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REINVENTING THE RUSSIAN STATE: PROBLEMS OF CONSTITUTIONAL IMPLEMENTATION

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INTRODUCTION

State-building in Russia is proceeding slowly, somewhat erratically and even occasionally regressively. As a process, state-building is neither systematic nor free of internal contradictions. Sources as diverse as Imperial Russia, the Soviet system and Western models are in some instances proving to be an incompatible mix.

At the heart of Russian state-building is the construction, or at least the major remodeling, of institutions. In turn, the new or renovated institutions require interconnection in a coherent system of governance. All of these institutions, and other activities as well, are part of the reinvention of the Russian state, the basic script for which is the new Constitution of 1993.

I. WHY REINVENT THE RUSSIAN STATE?

The reasons are manifold. In modern history, Russia was never a state in the conventional sense of the term. Imperial Russia was an empire containing a multitude of nationalities extending across the Eurasian space. Its successor, the Soviet Union, which included Russia as one of fifteen union republics, continued the imperial tradition under a different guise.¹

Although Russians dominated the Soviet elites, the centralized U.S.S.R. institutions were designed not only to govern Russia, but also fourteen other ethnic republics, as well as to manage a planned economy intended to foster a high degree of economic interdependence within the union. When the Soviet Union came to an end in December 1991, Russia, along with the other successor states, faced the immediate task of reinventing itself as a sovereign, independent state.

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1. RICHARD PIPES, *THE FORMATION OF THE SOVIET UNION* 293, 296-97 (rev. ed. 1964).

While Russia inherited the Soviet central institutions, the rationale for which they were established no longer existed: for example, the former inner Soviet empire and its centralized economy.² Simultaneously, Russia adopted the dual goal of developing a democratic polity and creating a market economy. Both of these considerations necessitated a large-scale program of institution building.

A. *State-Building During the First Republic*

The task of building new, or renovating old institutions as the core of a modern Russian state, was complicated during the First Post-Soviet Russian Republic by a fierce and unrelenting power struggle within the political class.³ At the time, President Boris Yeltsin threw his authority behind a strategy of rapid and radical economic reform. He was soon opposed by his erstwhile protege, Ruslan Khasbulatov, who had succeeded him as parliamentary leader. The more conservative parliament supported reform, but at a more moderate pace and with due concern for the social safety net.

The conflict was compounded by baggage from the Soviet past. The Russian Republic Constitution of 1978, a Soviet-period document now heavily amended, was still in effect.⁴ While the elites struggled to come to terms over the shape of a new post-Soviet constitution, the extant document provided for Brezhnev-era parliamentary supremacy combined with Gorbachev's *perestroika*-period innovation of a strong executive presidency. Given the forceful personalities of Yeltsin and Khasbulatov and absent the controlling hand of the former Communist Party, a clash of powerful political wills was inevitable.

The final collision of the power branches of the post-Soviet polity in the fall of 1993 brought the First Republic to an abrupt and violent end. During the three-month interregnum that followed, Yeltsin, the victor in the struggle, governed unchecked by the dissolved parliament or the 1978 Constitution and its interpreter, the Constitutional Court. Yeltsin had effectively suspended the parliament, the Constitutional Court and the 1978 Constitu-

2. By "Inner Empire," the author is referring to the 15 union republics of the former Soviet Union. In contrast, by "Outer Empire" reference is to the former Communist states of East Europe with the exception of the former Yugoslavia.

3. Dating the First Republic can be a problem. One can use either the 1990 elections or the end of the U.S.S.R. in late 1991. Robert Sharlet, *Russian Constitutional Crisis*, 9 POST-SOVIET AFF. 314, 316 (1993).

4. The 1978 Constitution of the Russian Republic was modelled after the 1977 U.S.S.R. Constitution. F.J.M. FELDBRUGGE, ED. THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS 263-342 (1979).

tion by presidential writ.⁵

B. Politics and Law During the Interregnum

President Yeltsin accomplished what he saw as the two main tasks of the interregnum: the holding of elections for a new parliament and the referendum on the final draft of the Constitution that was revised to conform to presidential preferences. The election/referendum of December 12, 1993, produced a mixed outcome. The elections brought forth a parliament more conservative and nationalistic than its fallen predecessor. Although the referendum yielded a new post-Soviet Russian Constitution, the constitution was clouded by uncertainty over its legitimacy due to official manipulation of the turnout figures.⁶

The new Constitution of 1993, despite lingering doubts about its genesis, inaugurated the Second Russian Republic. As the law of the land, the Constitution is the framework within which reinvention of the Russian state is proceeding, albeit through retrograde motion — steadily, unevenly and with occasional backward steps.

