

CHAPTER ONE

THE CONSTITUTION OF THE RUSSIAN FEDERATION

1. Background

The last decade has been a period of radical political change in Russia. On December 12, 1993, the world witnessed the adoption of a new democratic Constitution of the Russian Federation by national referendum. This accomplishment meant that for the first time in its history, Russia's leadership would be neither a monarchy nor a dictatorship. Under the 1993 Constitution, the president is democratically elected through direct vote and secret ballot. Compared to presidents in the West, however, the Russian president is, generally speaking, afforded more power and influence.

The new constitution, entered into force on December 25, 1993.¹ From a broad political perspective, the Constitution represents a complete departure from the Communist dictatorship and a shift to democratic government, and is a crucial step towards the establishment of a *Rechtsstaat* in Russia.

The process leading to the adoption of the Constitution was very cumbersome, reflecting years of political struggle between conservative forces trying to preserve the old 1978 Constitution of the USSR, and reformers who favored the enactment of a new constitution.² While the collapse of the Soviet Union made it clear that Russia needed a new constitution, there were different views as to how to achieve this goal. The conservative forces entrenched in the former Congress of People's Deputies, which had exclusive jurisdiction over constitutional changes, favored a *gradual* redrafting of the existing constitution and were reluctant

¹ Konstitutsiia Rossiiskoy Federatsii [Constitution of the Russian Federation] (1993), Rossiiskaia Gazeta, 25 December 1993, at 3, hereinafter referred to as the 1993 Constitution, or the Constitution.

² For a detailed account of events leading to the adoption of the Constitution, see Smith, Forging a New Constitution, in *Reforming the Russian Legal System* (1996) 79 *et seq.* See also Butler, *Russian Law* (1999) 273 *et seq.*

to adopt an entirely new text. Others advocated radical changes, including an entirely new constitution.

The political struggle for constitutional reform, referred to in the foregoing, was the result of events which began with the election of the Congress of People's Deputies of the Russian Federation in 1990. This Congress, at the time the primary legislative body of the Russian Federation, was elected while the USSR still existed. This was one of the most fundamental reasons for the constitutional crisis in the Russian Federation in the early 1990's. The Congress of People's Deputies was elected in a *different state*, the *Soviet Union*, which no longer existed as of late December 1991.

The old Constitution of the Russian Federation was in fact nothing more than a replica of the old Constitution of the Soviet Union. This Constitution was adopted on April 12, 1978. The basis was a 1936 version, known as the Stalin Constitution.

The communist system and the previous Russian system of the early 1990's did, however, share one important element, *viz.*, one-party rule. The Russian system was initially unable to break free from this element, because it was the necessary successor to the Soviet system. One-party rule was inevitable because only one ideology was permitted under the Soviet regime. The fundamental principles which formed the bedrock of this ideology were: one ideology, one party, and a complete monopoly on the power of the state. This ideology proclaimed itself, as well as the Communist Party, to be united, subordinated, and indivisible.

The subdivisions of political power within the Soviet Union were more of a formal than substantive nature. The inner circle of Communist Party officials dictated political decisions in secret at Party headquarters.³ In turn, such decisions were transmitted as "political directives" to the Supreme Soviet. Yet, these directives were, in essence, offers that no one could, or would, refuse. Transmitting these directives was little more than a smoke-screen. The political system operated on two levels, a covert policy-making branch and a visible pseudo-legislative body which officially issued all policy decisions.

The practical consequences of this dual structure were that it deflected criticism of both the Communist ideology and top officials of the Communist Party — at least that seems to have been the theory. The fundamental principle underlying this system was, in effect, hypocrisy. For instance, if a political directive resulted in great success, the Party took full

³ A very interesting and truly fascinating – but at the same time depressing and pitiful – account of life in the Central Committee of the Communist Party can be found in Mikhail Gorbachev's memoirs; Gorbachev, *Memoirs* (1996) 108–397.

responsibility, or rather credit, for its creation and institution. If, however, one of these directives proved disastrous, the Party officials who actually had made the decision did not accept responsibility for its results. The political officials who merely issued the decree were blamed for the failure. Accordingly, vituperation against specific individuals was encouraged, with the result that the reputation of the Party and the top officials remained unscathed, at least in theory.

This was the political system which existed at the time of the dissolution of the Soviet Union. True, it had begun to change as a result of the reforms launched by Mikhail Gorbachev. Much of the basic framework remained, however. This was a situation which had to be dealt with in the new Constitution.

2. Creation and Adoption of the 1993 Constitution

In the years immediately prior to the collapse of the Soviet Union, attempts were made to institute democratic reforms which encompassed and preserved Soviet influence.⁴ Despite surviving the failed *coup d'état* on August 19, 1991, Mikhail Gorbachev's attempts to keep the Soviet Union intact proved fruitless. On Christmas Day 1991, Gorbachev resigned from power and the Soviet Union was no more. Gorbachev left behind an ineffective communist constitution which had been amended more than three hundred times since its adoption under the Brezhnev administration in 1977.⁵

Russia emerged as a separate country after Gorbachev's resignation with Boris Yeltsin as its President. For President Yeltsin, Russian independence meant, *inter alia*, an opportunity to pass a new constitution. Accordingly, he asked the Constitutional Commission of the Russian Federation ("the Commission") to draft a new constitution for Russia.⁶ The Commission

⁴ See, e.g. Hobér, Recent Trends in Foreign Trade and Investment, in Investing in Reform. Doing Business in a Changing Soviet Union (1991) 99–138.

