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CONSTITUTIONS FOR NEW DEMOCRACIES: REFLECTIONS OF  
TURMOIL OR AGENTS OF STABILITY?

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## Abstract

Despite the widely held view in newly emerging democracies that constitutions are mere words on paper or that parchment barriers cannot render a state stable or democratic, those who draft such documents commonly act as if words ARE of consequence. The difficulty, however, is that contemporaneous conflicts too easily intervene so as to corrupt the drafting process and to preclude optimal constitutional design. The specific principle of design most likely to be violated is the proposition that we treat all parts of the constitution as an interconnected whole and that we not try to assess the consequences of one part without appreciating the full meaning of all other parts. This essay illustrates this violation by looking at the new Russian Constitution, ratified by direct popular vote in December 1993, with special attention paid to that document's treatment of federalism. We offer the additional argument, however, that even contemporary research in political institutional design pays insufficient heed to this principle.

# CONSTITUTIONS FOR NEW DEMOCRACIES: REFLECTIONS OF TURMOIL OR AGENTS OF STABILITY?<sup>1</sup>

Peter C. Ordeshook

## 1. Introduction

Constitutions are rarely written in a vacuum, insulated from the political conflicts that swirl about them. The uncertain and confused steps taken in drafting ones for Poland and Ukraine, for example, bear witness to the impact of contemporary disputes, just as the extraordinary powers granted the president by Russia's new constitution signal unambiguously who won the conflict there in 1993 between Yeltsin and the People's Congress. With the exception of states that had constitutions imposed on them by some occupying military force or by a dictator who sought to apply a democratic gloss to his regime, not only has the philosophy of the American constitution been a template for others, but the process by which that document was prepared -- contentious wrangling over sectional and substantive issues -- has been replayed countless times as well.

There are three lessons to be learned from these wars of words. First, despite the view of many that constitutions are mere words on paper or that parchment barriers cannot render a state stable or democratic, they tell us that those who draft such documents act as if words ARE of consequence. Either constitutions allocate power, or contentious negotiation over their content is manifestly irrational. Second, the product of these wars need not correspond to any optimal or rational design. We may be able to understand that product in the same terms as we come to understand any social process, but we can appeal to theories of many types -- to social choice theory or to the pitfalls of short-sighted vote trading -- to predict that the resulting documents will only accidentally adhere to some definition of social rationality. The final lesson -- actually, more an hypothesis -- is that the observed failures of constitutional democracy should not be interpreted to mean that constitutions have little or no effect. Such examples are consistent with a contrary proposition; that absent a theory of constitutional design sufficiently compelling to overcome myopic self-interest, they illustrate the consequences of the poor constitutional designs born of the imperatives of that self-interest.

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Our purpose here is not merely to argue that constitutions matter or that the exigencies of contemporary politics can preclude the implementation of appropriate political institutions. Instead, we want to offer some advice to those who would craft such documents so that less is left to chance or surprise. Section 1, then, considers three examples, drawn from the Soviet experience, that illustrate the preceding lessons, and which show in particular that constitutions matter even for states without a democratic tradition. Section 2 considers briefly the process and conflicts that led to the ratification of Russia's current constitution in order to illustrate the principle most commonly violated when crafting new constitutions. That principle is that the various parts of a constitution should be treated as interdependent components of the document. Section 3 focuses on federalism and describes how that principle was violated owing to contemporaneous conflicts so that Russia failed to formulate a wholly integrated constitutional system. Finally, Section 4 argues that although several (but hardly all) of the problems Russians created for themselves have subsequently been resolved, little guidance was provided them by the comparative political literature on constitutional and political institutional design and that until this literature develops further, we can suppose that states will continue to duplicate Russia's experience.