C. The Constitution of 1993

The Russian Constitution provides for an unequally balanced three-way separation of powers, an essentially unitary state with federalist aspirations and an array of human rights.⁷

The cynosure of the new Constitution is a strong executive that not only survived the demise of the First Republic, but was strengthened during the interregnum. The national legislative and judicial branches, however, had to be recreated according to the new Constitution. The two-tier parliament of the First Republic had been discarded for a more Western-style bicameral body called the Federal Assembly.⁸

The Federal Assembly is divided into the State Duma, as the lower house, and the Federation Council, as the upper house. The Constitution assigns each house specialized powers and duties, as well as the joint task of enacting legislation to be forwarded for presidential signature or veto. Both houses of the new Russian

5. Sharlet, *supra* note 3, at 327.

6. To be a legal referendum, turnout must be 50% of all registered voters. No official figures have ever been released, but there are rumors that turnout was no more than 46%. Wendy Slater, *Russia's Plebiscite on a New Constitution*, 3 RFE/FL RESEARCH REP. 2, 5 (1994).

7. Erik P. Hoffmann, *Challenges to Viable Constitutionalism in Post-Soviet Russia*, 7 HARRIMAN REV. 19, 37-45 (1994).

8. The two-tier parliament included the Congress of Deputies and the smaller working Supreme Soviet. JOHN LOWENHARDT, *THE REINCARNATION OF RUSSIA* 83 (1995).

parliament sat for the first time in early January of 1994.

D. State-Building in the Second Republic

The major work of constructing the Russian state of the Second Republic rests jointly on the shoulders of the executive and legislative branches. The received body of laws is a melange of legislation from the Brezhnev period, the time of *perestroika* and the First Republic. Most of these laws require replacement or revision to conform to the 1993 Constitution and its institutional imperatives.

During the interregnum, pro-reform legislators of the old parliament, now working within executive structures, drafted bills for much of the legislation that would be necessary under the new constitution. Upon opening of the Federal Assembly, President Yeltsin forwarded a long list of bills as his initial legislative program for building the new Russian state.

According to the Constitution, the forwarded bills were divided into two types of prospective laws. The majority of bills were intended for passage as federal laws by simple majorities. A smaller number were meant to produce "federal constitutional laws," a new category of Russian legislation, which require supermajorities. Federal laws include the familiar rules necessary to operate a polity and regulate a society, such as annual budgetary legislation. In contrast, federal constitutional laws are those with systemic import that are foundational to the state-building project.

One of the first items of business to come before the newly seated parliament was the bill for a federal constitutional law re-establishing the Constitutional Court as the apex institution of the "third branch." Unlike most of the other executive bills, the court bill was largely drafted under presidential auspices by the justices of the first Constitutional Court during the interregnum. Under the prevailing 1991 law, the Constitutional Court enjoyed the right of legislative initiative on relevant matters.⁹

In any event, the justices were idle and who knew better than they the defects of the initial law on the court. It was not until the second Constitutional Court was in place that the Constitutionally prescribed separation of powers doctrine became operational. This, however, would not occur for some time.

9. See Law of the Russian Soviet Federated Socialist Republic on the Constitutional Court of the RSFSR, ZAKON RSFSR O KONST. SUDE RSFSR (July 12, 1991), VEDOMOSTI RSFSR, no. 30, item 1017 (1991) *translated in* 30 STATUTES & DECISIONS, 42-94 (1994) (containing the right of legislative initiative in article 9).

*E. Politics of Reinventing the
Russian State*

Aside from the great structural tasks of state-building, antecedent steps for setting in motion the Second Republic included re-opening normal political communications between the executive and legislative branches of government; alleviating some of the tensions between the central government and the subjects of the federation; and developing a broad social consensus in support of a calm, deliberative political process.

