sup>37</sup> By the same token, as both sides courted the regions and republics, the Russian constitutional process was ever more frequently likened to the Novo-Ogarevo process whereby Gorbachëv sought to adopt a new Union Treaty to maintain the unity of the state but in the event precipitated its disintegration.<sup>38</sup> The presidential draft was presented to the Constitutional Commission on 6 May 1993, and on the next day rejected.<sup>39</sup> It remained unclear how his draft, or any other, could be adopted without the support of the existing Congress and Supreme Soviet.<sup>40</sup>

At the same time, the communists published a new version of their own constitution.<sup>41</sup> The patriotic movement also sought not to be left out, and at a conference on 29 June 1993 presented the result of its labours. Patriots insisted that the source of authority for the new constitution should be the national traditions of the country. Viktor Aksjučic, the leader of the Russian Christian Democratic Movement, insisted that the spiritual rebirth of Russia was linked with traditional values like a constitutional monarchy and local self-government.<sup>42</sup> This attempt to revive the fortunes of the patriotic alternative by coordinating their work once again came to nought.

Work had continued on the Constitutional Commission's draft, hastened by the 8th Congress of People's Deputies' resolution of 12 March on achieving constitutional reform in Russia, and on 7 May 1993 the Commission approved the fifth "Khasbulatovite" parliamentary version.<sup>43</sup> The equality of members of the federation was stressed "apart from those allowed by the constitution." Republics were recognised as states, enjoying the full panoply of state powers on their territory apart from those that remained the prerogative of the Russian Federation. Other members were labelled simply as state-territorial formations. The upper house was to be called the Federation Council, while the lower house, the State Duma, was to be elected by a straightforward first-past-the-post system. The president was to become merely the ceremonial head of state and not head of the executive branch.<sup>44</sup> The draft was to be discussed by parliamentary committees and a final version was to be published by 15 October and discussed by a special convocation of the Congress of Peoples Deputies to meet on 17 November.<sup>45</sup>

Eltsin could not ignore this direct challenge to his constitutional status, and on 20 May he decided to refine the constitutional question by taking up the option long advocated by the Russian Democratic Reform Movement led by Sobčak and Gavriil Popov,<sup>46</sup> namely the convocation of a special Constitutional Assembly to accelerate the constitutional process.<sup>47</sup> However, whereas Popov had insisted that the Assembly should meet for only one purpose, the adoption of a new constitution, Eltsin's Constitutional Assembly was intended to shape a draft that could then be sent round to members of the federation for their approval. The Constitutional Assembly opened on 5 June 1993 and was composed of some 750 representatives of the federation as well as from social organisations.

In his opening speech Eltsin likened the contemporary period with 1917 and insisted that the new Assembly was continuing the work of the Provisional Government in devising a democratic constitution for Russia, work that was brought to a violent end by the Bolshevik seizure of power and the dispersal of the Constituent Assembly in January 1918.<sup>48</sup> Eltsin's attempt to base the rebirth of the Russian constitutional order on this tradition, rather than the Tsarist, let alone the Soviet, was significant and symbolised the attempt to portray the Soviet period not just as an aberration but as fundamentally

illegitimate. Indeed, his insistence that Soviets and democracy were fundamentally incompatible was one of the factors that led to the final rift between himself and the parliamentary speaker, Ruslan Khasbulatov.<sup>49</sup> Eltsin branded the attempt by the Supreme Soviet to manage a smooth transition by maintaining continuity and observance of the existing constitution as being no more than “a weapon in the hands of an illegitimate new ruling class, with whose assistance they try to retain their illegal power.”<sup>50</sup>

Despite the president's fighting talk the work of the Assembly proceeded in a more conciliatory atmosphere, and in its committees many of the ideas put forward by parliamentary representatives were adopted, giving rise to a “mixed” form of government.<sup>51</sup> The Assembly came up with a new version on 12 July, drawing on both the presidential draft of April 1993 and parliament's.<sup>52</sup> There was much on which they agreed, such as the rights and obligations of the citizen and the right to all forms of property, but they differed radically over the role of the president and parliament. The Assembly's version represented Eltsin's last attempt to achieve some agreement with the old legislature over the constitution: the problem still remained of how to adopt it.<sup>53</sup> In an attempt to win over the regions Eltsin in August announced the creation of a Federation Council made up of a representative each from the legislative and executive branches of components of the federation, but at its first meeting on 18 September 1993 Eltsin failed to get them to sign a founding document.

The Supreme Soviet was still working to its own timetable of constitutional reform, ignoring the Constitutional Assembly, and in the event this attempt to give substance to a parallel constitutional process that threatened to strip the president of his powers proved a grave miscalculation. Eltsin struck first, and on 21 September 1993 issued decree No.1400 dissolving the legislature and suspending the constitution.<sup>54</sup> His action raises grave ethical issues: to what extent are unconstitutional acts valid in the attempt to establish the rule of law? The new constitutionalism was based on the view that the Soviet system was unreformable, and hence in a revolutionary process law is subordinate to political expediency. In other words, the constitution became a tool in the struggle for reform, an instrumental view that absolved the “reformers” from the need to subordinate themselves

to the rule of law. From this perspective, current events were no more than the final triumph of the “counter-revolution” against the Bolshevik usurpation of power in October 1917. This view was in sharp contrast to those who insisted on continuity in the evolution from Soviet constitutional practices into the new democratic era. These two approaches reflected divergent views over the nature of the transition.

Following the dissolution of the Supreme Soviet the Constitutional Assembly was reorganised to include a “public chamber”<sup>55</sup> and shortly afterwards a “state chamber” (the work of both was regularised on 11 October), to complete work on the constitution under the aegis of a committee chaired by Sergej Filatov, the president’s chief of staff. The committee drew on the synthesis made by the Constitutional Assembly but also borrowed directly from the presidential and parliamentary drafts. Alekseev noted that earlier versions, above all the July Constitutional Assembly draft, had in the spirit of compromise incorporated “pro-Soviet elements” that undermined democratic principles.<sup>56</sup> The draft constitution was published on 10 November and, as expected, proposed a strongly presidential system and modified some of the privileges accorded the republics and regions when they had been able to take advantage of the struggle between the president and parliament.<sup>57</sup> A final section of the new version made a number of provisions for the transitional situation, stipulating that the President must serve his full term until June 1996 and thus ended speculation about pre-term presidential elections. It was this version that was placed before the people for approval and became Russia’s first democratic constitution.

### *The Referendum of 12 December*

By a presidential decree of 15 October 1993 voters were asked to participate in a plebiscite on the new constitution,<sup>58</sup> to be held at the same time as parliamentary elections. While the adoption of the constitution still required at least a fifty per cent turnout, it could now be adopted with the support of 50 per cent of those who voted rather than the support of the majority of the registered electorate as stipulated by the referendum law of 16 October 1990.<sup>59</sup> The question placed on the ballot paper on 12 December was a simple one: “Do you support the adoption of the new Russian Constitution?”

The method of adopting the constitution is clearly open to criticism.<sup>60</sup> The use of a plebiscite is the favoured technique of dictators, and the judgement of a simple “no” or “yes” to a complex document is hardly the most democratic way of adopting such a crucial document. This was the method employed, however, by De Gaulle in 1958 to mark the establishment of the Fifth Republic by the adoption of a new constitution. Though initially published in some mass-circulation newspapers, the pervading criticism of the referendum was the lack of availability of the draft and the shortness of time allowed for discussion.<sup>61</sup> Some of the criticism on this count, however, was exaggerated, since the constitution was not an utterly new document but represented a synthesis of the ideas and variants that had been in the forefront of public discussion for over three years.

The actual conduct of the campaign, however, is another question. In the weeks leading up to the plebiscite Eltsin warned party leaders against criticising the constitution,<sup>62</sup> and leading government officials like Vladimir Šumeiko insisted that the constitution was not negotiable and that politicians were barred from campaigning against its adoption under threat of being banned from the elections altogether.<sup>63</sup>

Some 106.2 million citizens were registered of whom 50 per cent had to turn out for the constitutional referendum to be valid. The official turnout figure (58,187,755) was rather lower than anticipated, but at 54.8 per cent of registered voters exceeded the 50 per cent threshold.<sup>64</sup> Official figures show that the constitution was supported by 32,937,630 people, or 58.43 per cent of the vote; while 23,431,333 voted against it, or 41.6 per cent.<sup>65</sup> Only 30.7 per cent of the total electorate voted for the constitution, and in 17 republics and regions the constitution was rejected.<sup>66</sup> While the majority of the republics supported the draft constitution, even though their claims to sovereignty were excluded, the closeness of the vote may well undermine the constitution’s legitimacy. The constitution officially came into force on Saturday 25 December 1993 when it was published in the Russian media.<sup>67</sup>

The changes in the number of registered electors remains unexplained.<sup>68</sup> The Central Electoral Commission (CEC) finally came up with a figure of 106,171,000 in its results published on 15

February, yet the figure of registered voters given on 13 December 1994 by the CEC was 105,284,000, a number repeated on 20 December when announcing the results of the referendum.<sup>69</sup> Even the new figure fell short of the 107,310,374 voters registered for the referendum of 25 April 1993.<sup>70</sup> What had happened to over a million voters? There had been no demographic dip in the birthrate a generation earlier, and if anything, since April 1993 the Russian population had increased significantly as refugees and migrants came in from the former Soviet republics. The main accusation was that regional administrations, which in these elections organised the local electoral commissions, had exaggerated voter turnout in order to ensure that the 50 per cent threshold for the adoption of the constitution was exceeded.<sup>71</sup> The pressure to get the constitution adopted might well have undermined the legitimacy of the elections as a whole.