#### **1. Lessons from the Soviet Union**

The constitution of the Soviet Union, both its '36 Stalinist and '77 Brezhnevian versions, offered a panoply of constitutional rights as detailed and expansive as anything set to paper in the West. Chapter X of the 1936 document "guaranteed" the right to free speech, a free press, free assembly, equal protection, freedom of religion and thought, equal rights for women, the inviolability of the person and due process, and, conflating negative with "positive" rights, the right to work, rest, material security, and education. The USSR's failure to satisfy these constitutional prescriptions, though, is often taken to indicate a failure, if not of constitutionalism in general, then at least of its applicability to Russia and "Russian tradition." The fault of those documents, though is not that they failed, but rather that they worked precisely as designed.

Those who believe they failed owing to the gap between promise and reality are correct to assert that merely setting words to paper about rights and social welfare entitlements did not and, in general, cannot accomplish much. Only appropriately designed and properly functioning institutions can ensure adherence to rights and the promulgation of legitimate governmental policy. The presumption of failure, though, is based on a preoccupation with only one of three questions we can ask about a constitution when evaluating its performance. In this instance the question asked is: Did the constitution lead to the realization of stated goals? The answer, evident to everyone, is NO (at least insofar as rights and welfare guarantees is concerned), and therein lies the basis of pessimism about the prospects for a democratic society guided by constitutional

principles among the citizens of the successor states of the Soviet Union. But before we concur in this judgement, we must answer two other questions: Did Soviet constitutions legitimize or contribute to the stability of the political institutions they prescribed; and were those institutions appropriate for the realization of the rights and guarantees it identified as goals? Only if our answers to these questions are NO and YES can we deem a constitution a failure. In fact, our answers are exactly the opposite.

The problem with Soviet constitutions was that they were based on a social theory that assumed that people are perfectible and that beliefs and values can be changed fundamentally so that social goals become private ones. Thus, they enshrined a political system doomed to failure. However, although they failed to achieve what is beyond the reach of any constitution -- guarantee the realization of lofty principles by mere proclamation -- Soviet constitutions succeeded to the extent that the system and institutions they legitimized did in fact function as described. Setting Marxist-Leninist principles at the core of Soviet social organization, both the '36 and, even more forthrightly, the '77 constitutions legitimized the dictatorship of the Communist Party, and having done that, all the rest was mere window dressing. In fact, absent a Constitutional Court, neither constitution was intended as working law (Blankenagel 1992). This is not to say that those constitutions played a role in forming political structures: those structures existed before either document was written. Thus, the '77 document codified many of the post-Stalinist changes in Soviet law and, by institutionalizing the role of the communist party more forthrightly in Article 6, signaled the transition from Stalin's personal dictatorship to that of the party. Both documents, then, gave legal sanction to what existed so that, with respect to our second question about their influence on political structures, we should judge Soviet constitutions as either irrelevant to events or we can infer that they contributed to the strength of institutions. In either case, the answer to our second question ought to be YES.

Turning to our third question, about the adequacy of that structure for realizing stated goals, we can, of course, debate whether the USSR's dissolution was inevitable and whether Gorbachev's "reforms" merely hastened the end (see, for example, Laqueur 1994 for a critical survey of the literature). Insofar as the gap between constitutional pronouncement and reality is concerned, though, the social theory on which Soviet constitutions were based -- the '36 one, the '77 one, or the much-amended version of the '77 one that disappeared in 1991 -- failed to anticipate the inevitable consequences of the unchecked power: inefficiency and corruption. Nevertheless, this was the structure that Soviet constitutions legitimized, and this was the one that prevailed. Soviet constitutions failed to deliver on their promises, then, not because constitutionalism is somehow alien to the "Russian soul" but because they legitimized a political system that failed to channel self-interest so as to serve the public interest. Thus, the answer to our third question is NO.

So, if there is a lesson to be learned generally from the USSR's constitutional experience, it is not that constitutions did not work. The lesson is either that that experience is an irrelevant experiment or that even bad constitutions can, for a time at least, be stable. This argument does not challenge the view that history would have been unchanged if any of these constitutions was merely a blank piece of paper. It need not convince anyone that a new constitution can lead to something other than what exists, and it does not contradict the assertion that the USSR or any of its successor states must proceed along historical paths that can only be interrupted but not negated by attempts at developing a constitutional democracy. To counter these arguments requires consideration of the more general matter of how constitutions in fact influence political processes, how they ensure rights, and how they facilitate the establishment of stable political systems.