President Yeltsin accomplished the first step early by an exercise of political self-restraint. Yeltsin had previously signalled that he was seeking with the new Constitution, not so much the panoply of powers that accrued to him as chief executive, as the creation and maintenance of Russian political "stability." In fact, the quest for stability after the turbulent First Republic quickly became the leitmotiv of the Yeltsin Administration during the first year of the Second Republic.¹⁰

In this spirit, Yeltsin refrained from overreacting to the Duma's February 1994 decision granting amnesty to his principal opponents, who were under investigation for inciting violence during the September-October 1993 confrontation that led to the end of the First Parliament. In spite of his strong personal feelings on the issue and his concern that former Vice President Aleksandr Rutskoi and former Speaker Khasbulatov might become destabilizing forces, President Yeltsin ignored the advice of militant advisers and refrained from blocking their release from prison.¹¹

To address the center-periphery strains in the putative federation, the Government brought to a successful conclusion more than two years of negotiations between Russia and Tatarstan.¹² The first of its kind, the outcome was a bilateral treaty between Russia and one of its components. Both sides made significant concessions over contentious issues of allegiance as well as jurisdiction over natural resources.¹³

The Tatarstan treaty represented an important signal that, notwithstanding the centrism of the new Constitution, the Yeltsin

10. Steven Erlanger, *Yeltsin Says He Won't Rule Out a June Presidential Election, Yet*, N.Y. TIMES, Nov. 16, 1993, at A8.

11. Donald D. Barry, *Amnesty Under the Russian Constitution: Evolution of the Provisions and Its Use in February 1994*, 1 PARKER SCH. J. E. EUR. L. 437, 451-58 (1994).

12. Tatarstan is one of the most restless subjects of the 21 ethnic Russian Federation republics. Robert Sharlet, *The Prospects for Federalism in Russian Constitutional Politics*, 24 PUBLIUS 115, 119 (1994).

13. *Id.* at 126.

Administration was prepared to move in the direction of a more federative arrangement with the ethnic republics and even with the administrative regions of the federation. Other agreements with regions as well as certain republics followed during 1994.

In a final step to getting state-building underway, Yeltsin made some progress toward developing a supportive public consensus in the spring of 1994. Under his aegis, a Treaty on Social Accord was drawn up as a kind of post-constitutional agreement on civic peace. Sergei Filatov, Yeltsin's chief of staff, managed to persuade a broad spectrum of government officials, party leaders and the heads of various extra-parliamentary groups, as well as social and even religious organizations, to sign the document in a formal ceremony.

While there were several notable holdouts, the Social Accord did contribute to stability and an atmosphere of relative calm for about six months. At that point in the fall of 1994, the consensus began to fray: first over the sudden collapse of the ruble in October, and then in December with the onset of the Chechen crisis.¹⁴

Nevertheless, partly as a result of Yeltsin's restraint and the vertical and horizontal para-constitutional¹⁵ agreements, the political environment remained tranquil enough to allow Yeltsin to forward dozens of bills to the floor of the parliament where legislative deliberation gradually got underway on some of the draft laws.

Progress in constitutional implementation during the first year of the Second Republic, however, unfolded slowly. A great deal of time was devoted to the first budget bill over which there were major differences between parties and factions. It proved easier to pass other relatively neutral and particularistic time-sensitive, financial legislation such as inflation-related pension adjustments. Meanwhile, many other pressing bills languished in committee or seemed suspended in time between parliamentary "readings."

Legislation that did pass both houses and gained the President's signature was sometimes subject to slippage in terms of its particulars. The Constitutional Court bill became the first federal constitutional law after seven months of parliamentary consideration. President Yeltsin signed the bill into law in July of 1994.¹⁶ The law increased the size of the court from fifteen to

14. Robert Sharlet, *The New Russian Constitution and Its Political Impact*, 42 PROBLEMS OF POST-COMMUNISM 1, 7 (1995).

15. See Fred W. Riggs, *The Survival of Presidentialism in America: Para-Constitutional Practices*, 9 INT'L POL. SCI. REV. 247, 251-52 (1988).