### *Analysis of the 1993 Constitution I: Basic Principles*

The Russian Constitution of 1993 is liberal in its overall conception, but some of its democratic procedures might be flawed. The document reflects the tendency that has been paramount in Russia's post-communist transition, namely that liberalism takes precedence over democracy. Nevertheless, the document upholds certain basic principles of democratic state building such as the separation of powers, defining the rights and duties of various levels of government. According to its critics, however, while the principle might have been upheld, the lack of balance in the separation of powers undermined the principles which it claimed to enshrine.

### *Human and Civic Rights*

The new constitution is a liberal document, meeting world standards in its provisions for human and civic rights (outlined in Chapter 2). It enshrines the civil rights of citizens, preventing in law the incarceration of dissidents and placing checks on the monitoring of correspondence and bugging of telephone calls. The constitution forbids censorship and guarantees freedom of the press. It allows Russians to travel abroad as a right, forbids the government to send citizens into foreign exile or to strip Russians of their citizenship. It also promises freedom of movement within Russia, and in an important advance over Rumjancev's draft enshrined "the right to

travel freely and choose one's place of stay and residence" (Article 27), thus making the dreaded *propiska* residence permits unconstitutional. It also guaranteed the right to private property, and thus sealed this core aspect of the liberal revolution, including the right for citizens to buy and sell land (Articles 35, 36). Provision was made for an ombudsman for human rights, whose duties would be specified by a special law. Thus the new document sought to overcome the legacy of legal arbitrariness of the Soviet years.

In addition, Russia was defined as a "social state" (Article 7) and numerous rights and entitlements were guaranteed to its citizens. The emphasis on social as well as political rights draws on the social-democratic element in Bolshevik thinking and on the "social liberal" tendency in pre-revolutionary Russian thought, but at the same time fundamentalist liberals insisted that "social" was no more than a tame word for "socialist."<sup>72</sup> Whatever the inspiration, a question remains over the degree to which these social rights can be fulfilled since entitlements to positive rights are even more difficult to enforce in a court of law than the negative rights concerning the inviolability of the individual. The whole notion of listing entitlements is somewhat alien to the Anglo-Saxon tradition but reflects the tendency in Continental social philosophy to assume that what is unregulated in society does not exist.

There is a more fundamental problem, however, than simply the abstract enumeration of political and social rights. Some of these rights are accompanied by qualifications that could be used to stifle political opposition. In particular, Article 29.2 forbidding agitation inciting social, racial, national or religious hatred has been cited as an unwarranted limitation on political and expressional rights. More seriously, the defence of state security or the legitimate rights of others (Article 55.3) could be used for repressive purposes. The constitution failed to state that voting (except for the president, Article 81.1) takes place on the basis of free and *equal* representation, thus making it impossible to appeal to the constitution to prevent, for example, constituencies varying greatly in the number of electors. Moreover, the proclamation of unfulfillable promises of social justice, such as the right to free health care (Article 41.1) and a "decent environment" (Article 42) might well be seen as undermining the very basis of trust on which the constitution rests. In this category come the



guarantees for trial by jury (Article 47.2) when there is as yet no such system in general operation, and the prohibition on “the use of evidence obtained by violating federal law” (Article 50.2), both alien concepts to Russia’s immediate past. If these are not fulfilled, then what price all the other promises?

However, these criticisms perhaps overstate the case. This constitution is very much a normative document, establishing the principles on which an ethically desirable state could be established rather than suggesting that it can be achieved immediately. If we accept Bogdan Kistjakovskij’s argument that law and the state originally existed independently, and that independent courts could be introduced under conditions of absolutism, so too today we can appreciate the new constitution in terms of asynchronicity in the introduction of the rudiments of liberalism, democracy and, indeed, social democracy. While Western democracies have spent the better part of the twentieth century introducing a social corrective to classical liberalism – until the rise of neo-liberalism in the 1980s – post-communist Russia faces the problem of enormously extended social, and indeed political, demands in conditions in which it lacks the ability to meet these demands, resulting in an irremedial gulf between aspiration and achievement. As in pre-revolutionary Russia, however, the tendency to subordinate law to the political struggle only creates more obstacles in the way of achieving the goal of a *pravovoe gosudarstvo*.

In a sharp break with the past the constitution made no reference to any state ideology or religion and instead guaranteed freedom of conscience, religion, thought, and speech (Articles 28 and 29) based on political pluralism and a multiparty system. However, this does not mean that the constitution is not an ideological document: it represented a clear commitment to certain values, including the notion of a “social” and “secular” state based on private property, the rule of law and popular sovereignty. However, the enunciation of the rationale behind these views was no longer as explicit as in earlier drafts. The section explicitly devoted to civil society was no longer included, ostensibly for the sake of brevity but also reflecting sensitivity over the criticisms made by Sobčak earlier. What was lost, however, was a clear repudiation of Russia’s statist traditions

and the commitment to the development of the sphere of freedom and autonomy associated with the notion of civil society.

### *Analysis of the 1993 Constitution II: State and Government*

For the first time in Russian history a constitution made a serious attempt to define and limit state power. The final vestiges of the communist legacy were swept away as the new document promised economic liberalism and the democratic separation of powers. Eltsin argued that the constitution was designed to lay down a “firm, legal order” for a democratic state, marking an end to the “dual power” between the presidency and the legislature.<sup>73</sup> The new constitution sought to create a “democratic, federal, rule-of-law state with a republican form of government” (Article 1.1). The new version incorporated elements from the previous drafts, above all the section on human and civil rights, but significantly augmented presidential authority and limited the powers of parliament and the republics. Yet the model of governance that emerged from the document is both pseudo-parliamentary and pseudo-presidential, allowing a unique hybrid to emerge in which the government itself can become a relatively autonomous third centre of power.

### *The New Federalism*

The parliamentary drafts had both encouraged the aspirations of Russia’s republics for sovereignty while at the same time limiting these aspirations, a tension never satisfactorily resolved in parliament’s approach to federal relations. Strengthened by his defeat of the Russian Supreme Soviet, Eltsin took a more assertive line towards the regions and republics of Russia and in effect reneged on what he had been forced to concede earlier (Chapter 3). In particular, the word “sovereign,” which a number of republics had adopted to describe themselves, was struck from the draft on the grounds that one state could not have two sources of sovereignty.

The rights of Russia’s 21 republics, 6 provinces, 49 regions, 2 cities (Moscow and St Petersburg) with regional status, and 11 autonomous areas were significantly equalised and made subject to the laws and decisions of federal authorities. The principle of “asymmetrical federalism,” which had been the keystone of the Federal Treaty of 31 March 1992 and which had been incorporated in earlier

draft constitutions, was in effect abandoned. No longer were some subjects of the federation “more equal” than others – at least in theory. While the provisions of the Federal Treaty were effectively reflected in the new constitution, the Federal Treaty itself was not bodily incorporated into the text. The intention here was to underline that Russia is a federation based on a constitution and not on a treaty.

The constitution regularised the hybrid federalism that had been emerging in Russia based partly on national areas (like Belgium and India) and partly on areas lacking any national significance (as in Brazil, Germany, and the USA). This mix of national and territorial federalism was accompanied by declarations (Article 5) on the equality of all the subjects of the federation when in fact they had greatly differing rights. The republics, for example, have their own constitutions, governments, parliaments, presidents, and other attributes of statehood denied the territorial formations.

There was no effective recognition of ethnic rights or status. Indeed, the adoption of the constitution marked yet another step away from the old Soviet primacy given to the ethno-federal organisation of the state, a principle that was largely meaningless when the Communist Party acted as the universal coordinating force but which threatened to tear Russia apart in its absence. The new document sought to prioritise civil over collective ethnic rights, and at the same time tried to prevent ethnic differences becoming the foundation of local or central statehood, a development that could only exacerbate centrifugal tendencies. The 1993 election results clearly demonstrated that those parties which opposed the ethnocratic organisation of the national-federal structure of the country gained.<sup>74</sup>

Claims that Eltsin was trying to restore a unitary state, however, were exaggerated. His aim was more modest: to restore the viability of the state and put an end to the dangerous game in which the executive and legislature during their confrontation vied with each other to promise most to the regions and republics. The regions and republics were guaranteed significant areas of autonomy as long as their legislative acts did not contradict the Russian constitution or federal laws. The long-standing dispute between republics, on the one hand, and between regions and territories, on the other, began at long last to be settled, though debates over Russia’s state structure were by no means over.