Our second example comes also from the Soviet experience, and illustrates more directly how even the Soviet constitution influenced things. Although both the '36 and '77 versions allowed for secession in principle (Articles 17 and 72, respectively), these words were generally understood to be void of content; indeed, both documents precluded such a possibility by their failure to offer any procedure for separation. However, thinking that he could borrow time for his reforms, in 1990 Gorbachev acceded partially to Lithuanian demands and allowed implementing legislation that specified a clear albeit tortuous path to secession. The effect, though, was to legitimize secession as part of Soviet law, thereby emboldening leaders in the Baltic republics to pursue separation from the USSR more vigorously (Sharlet 1992). Thus, playing the coordinating role that is the ultimate basis of the enforcement of their provisions (Hardin 1989, Ordeshook 1992), we have here an example of a constitution (and its implementing legislation) coordinating expectations so that what was deemed illegal under one set of words becomes legal and attainable under a different set.

Our third example comes from Russia itself and the constitution, largely a reprint of the '77 Soviet text, that was superseded by the 1993 document. Although that constitution was amended to establish a president, to empower a Constitutional Court, and to proclaim the principle of a separation of powers, Article 104, consonant with the revolutionary slogan "all power to the Soviets," gave the Congress of People's Deputies (actually, the Supreme Soviet) the authority to legislate and govern in all important matters. Thus, following the demise of a communist party that could negate theoretical inconsistencies, the document's logical flaws found full play in the conflict between Yeltsin and parliament that resulted in a mini-civil war that was resolved only by military force. Unlike Soviet constitutions, though, the Russian one can be credited with empowering new institutions (notably, the presidency and the Constitutional Court). Thus, rather than argue that constitutions had little in the early years of an independent Russia, we can find good reasons for

arguing exactly the opposite, provided we appreciate the ways in which its constitution encouraged political conflict.

## 2. A First Principle of Constitutional Design

Admittedly, the evidence that Soviet-era constitutions influenced events is not scientifically compelling. However, although Russians commonly lament that constitutions can never be much more than mere words, the drafting of Russia's current constitution, like most constitutional drafting processes, was approached as though it was critical to the resolution of several internal conflicts: "Constitutions are usually retrospective documents, not prospective ones. They are designed to solve the most pressing problems of the past, not the future. Yeltsin's constitution is no exception ..." (Holmes and Lucky 1994) and "political institutions ... often get chosen more because of calculations made during the process of change ... than because certain versions of these institutions are uniquely appropriate ..." (Colomer 1995). We cannot here review the events leading to the preparation and ratification of that constitution and to Yeltsin's Ukaz 1400 dissolving the old parliament (for overviews of those events see Tolz 1993, Rutland 1994, Semler 1994). We need only note the basic issues that confounded that process. Briefly, those conflicts were,

- between those who accepted the view that constitutional rights were first and foremost limitations on the state, versus those who sought to compel the state to partake of a variety of welfare entitlements and to regulate not only the state, but society as well.
- between those who saw a constitution as a minimal document that concerned essential institutional details, versus those who viewed them more as a social contract in which as much detail as possible was included to preclude disputes over meaning.
- between those who argued for the strong hand most consonant with a presidential system, versus those who feared Russia's traditions of Czar rule and who preferred parliamentary government.
- between those who feared Russia's disintegration and preferred a unitary state, versus those who saw federalism as the only way to govern a state as heterogeneous as Russia.