16. See Russian Federation Federal Constitutional Law, July 21, 1994, "On the Russian Federation Constitutional Court," as translated in CENTRAL EURASIA DAILY REPORT, FOREIGN BROADCAST INFORMATION SERVICE, FBIS-USR-94-033, July

nineteen justices. However, since the thirteen original justices were grandfathered onto the new bench by a transitional provision of the constitution, six vacancies remained.

The parliamentary implementation decree mandated the President to nominate, and the Federation Council to appoint, the new justices within thirty days. The court could not convene without a full bench of justices.¹⁷ Nevertheless, after numerous failed nominations, the nineteenth and final justice was appointed in late January 1995. Thus, due to the failure of the presidential nomination process and the parliamentary appointment process effectively to intersect, the staffing of the court took six months.

This meant that the second Constitutional Court that was necessary to complete the triadic separation of powers as part of the basic foundation of state-building, did not hold its first public session until March 1995, nearly fifteen months after ratification of the Constitution.

II. IMPACT OF THE CHECHEN CRISIS ON CONSTITUTIONAL IMPLEMENTATION

Paradoxically, the Chechen Crisis has both retarded and accelerated the process of state-building in Russia. Since the Russian military assault on the secessionist Chechen Republic on December 11, 1994, the eve of Constitution Day, a day celebrating the first anniversary of the new Constitution, a debate has arisen in Russia and abroad about the crisis's implications for Russian politics and reform.

As one analyst put it, Chechnya is to democracy in Russia what Chernobyl was to *glasnost* in the U.S.S.R.¹⁸ Metaphorically, the Chechen crisis has magnified the new Russian political system, revealing its gaps and defects, but also highlighting its strengths and potential. The debate revolves around three issues:

(1) Does the Chechen crisis reveal a weak state and fragile stability, or does it reflect an executive that can act with autonomy and independence disregarding press and political criticism?

(2) Is the Chechen crisis signifying a break from the path of democratic development, or is it a sequel to Yeltsin's military assault on parliament in October 1993 and the natural consequence of Russian authoritarianism?

(3) Was the attack on Chechnya an anti-Constitutional act (so argues a former Minister of Justice), or was the President

28, 1994 at 1-21.

17. A full bench of justices is necessary for the election of the chief justice and other officers of the Constitutional Court. *Id.* at 21.

18. *Lessons of the Chechen Crises*, IZVESTIYA, December 16, 1994 at 4, translated in CENTRAL EURASIA DAILY REPORT, FOREIGN BROADCAST INFORMATION SERVICE, FBIS-USR-94-017, December 19, 1994 at 15.

acting within purview of the Constitution and related legislation (as the former Executive Secretary of the Constitutional Commission insists)?

A. *The Negative Impact of the Chechen Crisis*

Whichever answers one finds compelling, there is little dispute that the Chechen crisis has had a negative effect on the process of reinventing the Russian state. Political behavior familiar from the Soviet past has resurfaced rather vividly. This includes the practice of demonizing one's opponents and labelling an entire people a pariah group.

When Sergei Kovalev, the first Ombudsman of Russia, sharply criticized the President and the military for his policy and its conduct in Chechnya, respectively, the Minister of Defense, General Pavel Grachev, branded Kovalev a "traitor." Conversely, the critics of the Chechnya policy also practiced demonization with a Federation Council senator, calling for political trials for Grachev and other power ministers carrying out the President's military policy.

From the outset of the crisis, Yeltsin and his ministers declared the entire Chechen people pariahs in Russian society, labelling them a nation of criminals who posed a serious threat to the integrity of the Russian state. These were not idle comments by officials frustrated over the initial embarrassing setbacks to the Russian military, but the express language of decrees and other official pronouncements.

Indeed, there is a Chechen mafia in Russia that operates in Moscow as well as Grozny; however, in this respect the Chechens are not unique. Organized crime is rife in Russia today, and a number of other "ethnic" mafias are active in Moscow, including Georgians, Azeris, various Central Asian gangs and of course, the omnipresent Russian mobs. Nonetheless, it has been state policy to use the Chechens as a scapegoat for the epidemic of crime in the Russian Federation. Not surprisingly, the Moscow police authorities have singled out Chechens and any dark-complexioned individuals thought to be Chechens for special identity checks and other forms of harassment.