Even before the new constitution's adoption Vjacheslav Kostikov, President Eltsin's press officer, warned that "the leaders of republics within Russia have over the past two-three years grown accustomed to a big scope of sovereignty. They have developed a taste for political rituals. And it will probably be hard for them to get rid of this, but they will have to." Kostikov favoured a return to the *gubernija* principle whereby Russia was divided into simple administrative units and in which the principle of ethno-federalism was abolished.<sup>75</sup> This was also a principle supported by the nationalist Vladimir Zhirinovskij, and which apparently gained significant support in the elections of December 1993.

### *The Presidency*

The new constitution is built around the principle of a strong federal executive, granting the president extensive powers in naming governments, introducing legislation, and making policy (Chapter 4). This version, it might be noted, scaled back some of the powers granted to the executive in the Sobčak-Alekseev version. The president is the head of state and the "guarantor" of the Constitution (Article 80), elected for a four-year term with a maximum of two terms (with the upper age limit of 65 now dropped) (Article 81), and is assigned numerous powers. The president has the right to nominate the prime minister and to chair Cabinet meetings, to nominate to the State Duma the director of the Central Bank, nominate to the Federation Council members of the Constitutional Court, the Supreme Court, the Supreme Arbitration Court, and also nominates the Procurator-General. The President is also head of the Security Council, confirms Russia's military doctrine, appoints the Commander-in-Chief of the Armed Forces, and "exercises leadership of the foreign policy of the Russian Federation" (Article 86). The president was granted the right to introduce a state of emergency and suspend civil freedoms until new federal laws are adopted. Equally controversial was the president's right to issue binding decrees: the president can issue decrees, which have the power of law but which do not have to be approved by parliament.

If the Duma rejects the president's nomination for the post of prime minister three times, it is deemed to have dissolved itself. Impeachment was made well-nigh impossible, requiring a ruling by

both the Supreme and Constitutional Courts to be confirmed by two-thirds of both the State Duma and the Federation Council, and was to be initiated only in the event of “treason or commission of some other grave crime” (Article 93.1). The president was granted the right to reject legislation of the State Duma and in extreme circumstances to dissolve it (Article 109), but the scope of this article remained vague. The post of vice president was abolished and in the event of the president’s incapacity power was to be transferred to the prime minister. The government was subordinated to the president and, apparently, did not have to represent the majority party or coalition in parliament (Chapter 6).

The new constitution sought to prevent a repetition of the conflict between executive and legislative authorities that had so nearly destroyed the Russian state. A strong and largely irremovable president was to act as the focus of stability. The problem of presidential systems, however, is their rigidity; it is almost impossible to change the president in mid-term without bringing down the regime itself. Parliamentary systems, on the other hand, allow more flexibility in forming governments and in responding to popular moods.<sup>76</sup> This perhaps, is precisely what the advocates of presidential government have been trying to avoid. The philosophical basis of presidential government in post-communist Russia is precisely the notion of *choicelessness* in the so-called transition. The Bolshevik formula had been “one class, one party, one ideology” and in early post-communist Russia this appeared to become “one policy, one leader.” The politics of reform mimicked the future-oriented politics of the old regime despite the qualitative difference in their orientation.

### *Parliament*

The organisation of the new bicameral Federal Assembly (parliament) marked a decisive break with Soviet traditions (Chapter 5). For the first time the functions of the two chambers of parliament were clearly separated. The upper chamber, the Federation Council, acts like the Senate in the USA with, according to the Constitution, two representatives from Russia’s 89 components, one each from the executive and legislative branches (Article 95.2). Its first convocation, however, was elected on 12 December 1993 with two “senators” from each of Russia’s federative subjects for a two-year term.

The functions of the Federation Council include the endorsement of legislative acts adopted by the Duma, deciding on the impeachment of the President, appointing justices of the highest courts, appointing the Procurator-General, endorsing the declaration of war and martial law, and legitimating any changes of internal borders. The public chamber of the Constitutional Assembly had unanimously condemned granting the Federation Council rather than the State Duma some of these powers, such as endorsing presidential decrees on a state of emergency, martial law, and the deployment of troops abroad.<sup>77</sup>

The lower house, the State Duma, is to be elected every four years and consists of 450 deputies, half of whom in its first two-year convocation were elected in single mandate seats and half from a proportional party list system. The State Duma elected in December 1993, however, was to last only two years, at the insistence of democratic forces, on the grounds that the pace of change was too rapid for long parliamentary terms. The Duma's prerogatives include the initiation of impeachment proceedings against the President, the endorsement of the Prime Minister, declaring an amnesty (the President retaining the right for pardons), and calling for a vote of confidence in the government as a result of which the President could either change the government or dissolve the Duma.

The Duma was at the heart of the legislative process, drafting and endorsing laws, but a variety of bodies were granted the right to initiate legislation, including the president (Article 104). For a bill to become law a simple majority of the Duma and then of the Council of the Federation is required. It is then passed to the president and if within 14 days s/he rejects it, it is then sent back to parliament and can only become law if passed by two-thirds of the deputies in both chambers.

The adoption of the constitution inaugurated a new period in the development of parliamentarianism in Russia. All post-communist countries are groping to find the optimum way to replace the rule of the party by the rule of law and the institutionalisation of popular sovereignty, but from a Schumpeterian perspective too much democracy can itself be destructive of political order. It is as destabilising for legislatures to have too much power as to have too little, and only

history will tell whether the balance established in 1993 is a viable one.

### *The Government and Prime Minister*

Russia is not a parliamentary republic but neither is it fully a presidential one in the classical sense. A distinctively hybrid “tripartite” system emerged in Russia in which the government acts as a relatively autonomous centre of political authority in its own right. In America the president is head of the executive, whereas according to Article 110 executive power in Russia belongs to the government, but the head of the government worked within the framework of presidential power. The Public Chamber of the Constitutional Assembly on 30 October 1993 agreed to adopt the version sponsored by Filatov that the prime minister would be appointed by the president with the consent of the State Duma. This version was opposed by Sobčak, chair of the Public Chamber, who argued that this would “sharply strengthen the position of the president, placing him higher than the figure of a constitutional monarch.”<sup>78</sup> As noted, the constitution (Article 80) endowed the president with control over foreign policy as well as the main direction of domestic policy, and it was this article that provided the juridical basis for presidential rule.

The prime minister is appointed by the president and endorsed by the State Duma. If the president’s nomination is three times refused by the Duma it is automatically dissolved and the president’s choice is confirmed (Article 111). Thus the Duma’s right to veto a nomination was removed. In addition, resignation was also accepted by the president rather than by the Duma. A motion of no-confidence can be proposed by the State Duma, but if adopted the president is then empowered either to dissolve the Duma or to nominate a new prime minister for the Duma’s approval. It was incumbent upon the prime minister to tender his or her resignation following presidential elections, but this was not obligatory after parliamentary elections.

With the adoption of the constitution the old term “Council of Ministers” to describe the cabinet was replaced by the simple “Government of the Russian Federation.” The government, however, like its Soviet and Tsarist predecessors, was largely restricted to managing the economy while foreign and defence policy remained the preserve of the president.

*The Judiciary*

Judges of the Constitutional Court, the Supreme Court and the Supreme Arbitration Court are nominated by the president and endorsed by the Federation Council and are meant to be irremovable. The candidate for the post of Procurator-General is nominated by the President but formally their appointment and dismissal is the responsibility of the Federation Council. The constitution sought to regularise the judicial process in Russia and to preclude the possibility of the emergence once again of “emergency courts” and the like (Article 118). Assertions that the president controls the judicial process are exaggerated, at least according to the letter of the constitution. The crisis over the “amnesty” of 26 February 1994 for the putschists of August 1991 and October 1993 against the will of the president suggests considerable scope for independence of the judiciary.

The main danger perhaps lies elsewhere, and the new constitution has enshrined the rights of local elites over the judicial process (Article 129.3). Local procurators are appointed by regional and republican authorities, hence facilitating corruption and undermining the independence of the judiciary. The separation of powers between the regions and the centre is flawed.

Even the most splendid constitution on paper is valueless if there are no effective mechanisms in place to ensure compliance with its provisions. The dissolution of the old legislature and the fate of the Constitutional Court under its chairman, Valerij Zor’kin, appeared to illustrate the old Russian principle that law is subordinate to politics.<sup>79</sup> A new Constitutional Court of 19 judges was established (Article 125) with the judges appointed by the Federation Council but nominated by the president. The reorganised Court had a more restricted brief than its highly politicised predecessor. While retaining the authority to ensure that federal laws and decrees comply with the constitution, the Court lost some of its prerogatives concerning relations between the central authorities and components of the federation. Much-needed gate-keeping mechanisms were established to make appeals to the court more difficult as part of the attempt to transform it into a more professional and less politicised body.<sup>80</sup> The court now has a stable constitution to work with rather than the earlier constantly changing text, but until a new constitu-



tional law governing its prerogatives is adopted it is not clear what acts come under judicial review. Can presidential decrees be challenged by the court or will law once again be subordinate to power? Moreover, the mayor of Moscow, Yuriy Lužkov, appeared to flout the constitution by insisting on the continued use of the *propiska* system.