Several participants in the drafting process were familiar with Western practice, but opponents in these disputes were rarely motivated by principled notions of constitutional democracy. Yeltsin sought a strong presidency because he was president; conservatives in the People's Congress argued for a parliamentary system because they sought to undermine Yeltsin's policies (Thorson 1993); leaders of the republics argued for federalism because they wished to maximize their autonomy and control of the resources on their territories; politicians in Moscow preferred a unitary state

because they sought to maintain control of governmental revenues and because they knew no other governmental form (Sharlet 1993); the Constitutional Reform Commission argued for an elaborate document since that was the style of their ill-prepared draft and to argue otherwise was to hand the constitutional agenda to competitors; competitors such as St. Petersburg mayor Anatoly Sobchak and Yeltsin advisor Sergi Shakrai argued the opposite to seize the agenda and the label 'the James Madison of Russia'; and those who argued for extensive welfare entitlements did so because doing otherwise was to reject their heritage of democratic centralism.

The details of these disputes concerned nearly every article of the various draft constitutions (Cohen 1993), and their final resolution was a document that contradicts many of its loftily stated principles. Despite proclaiming Russia a federation (§ 5), federal subjects are precluded from establishing their own independent judiciaries (§ 118) or from controlling the method whereby deputies to either national legislative branch are elected (§ 96); regional governments possess few if any exclusive policy jurisdictions (§ 71 and 72) and have no authority over local governments (§ 132 and 133); the president is empowered to overturn those regional executive acts he deems unconstitutional (§ 85); regional governments possess no independent taxing authority (§ 72), there is no guarantee of the obligation of contracts and no comity clause; and, in perhaps the clearest reincarnation of Lenin's idea of democratic centralism, the constitution provides that "federal executive bodies and the bodies of executive authority of the members of the Russian Federation shall form a single system of executive authority" (§ 77). Despite proclaiming the people as the ultimate sovereign (§ 3) and rights as inalienable (§ 17), citizens have no standing before the Constitutional Court (§ 125), constitutional rights are confused with citizen duties (§ 57-59), and the law is allowed to limit rights in order to uphold "the foundations of the constitutional system, morality, or the health, rights and lawful interests of other persons or for ensuring the defense of the country and state security" (§ 55). And despite proclaiming a governmental form based on a separation of powers (§ 10), in addition to the duties and powers normally associated with that office (appointment, legislative initiative, veto) and in addition to being anointed "guarantor of the constitution" (§ 80), the president of the Russian Federation is empowered to dissolve parliament (§ 84), to appoint ministers without legislative oversight (§ 83), and to issue decrees insofar as the law is silent (§ 90) -- a power Yeltsin has already used under the guise of controlling rampant crime to abrogate constitutional rights (Cohen 1995).

This constitution, then, violates not only a good many ideas about democratic institutional design, but also its own stated objectives. Many of those violations can be resolved through amendment, judicial interpretation, and evolving tradition. But if we want to argue that politics distorts the design of constitutions and precludes the implementation of appropriate institutions, we need to consider what specific principles of design are most likely to be violated. Only when



we identify the "disease" can we offer a cure. And here our argument is that the principle most at risk is the proposition that

*all parts of the constitution are interconnected and that we cannot assess the consequences of one part without appreciating the full meaning of all other parts.*

The violation of this principle is a consequence of the understandable inability to isolate writing a constitution from the conflicts that make constitutions essential and is manifest in the tendency to address each part of the document separately, as an arena for negotiations between competing interests. Thus, the presidential powers enshrined by Russia's constitution are best understood as a byproduct of the presidential-parliamentary conflict that preceded it, and by the fact that Yeltsin won that conflict. For example, the president is empowered to name and fire his own ministers without parliamentary approval because of the Congress's recalcitrance at approving earlier presidential recommendations; the president can dissolve the Duma if it fails to approve his nomination for Prime Minister because of Yeltsin's earlier inability to secure the re-appointment of Yegor Gaidar to that post; the president can issue decrees with the force of law because the dissolved Congress had been unwilling to extend his emergency authority; and the constitution fails to provide for the office of vice-president because Yeltsin's first vice-president, Alexandar Rutskoi, became a focal point for parliamentary opposition to his policies.