Another casualty of the Chechen crisis is the draft legislation on the Office of the Ombudsman. While preliminary organizational work was started by authority of a Presidential decree during the late summer of 1994, full empowerment and implementation of the new institution awaited passage of the Ombudsman bill. The bill passed its first reading in the Duma, and during the late fall it was expected that the bill would clear the second of three readings in December.

However, before the Ombudsman bill could pass, military operations began in Chechnya, causing a political uproar in Moscow and disrupting routine legislative business. By then, Kovalev, the first Ombudsman of Russia, began his extraordinary individual mission to Grozny. As the Russian and Western press began to disseminate his criticisms, Kovalev became a hero to some and a heretic to others. Although Kovalev was named "Man of the Year" by several Russian publications, Speaker Ivan Rybkin subsequently acknowledged that due to strong objections to the conduct of the Ombudsman-designate in Chechnya, the Duma had deferred further work on the bill. In early 1995, the Duma, exercising its Constitutional power of removal, stripped Deputy Kovalev of his title of Ombudsman of the Russian Federation.

The government claimed it launched the Chechen operation to "restore constitutional order;" to Dr. Elena Bonner, however, it was more reminiscent of Soviet military operations on Gorbachev's watch in Baku, Tbilisi and Vilnius. In this spirit, Dr. Bonner excoriated Yeltsin in an open letter, declaring dramatically, "You have met your Foros."¹⁹

B. The Chechen Crisis as an Accelerant to State-Building in Russia

In spite of its negative impact on constitutional implementation, the Chechen crisis, in other respects, has quickened the pace of Russian state-building.

I will mention several positive effects of the crisis telegraphically.

1. *Constitutional amendments* — Due to the Chechen crisis, a broad consensus emerged in parliament on the need to strengthen the legislative branch vis-a-vis the executive. This was reflected in several proposed constitutional amendments on bridling the executive's use of troops on Russian territory and on defining the parliament's power of investigation more explicitly. While neither of the amendments garnered sufficient support to move forward through the complex amending process, they did indicate a more assertive legislature in the game of constitutional politics. In June 1995, after Chechen fighters prevailed in a hostage crisis in a southern Russian city, the legislature's new posture manifested itself in the Duma's first successful resolution of No-confidence in

19. Open letter from Dr. Elena Bonner to Boris Nikolayevich Yeltsin (Dec. 28, 1994) (translated by Catherine A. Fitzpatrick) (manuscript on file with author). In the quoted statement above, Bonner is suggesting that Yeltsin had been "captured" by his conservative advisers on the Chechnya issue much like former Soviet President Mikhail Gorbachev had been held under house arrest at his Crimean summer residence in Foros by his appointees on the occasion of the attempted coup d'etat against him in August 1991.

the Government.

2. *Legislation* — While war fever clearly drove proposed amendments to the Criminal Code, legislative concern about checks on executive power inspired a critical attitude toward certain draft laws. This included a bill "On States of Emergency," a federal constitutional draft law on the Government of the Russian Federation, as well as a bill being drawn up on the Security Council, the executive body that has played a leading role in the Chechen crisis.

3. *Powers of legislative investigation* — The State Duma asserted its right over executive protest to form a special commission, hold hearings and carry out an investigation of President Yeltsin's policy on Chechnya. When the Acting Procurator General initially refused the commission's summons, invoking a kind of "executive privilege," the Duma used its budgetary muscle to compel the production of sought after documents by threatening to cut off funding for the Procurator's Office.

4. *Media activism* — As the Russian public and world audiences know, Kovalev's critical messages were widely heard due to an active Russian media. Independent television, in particular, made Yeltsin's Chechen campaign a "living room war" from the outset. The terrible images of indiscriminate bombardment by the Russian forces, and the resulting high civilian casualties in Grozny, stimulated widespread public opposition to the campaign, adversely affecting the President's public approval rating. As the *New York Times* observed, the war in Chechnya "has been a kind of watershed . . . displaying the power and influence of independent journalism" in post-soviet Russia.²⁰

5. *Reemergence of the Constitutional Court* — As the military campaign in Chechnya opened, the President and the Federation Council were still trying to come to agreement on judicial appointments to the second Constitutional Court. The Court was short of its full bench of nineteen justices and thus unable to convene as federal troops began moving towards Grozny. As the campaign went forward under the direction of Presidential decrees and Security Council decisions, it became abundantly clear that parliament, under the new Constitution, had insufficient powers to serve as an effective check on executive action.