The constitution sought to guarantee judicial independence (Articles 10, 120 and 124) but this might appear to lack substance in the absence of life tenure for judges or of provisions for financial autonomy. Above all, the tension in Russia between legal and political thinking was particularly sharp. In 1878, after all, the jury had acquitted Vera Zasulich despite the fact that she had shot Trepov, the police chief in St Petersburg. This can be interpreted as a contradiction between liberalism and democracy, with liberals appealing to the individual and law, whereas the democrats to the people (*narod*): morality is regarded as something higher than law. The continuing process of revolutionary upheaval in Russia may once again prevent the combination of the two. In this context, however, it should be stressed that the 1993 constitution is direct-acting, requiring no further legal enactments for its provisions to take effect, and thus the document remains the central reference point for legal and political processes in the country.

### *Local Self-Government*

The debate over local government was particularly divisive and ultimately the constitution allowed scope for considerable local variations (Chapter 8). The debate was influenced by the Council of Europe's Charter on Local Government, and the text had to be amended to take into account Western standards. In contrast to Soviet practice, local self-government was defined as an autonomous entity and not part of the state system. However, in contrast to the republics, the powers of the remaining 66 subjects of the federation appeared residual, sharing certain listed powers and enjoying other unspecified prerogatives not conflicting with the national state (Article 76.6), but there was no mention of any detailed regulatory or financial powers that they could exercise independently. Central government ministries in post-communist Russia appeared as difficult to bring under local control as their Soviet predecessors had been.

## EMBEDDING THE CONSTITUTION

A constitution establishes the foundations of a new polity, but the structure remains to be built. A constitutional system is a much broader concept than the constitution itself and reflects the ethical bases of society. It is quite possible to have a constitution but no constitutional order (as under the Soviet regime); or to have a constitutional order but no constitution (as in Britain); the aim in Russia today is to combine the two. The legal functions of a constitution are only one among many, and this was particularly the case with this constitution which sought to repudiate the communist political and philosophical legacy and to establish the basis of a new constitutional order.

Russia is only at the beginning of a constitutional process requiring the development of a whole system of laws and conventions. The adoption of the constitution was only the first act of a titanic process of legislative renewal based on a division between federal constitutional laws (those defining constitutional principles and processes) and routine federal laws.<sup>81</sup> A vast programme of legislative activity awaited the new parliament, with the constitution itself alluding to 11 constitutional laws, 44 federal laws, five existing laws needing substantial changes to bring them into line with the new constitution, together with six acts governing the activity of the Federal Assembly itself and four dealing with the work of the president, a total of 70 acts that would give legislative form to its general principles. Some of these acts were prepared by the presidential Commission for Legislative Suggestions, headed by M. Mitjukov, that had by 17 December drawn up a list of the required legislation.<sup>82</sup> The most urgent new laws were those governing states of emergency and martial law, on the prerogatives of the Constitutional and Supreme Courts, labour and tax laws, on social movements, on elections to the State Duma and on the composition of the Federation Council. Laws to be changed included those governing the status of the capital and on the procuracy.

There was a danger, however, that some of these new laws could subvert the principles on which the constitution was based. In particular, Eltsin left himself a hostage to fortune by establishing (Article 81.4) that "The procedure for electing the president of the Russian Federation is established by federal law." Theoretically, the whole

structure of presidential power could be destroyed by establishing impossible conditions for the election of a president. In this case and others it is clear that claims that the new Federal Assembly was powerless were much exaggerated. Its real weakness was the lack of effective precedents or experience of the operation of a parliamentary system, and in its first sitting in the first half of 1994 much time was spent establishing parliamentary procedures and prerogatives and the legislative results were meagre. The country as a whole was governed by presidential decrees.

#### CRITICISM OF THE CONSTITUTION

According to Yurij Stroev, the editor of *Konstitucionnyj vestnik*, "the constitution of 12 December 1993 did not resolve the crisis but forced it deeper."<sup>83</sup> While this may be an overly negative assessment, the document is nevertheless marked by certain flaws. Four of these are potentially devastating: the inadequate defence of the civic and human rights of individuals; the lack of balance in the relationship between the executive and the legislature; the tension between federal and unitary principles in the relationship between the centre and localities; and the lack of a realistic procedure for adopting constitutional amendments.<sup>84</sup>

In an explicit attempt to repudiate the Soviet past the constitution placed perhaps excessive emphasis on detailing the rights and obligations of citizens. Above all, the document sought to establish an open society by guarding against intrusions by the state, guaranteeing freedom of communications, the press and forbidding censorship. However, the list of civil and social guarantees is in some ways reminiscent of the old Soviet constitutions, serving declaratory and propagandistic purposes and with no substantive mechanisms to ensure their implementation. It is not clear how the new freedoms can be effectively defended against the great powers simultaneously vested in the executive authorities. Even before the referendum Rumjancev had criticised the draft on the grounds that "it is, for the most part, for show," insisting that "[i]n the current situation, when extreme liberals are in power, the statement about the social nature of the state, for example, simply cannot be implemented."<sup>85</sup>

These declarations, if that is how they should be described, are not designed primarily for foreign consumption but reflect a widespread

desire to live in a “normal” state. The ethical content of these aspirations is something that draws on foreign practices but which have become internalised precisely as a result of the alleged 74-year aberration. The constitution reflects the commitment, forged in the very early stages of the constitutional process in 1990, to develop a civic culture based on liberal principles and individual autonomy.

The second substantive criticism of the new constitution is its lack of balance in the separation of powers between branches of national government. However, it is not clear how the question of balance can be resolved, since “balance” is something derived from the alignment of social and political forces and in new states is essentially contested. The relationship between the executive and legislature is governed by numerous articles, but one in particular could be the source of conflict. Article 117.3 allows the State Duma by a simple majority of its total membership to adopt a motion of no confidence in the government. In response, the president may either dismiss the government or disagree with the Duma. If within three months the Duma once again expresses its lack of confidence in the government, then the head of state can either sack the government or dissolve the Duma. Article 109.3, however, modifies the latter option by stating that Article 117 cannot be activated to dissolve the Duma in the year following its election. This would imply that in its first year the Duma could dismiss one government after another with impunity, only having twice to vote a motion of no confidence and not even having to wait three months between the two votes.

The opposition claimed that the centre of political gravity had returned once again to the Kremlin, which now adopted many of the institutions and functions of the Politburo of old. The presidency had its own security service, its own Security Council apparatus and much more besides. Vitalij Tret’jakov, the trenchant editor of *Nezavisimaja gazeta*, argued that “It is a constitution for presidents in general and for President Eltsin in particular.”<sup>86</sup> Thus while the constitution embodies the principles of liberalism, it is predicated on the assumption that the strong president would also be a liberal. In the event of this not being the case, the “soft” authoritarian elements embedded in the constitution could come into contradiction with its liberal provisions.

Rumjancev concluded that “When the president personally formulates foreign and domestic policy, one can say that the monarchical principle outweighs the democratic principle in the constitution.”<sup>87</sup> His attempt to enter the Duma failed, thus his promise to work on a “post-dictator Basic Law” was disrupted. Konstantin Lubenchenko went even further in claiming that the constitution not only gave an overwhelming advantage to presidential power but actually “codifies the existence of a totalitarian state that controls all spheres of the life of society.” The absence of a strong parliamentary tradition meant that the transplantation of a French-style presidential system to Russian soil would inevitably take authoritarian forms. In particular, he noted that the draft failed to give parliament the right to monitor the budgetary process other than simply adopting the budget as a whole. In addition, parliament lacked the right to exercise normal legislative control over the government, in its formation and its activity. Thus, he concluded, “There can be no talk of any balance of powers whatsoever.”<sup>88</sup>

The third problem, the achievement of a balanced relationship between the centre and the localities, is equally vexed. While fears about the disintegration of the Russian Federation might have abated, they have not disappeared. Despite the fact that the draft had done what he had long advocated, namely limit the sovereignty of Russia’s republics, Rumjancev now suddenly became the defender of the rights of the republics.<sup>89</sup> In a departure from the principle enunciated in the constitution, the signing of the treaty between Tatarstan and Russia on 15 February 1994 suggested that Russia was indeed a treaty rather than a constitutional federation.