As with presidential-parliamentary relations, the treatment of federalism was isolated from other parts of the constitution (except the president's authority to over-ride regional executive actions). The connection of this part of the constitution to the sections dealing with presidential and parliamentary powers, for example, comes only as background: Yeltsin originally offered the republics special privileges to secure their support (in particular, majority control of the upper legislative chamber, the Federation Council). But once victory was achieved, he reneged on his "constitutional promises" and has since sought to render federal mere administrative appendages of the central government (Sharlet 1993).

Election procedures were relegated to implementing legislation or decree in part to ensure flexibility, but also because Yeltsin's supporters could not agree on which procedures best served their interests. The issue at hand here was selecting an election method that offered the best chance of filling the new parliament with "democratic" reformers. Lip-service was paid to the idea that something must be done to facilitate the formation of national political parties and to avoid dangerous ethnic and regional ones, but national party-list proportional representation was used to elect half the State Duma out of fear that communists would dominate the traditional single-

mandate election districts and that even regional PR would not allow democrats to take full advantage of their concentrated urban support.

### **3. Federalism: Violating the First Principle**

It is understandable that contemporaneous conflicts should influence the actions of constitutional draftsmen. But such conflicts need not preclude good design. To see how this is possible, consider again the subject of federalism. Briefly, throughout 1992 and 1993 debate on this subject focused on three words: sovereignty, supremacy, and symmetry. Yeltsin's early drafts, written to accommodate republic demands, labeled Russia's ethnic republics sovereign, which they interpreted as affording them the same status in international affairs as Stalin claimed for Ukraine and Byelorussia when negotiating their seats in the United Nations. Sovereignty also impacted on the issue of supremacy, and several republics asserted that republic laws were supreme over federal ones or that republics could nullify federal laws on their territory. The current constitution proclaims the supremacy of federal law, but the issue remains a contentious one and contradicts several republic constitutions (as well as the treaties negotiated with those republics that proclaim equal status for all constitutions). Finally, the issue of symmetry arose in the debate over whether Russia's ethnic republics would enjoy privileges not possessed by its other regions (oblasts and krais). Yeltsin's early drafts allowed federal subjects to renegotiate their status on a bilateral basis with Moscow, thereby confounding the meaning of the provision that all federal subjects "shall be equal in their relations with federal bodies of state authority" (§ 5), and although the final version makes no mention of such negotiations, a variety of bilateral asymmetric agreements have been negotiated between the republics and Moscow (Teague 1994).

Although the draft ratified in December 1993 imposed a federal form that made only modest accommodation of regional and republic demands, there was little dispute over what parts of the constitution were the core of its federal provisions, namely those provisions dealing with

- supremacy and secession;
- the admission of new federal subjects or alterations in the boundaries of existing ones;
- the role of federal subjects in amending the constitution;
- free trade within the federation;
- the policy jurisdictions of national and regional governments;
- democratic governance within federal subjects;
- the judicial system;
- representation in the national legislature.

Insofar as how the constitution treats these topics, we might prefer a more restricted grant of authority to the national government and a more explicit guarantee of democratic governance within federal subjects, but most of the items on this list find treatments that parallel other state constitutions. Federal law is unambiguously supreme (§ 15, 76), secession is prohibited (§ 4), new federal subjects can be admitted in accordance with procedures specified by federal law (§ 65), no subject's boundary can be altered without the affected subject's consent (§ 67), approval by super-majority of federal subjects is required to amend the constitution (§ 136), free trade is guaranteed within the federation (§ 74), and, paralleling Articles 73 and 74 of the German Basic Law, the national government has an explicit role in most issues of public policy (§ 71 and § 72). The rather ambiguous guarantee of democratic governance (§ 5) is most likely a consequence of the philosophy of democratic centralism that colors Russian thinking.

The instinct to compartmentalize constitutional issues, though, led to an unsatisfactory accommodation of the last two items on this list, and to a failure to consider several additional parts of the constitution, namely those that concern the following:

- control over the methods of election to the national legislature as well as state legislatures;
- the timing of presidential and parliamentary elections;
- the method of electing the president;
- elections as a means of filling federal subject and local public offices;
- the content of federal subject constitutions.