This realization made it even more imperative that the long-suspended Constitutional Court try to effect a balance of power. Only the full Constitutional Court would have the constitutional authority to review Yeltsin's executive decrees sending Grachev's armies into Chechnya. To the school-of-thought which argued the

20. Steven Erlanger, *In Russia's Fast-Developing Television, New Sources for Political Pluralism*, N.Y. TIMES, Mar. 5, 1995, at A4.

unconstitutionality of the Chechnya action, the case was clear. The Constitution provides for the use of troops on Russian territory only in the event that the executive declares a state of emergency in the particular area of concern. However, taking advantage of the absence of new emergency legislation and clearly intending to carry out a relatively quick Panama or even Haiti analogue, the Yeltsin team made no effort to inform or consult the appropriate committees of the upper house before dispatching thousands of troops to the Republic of Chechnya.

No one can be sure how a restructured Constitutional Court might have reacted in the heat of events. However, the contending positions over the constitutionality of the actions in Chechnya would have at least received public review and had their day in court. Finally, with the appointment of the nineteenth justice in early 1995, the Federation Council indicated that the second Constitutional Court would, at least retroactively, get a chance to review the Chechnya situation by signalling its intention to bring President Yeltsin's 1994 "war" decrees before the court. During the spring and summer of 1995, the Chechnya case was docketed and scheduled for hearing by the Constitutional Court.

6. *Emergent federalism* — The Russian Federation remains largely a unitary state in spite of its federalist inclinations. While the Yeltsin Administration has claimed its actions in Chechnya are necessary to safeguard the "integrity" of Russia, the negative reactions to the campaign have had the effect of pushing the central government to move more expeditiously on the redefinition of its relationship with the other eighty-eight subjects of the Russian Federation.

While Yeltsin's Chechnya policy found vocal support in the Republics of Buryatia and Kabarda-Balkaria, as well as in certain regions and territories such as Krasnodar and the Maritime province, there has been far more opposition to the war policy, especially among other ethnic republics. After, seeing nightly television images of the carnage in Grozny, and especially reacting to the heavy loss of life among ill-prepared Russian troops, regional opposition centered on various legislative approaches and administrative subterfuges to withhold troops or riot police being sent from local jurisdictions to the combat zone. Russian media reported such opposition in one form or another in at least ten subjects of the federation, including the Republics of Bashkortostan, Chuvash, Tuva, Urdmurtia, as well as the regions of Irkutsk and Chelyabinsk.

By late January 1995, the restlessness in the provinces of Russia was evolving into a Constitutional crisis. As a presidential adviser, a specialist on federation issues, warned, "While Russian troops fight for the federation's integrity in Chechnya, relations between the center and Russia's components are landsliding to

chaos behind their backs, without any Dudayevs."²¹

IN LIEU OF A CONCLUSION

Russia is at the beginning of what will be a long and arduous journey from its authoritarian past. In this context, one of the most significant positive effects of the Chechnya tragedy has been that it is serving as a testing ground for Russia's relatively new civil society. Committees of soldiers' mothers, peaceful demonstrations, the vigorous independent press, an aroused public opinion and others aspects of a civil society being tempered by conflict, have been in evidence. Most important for the longer run, a prominent Russian political psychologist has pointed out, as authority in Russia is evolving from its earlier charismatic bases to more rational-legal forms as citizens move toward "supporting institutions instead of leaders."²²

21. The speaker is Leonid V. Smirnyagin, a prominent political geographer who is a member of the Presidential Council and advises Yeltsin on federal issues. *Yeltsin's Aide Warns of Chaos in Ties Between Centre and Regions*, BBC Summary of World Broadcasts (taken from ITAR-TASS News Agency), Jan. 30, 1995, available in LEXIS, Nexis Library, International File.

22. Kathy Lally, *Chechen War Uncovers Some Signs of a Civil Society*, ALB. TIMES UNION (Albany, N.Y.), Jan. 21, 1995, at A7.