The fourth problem is the question of making constitutional amendments. The constitution is much more difficult to change than Soviet-era constitutions, and this characteristic might well have a tendency to turn a political conflict into a constitutional crisis. Chapter 9 discusses constitutional amendments and revisions, in effect making it easier to abolish the constitution than to amend it. An amendment requires a two-thirds majority of the complete Federation Council and State Duma, and then ratification by the legislatures of no less than two-thirds of the subjects of the federation (Articles 136 and 107.3). However, special rules apply to Chapters 1 and 2, dealing with general rights, and Chapter 9 itself, where changes require

a three-fifths vote of both houses and a Constitutional Assembly, convened in accordance with federal law (not yet written). This would, in principle, make it easier to change the “inviolable” Chapters than the others, not requiring the ratification of the subjects of the federation. According to some commentators, the difficulties attending constitutional revisions would lead to immediate attempts to kill off the constitution as a whole.<sup>90</sup>

Minor criticisms of the new constitution include the charge that it is too long, infringing Talleyrand’s dictum that “A constitution should be short and unclear.” America’s constitution writers had adhered to this principle, but the post-war framers of the West German constitution had not. The West German constitution came into force on 23 May 1949 and established the country as a federal, social, legal state based on a parliamentary system of rule in which the president is the non-executive head of state.<sup>91</sup> The new constitution sought to avoid the mistakes of the Weimar republic and enshrined the principle that “democracy must be able to defend itself,” including a ban on parties that challenge the existing constitutional order. There was no place for referenda and other forms of plebiscitary democracy. In terms of length the new Russian constitution veers to the long side, but was much shorter than the unadopted Rumjancev version.

#### THE CONSTITUTION AS POLITICS

Sir Ralf Dahrendorf has distinguished between constitutional and normal politics; in the former, “the hour of the lawyers” strikes as they attempt to root modern political society in a constitutional order, whereas in the latter legislative activity concentrates on managing the established system.<sup>92</sup> While useful, the distinction is too abstract since the new constitution had to be prepared at a time of profound political and economic changes. Zor’kin, indeed, argued that the crisis of power was a natural result of the policy of “shock therapy.”<sup>93</sup> In Russia, even more than elsewhere, the development of the constitution became part of the political struggle, and indeed in a peculiar way itself became the prize in the struggle between the executive and the legislature. Moreover, while “the hour of the lawyer” might have struck, with numerous Western legal experts

invited to Moscow to advise on the new constitution, the role of political scientists in “crafting democracies” has been neglected.<sup>94</sup>

While “normal” politics began to emerge after December 1993, the struggle over the nature of the constitutional order is by no means over. Indeed, much of normal politics in Russia has consisted of the appeal to constitutional and ethical absolutes, while constitutional debates have often served immediate political interests. Once again, Russian exceptionalism has taken the form of appealing to utopian abstractions and Russia’s special path, too often no more than a cover for anti-Western and sectional interests.

The analogy between the Eltsin constitution of 1993 and De Gaulle’s constitution of 1958 has often been noted. Both sought to impose order on a polity at breaking point, focusing on the strengthening of the executive powers of the presidency. Another analogy is the *autogolpe* (self-coup) of President Fujimori in Peru in April 1992. However, while the adoption of the constitution, a document stamped with the flaws and strengths of the president, represented a personal triumph for Eltsin, his victory was pyrrhic since the enhanced powers granted by the constitution were offset by the blows to his authority delivered by the elections of December 1993. Above all, Eltsin failed to build on his initiative to form a presidential party, something De Gaulle had achieved with lasting effect. Eltsin’s failure reflected the difficulties facing the institutionalisation of the democratic revolution in Russia.

The danger of a constitutional vacuum had been stressed by Viktor Sejnis, one of the architects of the new constitutional order. He insisted that the choice had not been an abstract one, between a parliamentary or a presidential republic, “but between two forces which stood behind the two branches of power.” Without a constitution executive power would inexorably have taken over legislative authority, ruling by decree and undermining principles of legality.<sup>95</sup> According to this argument, the adoption of the constitution had at last delivered the country from the pseudo-parliamentarianism of the Supreme Soviet. At least the new Federal Assembly appeared to have the potential to evolve into a genuine parliament.

The constitution became the focus of much oppositional activity. The whole constitutional process had revealed the tendency in Russian political life for individuals or groups to try to carve out

a niche for themselves. Rumjancev's opponents alleged that he had tried to take the whole constitutional process under his wing as part of the chronic tendency towards the feudalisation of Russian politics (derived from the Soviet era) where groups carve out fiefdoms for themselves. Indeed, it might be noted that the "territorialisation" of politics affected all aspects, with some using foreign policy issues to advance their careers and others the national question. In this case, Rumjancev was accused of desperately wanting to be known as the "father" of the "Rumjancev constitution" and thus ensuring his place in the history books.<sup>96</sup>

For many the new constitution represented something unique in history, an anti-legal constitution designed to act as the formal rationalisation of a political victory. In other words, in a paradoxical inversion the authorities themselves had recourse to the classic literature, from *Vindicae Contra Tyrannos* onwards, of the right of rebellion against existing laws if they were bad. As usual, Russian political life modifies, if not turns inside out, customary Western political notions. Here we have the state itself appealing to a higher law to defend the right of overthrowing the existing constitutional order.

The constitution acted as the focus of much oppositional activity. A conference on 3 December 1993 was devoted to the constitution, with some one and a half thousand activists in attendance from some 60 political and social organisations.<sup>97</sup> For the first time since the October events the whole spectrum of the opposition joined together. Zor'kin argued that the old leading role of the Communist Party had been replaced by the one-man rule of the president, while Rumjancev argued that the constitution gave legal form to the seizure of power. For Viktor Iljukhin this was a "constitution for the fascist future," while E. Volodin saw it as inaugurating "the banana republic of Russia."<sup>98</sup> A declaration of party leaders insisted that the constitution "restores the authoritarian system in the Russian Federation."<sup>99</sup>

The actual operation of the post-December 1993 political process revealed that the constitution did not establish virtually unchecked executive power, as some of its critics had suggested would be the case. Eltsin sought to rule with the consent of the Federal Assembly, and for the first time the legislature worked as a genuine parliament. With another president, however, the restraints on authoritarian rule



might prove inadequate. Lacking a tradition of democratic institutions and conventions, a developed party system or a firm social basis for liberal politics, the adoption of the constitution suggests that democracy in Russia would be built from the roof down.

#### THE CONSTITUTION AS PHILOSOPHY

The new Russian constitution is undoubtedly a liberal document and essentially democratic. Its adoption has therefore, on the political level, refuted the arguments of those who insisted that Russia's collectivist and authoritarian traditions and political culture precluded the emergence of liberal democracy. These traditions, however, have not entirely disappeared, and the constitution's attempt to place the triumph of individualism into an ethical context is consonant with elements of the political culture, as is the tendency for the emergence of a form of what we have called "soft authoritarianism" in the political arrangements enshrined in the document.

Literature on the transition has drawn attention to the alleged factors in Russian political culture that sustain collectivist traditions and the subsumption of the individual into the community. Above all, it is argued that the tradition of *sobornost'* (conciliarity) hinders the emergence of the liberal separation of powers and the rise of political individualism.<sup>100</sup> However, analysis not only of the constitution itself but also of the debates since 1990 clearly demonstrates that the idea of *sobornost'* and allied concepts played a marginal, if any, role in the emergence of the document. The liberal idea of individualism has triumphed, and more organic notions of community have clearly been marginalised. This liberal individualism, however, while accepting Lockean notions of possessive individualism (the right to property and so on) is also marked by a distinctive ethical content, above all the notion of social liberalism.

As noted, the Russian notion of *pravovoe gosudarstvo* is derived from the German concept of a *Rechtsstaat*, based on the positivist assumption that the state itself is the highest source of law; whereas the Russian debate over the constitution and its legal ethics clearly also drew on Anglo-American natural law traditions while at the same time appealing to Kantian normative principles of what ought to be (*Sollen*) rather than what was (*Sein*), a marked feature of

Solov'ëv's thinking earlier. Implicit in much of the discourse of the anti-communist revolution is the appeal to a modernised natural law theory on the inalienable human and civic rights of the individual. The ethical value placed on the individual is twofold: the inalienable rights of the individual as a legal, moral and possessive personality; but also the duties of the individual towards the larger community. These duties, however, are not defined in the Soviet way, whereby the right to work, for example, meant the abolition of the right not to work, but as part of an attempt to balance rights and duties. The foundation of these rights, however, is displaced from the realm of theory to geography, to a "normal" West, a basis which cannot be anything but shaky.

The legal revolution has a dual character. The achievement of a *Rechtsstaat* in Russia today in certain respects repeats the initial aims of the concept in nineteenth-century Germany, namely to limit the alleged arbitrariness of the absolutist *Polizeistaat*. The Soviet police state in its way was governed by law but public power remained arbitrary.<sup>101</sup> The first task, the establishment of a *Rechtsstaat*, is *limiting*, but the second, the establishment of the rule of law, is *expansive*. The constitutional process in Russia today can therefore be seen as a dual revolution: to achieve both a *pravovoe gosudarstvo* (a state governing by law) and to create a society governed by the rule of law to which the state itself is subordinated. For Russia the achievement of rule by law (if not yet the rule of law) would be no mean achievement. The gulf between aspiration and achievement remains large, but certain tangible advances towards the goal have been achieved, notably the adoption of the constitution itself.

The concept of law of the revived Russian constitutionalism is indebted to the debates of the late Soviet period and the notions of law devised during perestrojka. The aim here was above all to separate the party from the state and to remake the state as an autonomous political and ordered entity. At the same time, the overweening powers of the state were to be limited by the establishment of legal safeguards for individual rights. Associated with the second project was the discourse of civil society, a concept that figured prominently in the draft version of the CPSU's final Programme<sup>102</sup> and in early drafts of the new Russian constitution. There remained, however, a tension between the attempt to reconstitute the state and at the same

time to limit it. Notions of the triumph of civil society undermine the foundations of statehood essential for the rule of law: a stateless self-managing civil society has yet to be seen.