Insofar as the judicial system is concerned, the constitution appears to foil the design of balanced regional governmental structures based on a separation of regional executive, legislative, and judicial powers insofar as it precludes independent regional courts when it requires that the country's judicial system "be established by the Constitution of the Russian Federation and federal constitutional law" (§ 118) and that "judges [be] ... subject only to the Constitution and federal law" (§ 120). To our knowledge, little thought was given to the role of the judiciary in a federal system. Instead, the primary concern was to avoid a repeat of Yeltsin's experience with a runaway Constitutional Court chaired by someone (Zorkin in the case of the old Court) who sided too frequently with opponents.

We can imagine ad hoc accommodations to the problems of a centralized judiciary, including the passage of federal laws that allow for reasonably independent regional judicial structures, owing to regional and republic representation in both chambers of the national legislature. But here we run afoul of the constitution's treatment of the last item on our first list -- representation in

the legislature -- and its failure to consider fully the consequences of its treatment (or non-treatment) of the items on our second list. Briefly, the relevance to federalism of these things, which may be treated directly or only indirectly by a constitution, is that they influence the structure and role of parties, their degree of decentralization, the vertical integration of local parties with national ones, and correspondingly, the extent to which local, regional, and national governmental structures form an integrated whole in which local politicians "naturally" accede to the supremacy of federal law and national politicians are "naturally" protective of regional autonomy (Ordeshook and Shvetsova 1995). If "political parties created modern democracy ... and modern democracy is unthinkable save in terms of political parties" (Schattschneider 1941: 1), then it is also true that, in William Riker's (1964: 136) words, "Whatever the general social conditions, if any, that sustain the federal bargain, there is one institutional condition that controls the nature of the bargain in all instances here examined and in all others with which I am familiar. This is the structure of the party system, which may be regarded as the main variable intervening between the background social conditions and the specific nature of the federal bargain." Thus, the preceding provisions, in combination with those that treat representation in the national legislature, are as important to federalism as are the provisions relegated to those sections of a constitution labeled "The Organization of the Federation."

Unfortunately, unfamiliarity with party politics combined with contemporaneous political conflicts to preclude consideration of Riker's admonition about the role of parties and the ways to encourage the development of parties appropriate to a federal state. Instead, each of the items on this second list were attended to in the context of other issues. Thus,

- the basis of representation in the State Duma, as we note earlier, was considered only in the context of securing control of that chamber and minimizing the prospects of opponents. Thus, the electoral system decreed by Yeltsin allowed Zhirinovskiy to secure a plurality of PR seats, ensured a highly fractured party system, and discouraged anything but a top-down Moscow-centered process of party formation.
- fearful of regional bosses, the constitution merely states that "the procedure for forming the Federation Council ... shall be determined by federal law" (§ 96) and that the Council should "be composed of two representatives from each member of the Russian Federation; one from its representative and one from its executive body of state authority" (§ 95). Thus, the constitution fails to provide for direct election of deputies to the Federation Council, and leaves the door open to presidential appointment. Also, with "democrats" in the Kremlin concerned about the strength of regional communist party organizations, it gives

full control of parliamentary elections (including the drawing of districts for the State Duma) to Moscow (§ 96).

- Because Yeltsin saw no reason to jeopardize his own position and because he sought to maintain a Czar-like distance from "normal" politics, he postponed the presidential election until June 1996. Thus, rather than hold that election at the same time as parliamentary ones, parliamentary elections will be held six months before the presidential contest.
- The constitution requires only that the president be elected by direct vote (§ 81). Thus, there is no explicit (as in Nigeria) or implicit (as in the United States) constitutional requirement that the next president be elected with broad geographic support.