The ethical content of the notion of freedom in the new constitution remains ambivalent. In early versions freedom tended to be seen as the release from the state, and thus remained within the framework of the anti-politics of the anti-communist insurgency, most marked in Poland up to 1989. Later versions, however, moved away from this toward a more traditional balance between rights and duties, between the rights of the individual and the prerogatives of the state. The final version has fully rehabilitated the state, which is no longer seen as the main source of danger to individual rights but as their guarantor, a type of protective democracy consonant with the notion of soft authoritarianism.

The question of the constitution is therefore the question of the state. The exit from communism saw a rapid evolution of thinking. The liberation of society was initially equated with the weakening of the state and the slogan of civil society became a distinctive modern reinterpretation of traditional Russian *vol'nitsa*, with the state seen as an oppressive force in which Marxist condemnation of the liberal state became fused with traditional Russian condemnation of the autocratic state. The Hegelian notion of the state as an institute of freedom, a view that in a new guise was propounded by the *Vekhi* writers of 1909, has finally taken root, especially since in the nascent market order entrepreneurs need the state and laws. The reconstitution of the liberal order in Russia today, however, is marked by the massive retreat of governmentality, with the desire to free the economy and society of all laws, regulations and normative acts. Society lives according to its own rules, devised to evade the repressive Soviet social order but now endowed with a life of its own. The crisis of state building in Russia today is itself a crisis of the constitutional order.

Rumjancev has frequently talked about the foundations of the constitutional order in Russia, the concept of *stroj* in the broadest sense,<sup>103</sup> and he is right to do so as Leontovič noted earlier. The constitutional process in Russia has reflected the contradictory processes of social development since a constitution can hardly be more effective than the society which it seeks to regulate. At the same

time, this constitution is an act of deliberate political intervention in the evolution of the polity. The constitution is designed not to reflect an existing social order but to mould a new one, a task very different from that confronting the Founding Fathers in Philadelphia in 1787. The instrumental and normative elements in the document have given rise to a number of alleged tensions. For example, to what degree was the constitution drafted in terms of expediency rather than right? Does the idea of order rather than freedom lie at its heart?

The constitution is unambiguously liberal, but at the same time it is a peculiar combination of liberalism and authoritarianism reminiscent in its way of Hobbes' *Leviathan*. It is a liberal document, but this liberalism is mitigated by concessions made to the political expediency of establishing order through strong executive authority and by the commitments to social welfare and the demands made upon the duties of citizenship. However, the new constitution is liberal if by liberal we mean a legal process in which individual rights are inalienable and derived from the theory of natural law. Civil rights, moreover, take priority over political, let alone social, rights. The sections strengthening the powers of the presidency can be seen in terms of expediency and order, but overall the two assertions above are not really sustainable. Taken in isolation, the constitution puts an end to the Soviet system where law was ruled by the state and in its place establishes the inviolability of the individual and sets clear guidelines for the operation of the judicial process. The constitutional *system* of law, however, is clearly still only in its infancy, and there remains a long way to go before we can talk of Russia as a state of laws and ruled by laws.

Liberalism is in the ascendant in Russia today, but there are elements of weakness in this ascendancy. The dominance of liberal ideas amongst the elite does not necessarily reflect public opinion, and the evidence of public opinion polls is ambivalent. Moreover, while almost all party programmes are saturated with liberal principles, the great majority of these parties are based less on ideology, let alone interests, than the ambitions of their leaders. The weakness of the social base of liberalism in Russia has still not been overcome, despite strenuous attempts by the first post-communist government to create a property-owning middle class through privatisation. The

culture of representative democracy remains under-developed in Russia, reflecting perhaps not a primordial aversion to representative forms of government but the historical obstacles opposing the delegation of power. Changes of power have traditionally taken crisis forms, and it remains unclear whether the new constitution has endowed parliament with sufficient authority to act as the vector of political crisis management.

The tension between liberalism and democracy in the constitution has been noted. While social power (including the rights of individuals) was to be decentralised, the governmental model outlined in the document tends towards the reconcentration of political power and the recentralisation of federal authority and thus drew on the Pestel tradition of constitutionalism rather than the less bureaucratic and statist ideas of the Northern Society. The apparent contradiction between liberalism and democracy can be seen in the perspective of what can be called “developmental democracy” whose normative aspects have been noted above. While the late Soviet constitutional process sought to repudiate the typically Bolshevik notion of the constitution as a programmatic document, insisting that its aim would be “to regulate real social relations,”<sup>104</sup> the post-communist Russian constitutional process in certain respects reproduced the future-oriented perspective of Soviet constitutionalism. The Russian constitutional process was instrumental in so far as it sought to create the conditions for its own maintenance, and thus the classic problem of ends and means resurfaced; above all, between democracy as the end and liberalism as the means. Even more ambivalent was the role of the constitution in the great post-communist division of property in Russia. Was it no more than a mask for the *nomenklatura* to consolidate its oligarchical rule in new forms of property or, on the contrary, did it endow the executive with sufficient authority to carry through the anti-*nomenklatura* revolution to the end?

The constitution represented the culmination of the democratic revolution against communism but at the same time became a casualty of this struggle as it became reified into a form of self-sustaining (and self-serving) politics. The constitution, moreover, represented a conscious revolt against the alleged lack of a democratic political culture in Russia, but at the same time reflected the very cultural problematic that it sought to undermine. In other words, the consti-

tution remained ideologised (in the traditional sense) insofar as it acted as an instrument of reform in the hands of “the Bolsheviks of the marketplace.”

### CONCLUSION

Constitution-making has proved difficult in all post-communist countries, and in the former Czechoslovakia was accompanied by the disintegration of the country.<sup>105</sup> In Russia, at least, predictions that the country would follow the fate of the USSR proved exaggerated. The adoption of a constitution, however, is only the first step in the development of a sustainable civic and democratic culture. Even the most marvellous constitution can only be as effective as the context in which it operates allows it to be. Soviet politics was marked by a gulf between the formal processes of government as outlined in normative acts and the actual rules of the game, which usually bore little relation to the formal texts. In post-communist Russia this gap has narrowed, since the government is at least accountable to the press and the court of public opinion, and increasingly to parliament as well, but it has not disappeared. The gulf between what Walter Bagehot called the effective and decorative parts of the British constitution is typical of all modern polities, though in the United States, where the constitution has achieved almost sacerdotal authority, the distinction is at its narrowest.

There remains a long way to go before Russia’s political life is fully constitutionalised. As long as the institutions of civil society and the associated “habits of the heart,” as Tocqueville put it, of a democratic and free people remain weak, the naturally predatory instincts of the state will find little resistance. The precise nature of societal self-defence mechanisms that can resist the encroachment of the state remain disputed, but liberals would no doubt suggest that they include secure property rights and effective participatory mechanisms in the local and national community.

The adoption of a constitution is the core constitutive act of state building and defines the ethical essence of a new state. Russian statehood has now achieved a stable juridical form and the new political order has achieved a degree of political stabilisation. However, as Sejnis noted, “It is, of course, not enough to adopt a constitution in

order to create a stable democratic society, but this is a necessary and, at present, urgent prerequisite.”<sup>106</sup> There remains the question, however, of the degree to which social attitudes and political traditions influence the evolution of political institutions, or whether the conditions of post-communism in Russia have allowed an almost unique opportunity for institutions to mould social structure and political behaviour. Following the adoption of the constitution the new Federal Assembly and the president committed themselves to working with the new constitution and inaugurated an unprecedented period of political stability, suggesting indeed that it had been the lack of effective political institutions rather than a primeval flaw in Russian political culture that had provoked the continuing political crisis, one that had lasted for over a century.

The new constitution was considered by many as no more than a transitional document which was unlikely long to survive Eltsin. The world chess champion and candidate for Russia's Choice Gari Kasparov argued that “It is only temporary, it cannot serve the country in the longer term.”<sup>107</sup> In practice, however, the old maxim that *rien ne dure que le provisoire* seemed to apply in this case as well. Rather than being yet another temporary document the new constitution promises to provide the basis for a period of relative political stability and democratic consolidation in Russia.

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#### NOTES

<sup>1</sup> Cf. Jurij Pivovarov, Aleksej Salmin, “Zametki na poljakh Rossijskoj Konstitucii,” *Oktjabr*, No. 1, 1994, p. 164.

<sup>2</sup> Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (Oxford, Clarendon Press, 1987), pp. 15–16.

<sup>3</sup> O. G. Rumjancev, “Funkcii sovremennoj Konstitucii v segodnjašnej i zavtrašnej Rossii,” *Konstitucionnyj vestnik*, No. 17, 1994, p. 22.

<sup>4</sup> Donald D. Barry (ed.), *Toward the “Rule of Law” in Russia?: Political and Legal Reform in the Transition Period* (Armonk and London, M. E. Sharpe, 1992), p. xvi.

<sup>5</sup> Cf. Walicki, *Legal Philosophies of Russian Liberalism*, pp. 165–212. See also Jonathan Sutton, *The Religious Philosophy of Vladimir Solovyov* (Basingstoke, Macmillan Press, 1988).

<sup>6</sup> *Ibid.*, p. 114.

- <sup>7</sup> Max Weber, *Zur Lage der bürgerlichen Demokratie in Russland* (1906) *The Russian Revolutions*, edited by G. C. Wells and P. Baehr (Oxford, Polity Press, 1995).
- <sup>8</sup> See Lothar Schultz, "Constitutional Law in Russia," in G. Katkov *et al.* (eds), *Russia Enters the Twentieth Century* (London, Temple Smith, 1971), pp. 34–59, esp. pp. 44–47.
- <sup>9</sup> V. V. Leontovič, *Istorija liberalizma v Rossii, 1762–1914* (Paris, YMCA-Press, 1980), p. 539.
- <sup>10</sup> On the Soviet constitutions, see Aryeh L. Unger, *Constitutional Developments in the USSR: A Guide to the Soviet Constitutions* (London, Methuen, 1981).
- <sup>11</sup> Gorbachëv developed these ideas in his Supreme Soviet speech of 29 November 1988, "K polnovlastiju Sovetov i sozdaniju socialističeskogo pravovogo gosudarstva," *Izbrannye reči i stati*, Vol. 7 (Moscow, 1990), pp. 150–175.
- <sup>12</sup> For an analysis of the framework of its work, see L. V. Lazarev and A. Ya. Sliva, *Konstitucionnaja reforma: pervyj etap* (Moscow, Znanie, 1989).
- <sup>13</sup> *Argumenty i fakty*, No. 47, November 1990, whole issue; in *Konstitucionnyj vestnik*, No. 4, 1990, pp. 55–120; a popular edition was published as *Konstitucii Rossijskoj Federacii: proekt s kommentarijami* (Moscow and Krasnojarsk, newspaper *Svoj golos* and Krasnoyarsk Press and Information Agency, 1991).
- <sup>14</sup> *Sovetskaja Rossija*, 19 April 1991; an earlier version appeared in *Sovetskaja Rossija*, 24 November 1990.
- <sup>15</sup> *Rossijskaja gazeta*, 11 October 1991, special section, with an "explanatory note" on p. 7.
- <sup>16</sup> Oleg Rumjancev, "Začem nužna novaja konstitucija," *Konstitucionnyj vestnik*, No. 8, 1991, pp. 3–7.
- <sup>17</sup> *Konstitucionnyj vestnik*, No. 8, 1991, pp. 68–72.
- <sup>18</sup> *Konstitucionnyj vestnik*, No. 8, 1991, p. 74; and pp. 84–148 for the revised draft of 24 October.
- <sup>19</sup> *Rossijskaja gazeta*, 5 November 1991, p. 1.
- <sup>20</sup> *Argumenty i fakty*, No. 12, March 1992, whole issue; republished in *Proekt konstitucii Rossijskoj Federacii: sbornik materialov* (Moscow, Respublika, 1992), pp. 19–81.
- <sup>21</sup> Vladimir Kuznecevskij, *Rossijskaja gazeta*, 3 April 1992, pp. 1–2.
- <sup>22</sup> The Federation Treaty was made up of three separate documents: an agreement (published in *Rossijskaja gazeta*, 18 March 1992) signed by 18 out of the 20 republics, excluding the Čechen and Tatarstan republics; a document signed by Russia's oblasts and krajs; and an agreement with the autonomous okrugs and the Jewish Autonomous Oblast. The Russian Federation was a separate signatory to the Treaty. *Federativnyj dogovor. Dokumenty. Kommentarii* (Moscow, Izd-vo Respublika, 1992).
- <sup>23</sup> *Rossijskaja gazeta*, 3 April 1992, pp. 1–2.
- <sup>24</sup> *Konstitucija Rossijskoj Federacii (proekt): Alternativnyj variant* (Moscow, Novosti, 1992).
- <sup>25</sup> A. D. Sakharov, "Proekt Konstitucii Sojuza Sovetskikh respublik Evropy i Azii," in *Trevoga i nadežda* (Moscow, Inter-Verso, 1990), pp. 266–277; also in *Novoe vremja*, No. 52, 1989, pp. 26–28.
- <sup>26</sup> *Nezavisimaja gazeta*, 28 March 1992; *The Independent*, 6 April 1992; *Moskovskie novosti*, 5 April 1992, pp. 6–7.



- <sup>27</sup> *Moskovskie novosti*, 5 April 1992, pp. A6–7. Sobčak insisted that the assertion of Article 1 of the draft (retained in the version adopted in December 1993) that “the Russian state is a social state” was similar in spirit to the Brežnev constitution’s view that “the Soviet Union is a state of all the people.”
- <sup>28</sup> *Nezavisimaja gazeta*, 28 March 1992.
- <sup>29</sup> O proekte konstitucii Rossijskoj Federacii i porjadke dalnejšej raboty nad nim,” 18 April 1992, in *Proekt konstitucii Rossijskoj Federacii: sbornik materialov*, pp. 3–4.
- <sup>30</sup> *Rossijskaja gazeta*, 16 May 1992, pp. 3–5.
- <sup>31</sup> By that time seven laws making 340 amendments had been adopted: in 1990 there were 53 amendments and in 1991 29, Rumjancev in *Konstitucionnyj vestnik*, No. 15, March 1993, p. 8.
- <sup>32</sup> *Konstitucionnyj vestnik*, No. 13, November 1992, pp. 25–115.
- <sup>33</sup> *Konstitucionnyj vestnik*, No. 13, p. 7.
- <sup>34</sup> *Nezavisimaja gazeta*, 24 November 1993, p. 2.
- <sup>35</sup> This version was published as “Konstitucija (osnovnoj zakon) Rossijskoj Federacii: proekt” in *Izvestija*, 30 April 1993, pp. 3–5; reprinted in *Konstitucionnyj vestnik*, No. 16, May 1993, pp. 65–108.
- <sup>36</sup> *Izvestija*, 13 May 1993, p. 1.
- <sup>37</sup> *Stolica*, No. 22 (132), 1993, pp. 6–7.
- <sup>38</sup> For example, Marina Sakšina, “Istorija s konstituciej,” *Novoe vremja*, No. 23, 1993, pp. 3–5.
- <sup>39</sup> *Konstitucionnyj vestnik*, No. 16, May 1993, p. 202.
- <sup>40</sup> Šakhraj, for example, argued that it would be legal and constitutional for a Constituent Assembly to adopt a new constitution and declare new parliamentary elections, especially since presidential powers had been relegitimised in the referendum of 25 April 1993, *Izvestija*, 30 April 1993, p. 2.
- <sup>41</sup> *Pravda*, 5 June 1993, p. 1.
- <sup>42</sup> *Nezavisimaja gazeta*, 30 June 1993, p. 1.
- <sup>43</sup> “Konstitucija Rossijskoj Federacii: proekt,” *Konstitucionnyj vestnik*, No. 16, May 1993, pp. 9–64.
- <sup>44</sup> *Nezavisimaja gazeta*, 26 June 1993, p. 1.
- <sup>45</sup> “O zaveršenii raboty nad proektom Konstitucii Rossijskoj Federacii,” Supreme Soviet resolution of 29 April 1993, *Konstitucionnyj vestnik*, No. 16, May 1993, pp. 201–202.
- <sup>46</sup> *Rossijskaja gazeta*, 3 April 1992, pp. 1–2; *Nezavisimaja gazeta*, 26 January 1993, p. 5.
- <sup>47</sup> “O sozryve Konstitucionnogo soveščanie i zaveršenii podgotovki proekta Konstitucii Rossijskoj Federacii,” *Konstitucionnoe soveščanie*, No. 1, August 1993, pp. 7–8.
- <sup>48</sup> *Konstitucionnoe soveščanie*, No. 1, pp. 12–20; *Rossijskie vesti*, 8 June 1993, p. 2.
- <sup>49</sup> *Moskovskie novosti*, No. 25, 20 June 1993, p. A8.
- <sup>50</sup> Kronid Ljubarskij, “Konec sovetsoj vlasti,” *Novoe vremja*, No. 24, 1993, pp. 4–5.
- <sup>51</sup> B. A. Strašun, “O ‘smešannoj’ forme pravleniya v proekte Konstitucii Rossijskoj Federacii,” *Konstitucionnoe soveščanie*, No. 2, 1993, pp. 51–57; and V. E.

Čirkin, “‘Čistyje’ i ‘smešnyje’ formy pravlenija: plyusy i minusy različnykh sistem,” *ibid.*, pp. 57–65.

<sup>52</sup> *Konstitucionnoe soveščanie: informacionnyj byulleten*, No. 1, August 1993, pp. 109–157; *Rossijskie vesti*, 15 July 1993.