The last two items on our subsidiary list of constitutional provisions -- regional and local elections and regional constitutions -- are not normally addressed by a national constitution. But Yeltsin's subsequent policies here are consistent with a myopic view of constitutional democracy. Fearing the loss of political control that might accompany the rise of regional leaders with independent electoral mandates, Yeltsin has resisted allowing direct election of regional governors and the constitution sustains presidential appointment of regional plenipotentiaries (§ 83). Although it is assumed that regional Dumas and local Soviets will be directly elected, with attention focused on ensuring that local and regional governments rescind the mandated share of tax revenues to the federal government (Wallich 1994), little if any thought has been given to the role elections might play in regional and local governance. The constitution makes vague reference to direct citizen involvement in local governance (§ 130), but it is clear that the authority of local governments will be closely controlled by Moscow. And although the constitution makes reference to 'republic constitutions' and 'regional charters' (§ 5), it offers no guidance as to the content of those documents. Moscow's attempt to control that content has focused on ensuring that they do not contradict the federal constitution, Yeltsin's decrees, or federal law.-- in particular, that they not undermine Moscow's attempt to control Russia's vast natural resources.

Of course, we should not be surprised to see manipulation of electoral procedures in the interests of those who have the power to do so. Much of the early history of American state and national politics focused on such manipulations (see, for example, Williamson 1960, Hoadley 1986), just as interests of the same type dictated the selection of procedures in Central and Eastern Europe after the fall of communism (Colomer 1995, Holmes 1994). On the other hand, aside from Yeltsin's dissolution of regional soviets after the overthrow of parliament in 1993, little thought appears to have been given to the role of elections at the regional and local levels, and even less to the procedures that might be used there. Certainly the encouragement of parties that would facilitate stable federal relations is not seen as a relevant consideration when the provisions on our

second list were addressed. One might argue, perhaps, that the creation of a true federation was never the intent of those who drafted the final document. We suspect, though, that much of its democratic-centralist flavor is the result of the general belief that only traditional command-and-control devices could arrest the forces that threatened the fragmentation of Russia -- a belief that was the consequence of an inability to understand the potential role of parties in a federation and the failure to estimate the extent to which these provisions might usefully influence that role.

#### **4. Operating in Accord with the First Principle**

It is one thing to assert that constitutions ought to be written as fully integrated documents; it is another thing to contend successfully with the political pressures and crises that normally surround their preparation and ratification. Nevertheless, referring again to the Russian case, there are solutions to this seemingly insurmountable problem. We can begin by noticing that several solutions were achieved "automatically" following the December '93 parliamentary elections.

- It was soon understood that Yeltsin's aloofness from the election was an error and for this reason he encouraged the formation of two electoral blocks in April 1995, one headed by Prime Minister Chernomyrdin and the other by State Duma Speaker Ivan Rybkin -- blocks that could either support his bid for reelection or that could support a centrist candidate if Yeltsin chose not to run.
- The '93 elections also revealed the dangers of national party-list proportional representation, and Yeltsin has since argued for a reduction in the number of seats to be filled this way (although incumbent Duma deputies resist changing a system that led to their initial success).
- For the same reasons that the Duma resist changing the procedures under which it was first elected, direct election of the first Federation Council has become part of Russia's constitutional order, and the role here of 'representative and executive bodies' will become that of merely nominating candidates -- a role that is likely to be supplanted as regional parties take form.
- Much of the debate over electoral reform prior to December '95 examined the pros and cons of postponing parliamentary elections until 1996 so that presidential and parliamentary contests could be held simultaneously. Although it is unlikely that parliamentary elections will in fact be postponed, there is growing sentiment to alter the election schedule to allow for simultaneity some time in the future.

Yeltsin moved close to issuing a decree in March '95 that would have sustained his authority to appoint regional governors, but he has been dissuaded from doing so upon the advice of those within the Kremlin who are most familiar with regional affairs.

Also, although the republics, following Tatarstan's lead, adopted constitutions that contradicted the federal one (by proclaiming the supremacy of their constitutions and laws), Moscow muted this issue with a series of bilateral treaties so that, in exchange for increased autonomy, the republics have largely dropped their claims to sovereignty (Teague 1994).