<sup>53</sup> The Assembly envisaged a broad process of consultation, in particular with the subjects of federation, and a referendum before the draft could be adopted, “Zakon ‘O poryadke prinjatija Konstitucii Rossijskoj Federacii’ (proekt),” *Konstitucionnoe soveščanie*, No. 1, August 1993, pp. 155–157.

<sup>54</sup> “O poetapnoj konstitucionnoj reforme v Rossijskoj Federacii,” *Konstitucionnoe soveščanie*, No. 2, October 1993, pp. 15–19.

<sup>55</sup> 24 September 1993, “Ob obrazovanii obščestvennoj palaty Konstitucionnogo soveščanija,” *Konstitucionnoe soveščanie*, No. 2, October 1993, p. 81.

<sup>56</sup> *Konstitucionnoe soveščanie*, No. 3, December 1993, p. 7.

<sup>57</sup> *Rossiskaja gazeta*, 10 November 1993, pp. 3–6.

<sup>58</sup> “O provedenii vsenarodnogo golosovanija proektu konstitucii Rossijskoj Federacii”; accompanied on the same date by “Položenie o vsenarodnom golosovanii po proektu konstitucii Rossijskoj Federacii 12 dekabnja 1993 goda,” in *Rossijskaja Federacija*, No. 1 (13), 1993, pp. 22–24; *Rossijskie vesti*, 21 October 1993. The word “plebiscite” (*golosovanie*) was used rather than referendum.

<sup>59</sup> The October 1990 RSFSR Referendum Law established that matters affecting the constitution could be adopted by a simple majority of all registered voters, while non-constitutional matters could be decided by a simple majority of those participating in the referendum. A referendum would only be valid if turnout exceeded 50 per cent of registered voters, *Rossijskaja gazeta*, 2 December 1990.

<sup>60</sup> A trenchant critique of adopting the constitution by referendum was made by Rumjancev, *Nezavisimaja gazeta*, 24 November 1993, p. 2.

<sup>61</sup> A conference of 58 political parties and associations met on 3 December and subjected the draft constitution to withering criticism, an assault led by Valerij Zor’kin, the former head of the Constitutional Court, *Nezavisimaja gazeta*, 4 December 1993, p. 2. For more on the conference, see below.

<sup>62</sup> *Nezavisimaja gazeta*, 27 November 1993, p. 1.

<sup>63</sup> His threat was directed specifically against the Communist Party of the Russian Federation and the Democratic Party of Russia, *Izvestija*, 30 November 1993, p. 2.

<sup>64</sup> These figures have been the subject of considerable controversy (see below) and the turnout figure given here is the one given in the initial results, *Rossijskaja gazeta*, 21 December 1993, p. 1 and given in full in *Bjulleten’ Central’noj izbiratel’noj kommissii Rossijskoj Federacii*, No. 1 (12), 1994, p. 38.

<sup>65</sup> *Rossijskaja gazeta*, 21 December 1993, p. 1.

<sup>66</sup> Seven republics voted against the constitution: Adygeja, Baškortostan, Čuvašija, Dagestan, Karačaj-Čerkessija, Mordovia and Tuva; and 10 oblasts: Belgorod, Brjansk, Kursk, Lipetsk, Orël, Smolensk, Tambov, Penza, Volgograd and Voronež, mainly in the Russian South-West where support for the Communist Party was strongest (*Bjulleten’ Central’noj izbiratel’noj kommissii Rossijskoj Federacii*, No. 1 (12), 1994, pp. 34–38). In Tatarstan the referendum was declared invalid since not enough turned up to vote, but of those who did 74 per cent supported the Constitution, *Nezavisimaja gazeta*, 18 December 1993, p. 1. No vote took place in the Chechen Republic.

<sup>67</sup> *Rossijskaja gazeta*, 25 December 1993.

- <sup>68</sup> Cf. Wendy Slater, "Russia's Plebiscite on a New Constitution," *RFE/RL Research Report*, Vol. 3, No. 3, 21 January 1994, pp. 1–7.
- <sup>69</sup> For an analysis of the various figures of registered voters and the differing turnout figures, see Aleksandr Minkin, *Moskovskij komsomolec*, 11 January 1994, p. 1, and *Pravda*, 28 December 1993, p. 1.
- <sup>70</sup> Kronid Ljubarskij, *Novoe vremja*, No. 9, March 1994, pp. 10–13.
- <sup>71</sup> This was the main argument of the commission into electoral fraud led by Aleksandr Sobjanin, *Izvestija*, 4 May 1994, p. 4.
- <sup>72</sup> Sergej S. Alekseev, *Demokratičeskie reformy i konstitucija* (Moscow, Pozicija, 1992), p. 4.
- <sup>73</sup> *Financial Times*, 10 November 1993.
- <sup>74</sup> See Richard Sakwa, "The Russian Elections of 1993," *Europe-Asia Studies*, Vol. 47, No. 2, 1995, pp. 195–227.
- <sup>75</sup> *Moscow News*, No. 45, 5 November 1993, p. 2.
- <sup>76</sup> Cf. Arend Lijphart (ed.), *Parliamentary Versus Presidential Government* (Oxford, Oxford University Press, 1992).
- <sup>77</sup> Viktor Šejnis, *Moscow News*, No. 46, 12 November 1993, p. 2.
- <sup>78</sup> *Moscow News*, No. 45, 5 November 1993, p. 2.
- <sup>79</sup> Cf. Robert Sharlet, *The Russian Constitutional Court: The First Term*, *Post Soviet Affairs*, Vol. 9, No. 1, 1993, pp. 1–39.
- <sup>80</sup> See Robert Sharlet, "Russian Constitutional Crisis: Law and Politics under Yel'tsin," *Post-Soviet Affairs*, Vol. 9, No. 4, 1993, pp. 314–336.
- <sup>81</sup> Cf. Irina Koptel'skaja, "Konstitucionnye zakony – novoe javlenie v zakonodatelstve Rossij," *Konstitucionnyj vestnik*, No. 1 (17), 1994, pp. 59–63.
- <sup>82</sup> *Rossijskaja gazeta*, 17 December 1993, p. 1.
- <sup>83</sup> Jurij Stroev, "My prodolžaem," *Konstitucionnyj vestnik*, No. 17, p. 6.
- <sup>84</sup> Cf. *Nezavisimaja gazeta*, 30 December 1993, p. 2.
- <sup>85</sup> *Segodnja*, 13 November 1993, p. 2.
- <sup>86</sup> *Nezavisimaja gazeta*, 9 November 1993, p. 1.
- <sup>87</sup> *Segodnja*, 13 November 1993, p. 2.
- <sup>88</sup> *Moskovskie novosti*, No. 47, 21 November 1993, p. A13.
- <sup>89</sup> *Segodnja*, 13 November 1993, p. 2.
- <sup>90</sup> For example, Vjačeslav Nikonov, *Nezavisimaja gazeta*, 23 December 1993, pp. 1, 2.
- <sup>91</sup> See *Novoe vremja*, No. 11, 1993, pp. 42–44.
- <sup>92</sup> Ralf Dahrendorf, *Reflections on the Revolution in Europe* (London, Chatto & Windus, 1990), p. 79f.
- <sup>93</sup> Valerij Zor'kin, "Uroki oktjabrja–93," *Konstitucionnyj vestnik*, No. 1 (17), 1994, p. 11.
- <sup>94</sup> Cf. Giuseppe Di Palma, *To Craft Democracies: An Essay in Democratic Transition* (Berkeley, University of California Press, 1990).
- <sup>95</sup> *Moscow News*, No. 46, 12 November 1993, p. 2.
- <sup>96</sup> A charge made, for example, by the jurist Aleksej Surkov, *Stolica*, No. 22 (132), 1993, p. 7.
- <sup>97</sup> *Nezavisimaja gazeta*, 4 December 1993, p. 2.
- <sup>98</sup> *Stolica*, No. 50 (160), December 1993, p. 4.
- <sup>99</sup> *Pravda*, 19 January 1994.
- <sup>100</sup> Cf. Nikolai Biryukov and V. M. Sergejev, *Russia's Road to Democracy*:

*Parliament, Communism and Traditional Culture* (Aldershot, Edward Elgar, 1993).

<sup>101</sup> See Barry (ed.), *Toward the "Rule of Law" in Russia?*, p. 4.

<sup>102</sup> *Pravda*, 8 August 1991.

<sup>103</sup> For example, O. G. Rumjancev, "Osnovy konstitucionnogo stroja: ponjatie, soderžanie, otaženie v konstitucii," *Gosudarstvo i pravo*, No. 10, 1993, pp. 3–15.

<sup>104</sup> N. A. Mikhaleva, "Konstitucionnaja reforma v SSSR," in *Konstitucionnaja reforma: poiski i rešenija: sbornik obzorov* (Moscow, INION, 1991), p. 10.

<sup>105</sup> Cf. A. E. Dick Howard (ed.), *Constitution Making in Eastern Europe* (Washington, DC, Woodrow Wilson Center Press, 1993).

<sup>106</sup> *Moscow News*, No. 46, 12 November 1993, p. 2.

<sup>107</sup> *Financial Times*, 10 November 1993.

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