Thus, resistance to many of the things that would have led to a better integrated constitution and a more viable federal system in fact disappeared soon after the constitution's ratification. Of course, this is not to say that this resistance has disappeared owing to a better understanding of constitutional design, and it remains true that there is serious resistance to many of the things that would facilitate a move viable federal state -- regional governments with independent taxing authority, more extensive use of regional and local elections, regional governments with full control over their charters and constitutions, and regional control of elections to both chambers of the national legislatures. Earlier arguments for sequenced elections, party-list PR, and a president who was above politics gave way to political realities rather than more ready acceptance of reasoned arguments about political institutional design.

Thus, many of the errors of design, both today and in 1993, were not based on strongly held beliefs about the best way to organize the transition to democracy, but instead were the result of faulty judgements as to what procedures and tactics best served the self-interests involved and of the force of contemporaneous conflicts that compelled and continue to compel a divorced attention to constitutional issues. This is not to say that beliefs and actions can ever be easily changed, but especially with respect to beliefs about the consequences of certain choices, we can see with the benefit of hindsight where good social science arguments might have moved things in a different direction. Unfortunately, such arguments were not forthcoming, because political scientists in the West largely have largely ignored the subject of constitutional design or are guilty of the same error of compartmentalization that characterized Russian efforts. Despite Riker's (1964) seminal arguments and Horowitz's (1991) focus on the importance of electoral institutions in ethnically divided federal states, Sartori's (1994) recent discussion of presidential and parliamentary systems and of election laws, for example, devotes less than a page to federalism, Linz and Valenzuela's (1994) 2-volume study of the failures of presidential systems devotes a scant two pages to the subject, while Powell's (1982) analysis of democratic stability relegates federalism to two footnotes. Neither Lijphart's (1992) edited volume on presidential and parliamentary systems nor Shugart and Carey's (1992) book on presidential-legislative structures include the words 'federal' or 'federalism'

in their indexes, the index to Ostrom's (1991) otherwise seminal analysis of American federalism makes no mention of 'party', the World Bank's assessment of federal relations in Russia (Wallich 1994) makes only passing reference to political structures and wholly ignores party competition, none of the essays in Elster and Slagstad's (1988) edited volume on constitutionalism pays heed to Riker's argument, and although Lijphart's (1984) widely used text devotes a chapter to federalism, that chapter offers no discussion of parties.

But while mainstream comparative texts fail to provide much guidance, Russians might have gained from their own experience. Our arguments about federalism are summarized by the proposition that political parties breath life into constitutions structures, that the parties which do this are those with strong local roots but which also have an incentive to integrate with national parties, and that election laws, the timing and procedures of presidential elections, and the autonomy given regional governments to manipulate the elections laws that pertain to regional and local offices (including representation in the national legislature) are important influences on these incentives. Interestingly, the communist party performed an equivalent function with respect to Soviet political institutions. Although the party operated with a top-down command-and-control administrative apparatus and its authority did not rest on any electoral mandate, there was sufficient content to the theory of democratic centralism that our arguments here about parties and federalism might not have appeared wholly alien to those who drafted the Russian constitution.

Thus, constitutional engineering consistent with our first principle of design, although unrealized, was not infeasible. It was more the psychology of conflict rather than specifics that compartmentalized the drafting of Russia's constitution. Greater awareness of the need for integration, in combination with a better theory of federal constitutional design, would have sufficed to avoid many of the inadequacies of that document. This is not to say that the instinct to write a document that favored democratic centralism and a unitary state could have been averted. It is naive to argue that theory and mere consciousness can compel political elites in Moscow to embrace fully the precepts of democratic constitutional federalism. Nevertheless, consciousness and better theory would have encouraged such a government. At the same time, avoiding violations of our first principle of constitutional design would have been made easier if another aspect of the example set by those who met in Philadelphia would have been followed -- shutting the windows and closing the drapes around those who would write a constitution.



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