⁵ See Unger, Constitutional Development in the USSR 171–270 (1981) (explaining the ineffective nature of the Brezhnev Constitution).

⁶ The composition and functions of the Constitutional Commission were defined by its Statute. See Polozhenie o Konstitutsionnoy komissii [Statute of the Constitutional Commission], Vedomosti Siezda Narodnykh Deputatov Rossiiskoy Federatsii i Verkhovnogo Soveta Rossiiskoy Federatsii [Official Gazette of the Congress of People's Deputies and Supreme Soviet of the Russian Federation] [Vedomosti RF], Issue No. 8, Item No. 369 (1992). See Konstitutsiia (Osnovnoy zakon) (Rossiiskoy Federatsii-Rossii) [Constitution (Fundamental Law) of the Russian Federation-Russia] (1978), as amended in 1989, 1990, 1991 and 1992.

relied on the United States Constitution, which calls for a strong executive, but with powers in check,⁷ and on the 1958 French Constitution, which provides for a more commanding executive role.⁸ The Commission presented its first draft to President Yeltsin in October of 1992.

Early attempts to pass the new Constitution were unsuccessful, due primarily to the differences between communist and democratic leaders. Nevertheless, the Russian electorate demonstrated its confidence in President Yeltsin in a referendum held in April of 1993. With more Russians voting to hold early parliamentary elections than voting in favor of early presidential elections, the message to President Yeltsin, at least as interpreted by him, was to continue his constitutional reform. Toward the end of the summer of 1993, the Commission once again submitted a draft Constitution to President Yeltsin, and the plan was to put the draft to a national vote in October.⁹

There was no plebiscite, however, because on September 21, 1993, President Yeltsin signed decree No. 1400, which disbanded the Congress of People's Deputies of the Russian Federation and instituted a period of "gradual constitutional reform."¹⁰ President Yeltsin had the military on his

⁷ U.S. Constitution, Art. II. When the framers met in Philadelphia in 1787, they were building upon the ineffectiveness of the Articles of Confederation, which had provided for a weak national government. Cf. e.g. Gellhorn, *Returning of First Principles*, 36 Am. U. L. Rev. 345, 347 (1987); Lewittes, *Constitutional Separation of War Powers: Protecting Public and Private Liberty*, 57 Brook. L. Rev. 1083, 1170 (1992). With a distrust of kings and presidents and fearing that power could be misused and abused, the framers devised an executive with considerable powers, but always in check. Fortas, *The Constitution and the Presidency*, Address at the Washington Law Review Lecture Series, 18 April 1974), in Wash. L. Rev., (1974) Vol. 49, at 987–1011. Influenced by the theories of Montesquieu, the framers realized that avoiding tyrannical rule meant preventing one hand from controlling all legislative, executive, and judicial powers. Mikva, *Congress: the Purse, the Purpose, and the Power*, 21 Ga. L. Rev. (1986) 1, 2.

⁸ French Constitution, title II, articles 5–19 (conferring powers upon the French President). Mired by colonial war in Algeria and still fighting to rebuild financially and economically after the World War II, France adopted a new constitution in 1958 and looked upon General de Gaulle for leadership. Wright, *The Government and Politics of France* (1978) 19. The Constitution of the Fifth Republic, which de Gaulle helped write, provides a commanding executive role. *Id.* at 38. The French parliament, whose control over government was once considered far-reaching, was considerably weakened. *Id.* at 107. Moreover, de Gaulle frequently violated the text of the Constitution to his favor, without significant objection. *Id.* at 27.

⁹ See Sharapov, *Debate Begins on New Constitution for Russia*, Current Digest of Post-Soviet Press, 2 June 1993, at 6.

¹⁰ See President Yeltsin's decree "O poetapnoy konstitutsionnoy reforme v Rossiskoy Federatsii" ("On the Gradual Constitutional Reform in the Russian Federation") Sobranie aktov Prezidenta i Pravitelstva Rossiskoy Federatsii (Official Gazette of the President and

side, and promised democracy by calling for new parliamentary elections and a vote on a new Russian constitution on December 12, 1993.¹¹ President Yeltsin also promised to place his own presidency up for elections in June 1994. Later, he changed his mind, however. These promises were not well received by his opponents in Parliament. They responded with an uprising aimed at ousting him from power. President Yeltsin not only survived the September *coup d'état* attempt against him with the military's backing, but also put his opponents in jail until they were eventually granted amnesty by the new Russian Parliament.¹²

Subsequent to making his own final adjustments of the draft prepared by a so-called Constitutional Meeting,¹³ President Yeltsin published the draft Constitution for public scrutiny and urged for its adoption.¹⁴ The

the Government of the Russian Federation), Issue No. 39, Item No. 3597 (1993). – For various comments on the decree, see Luzhkov, *When I Heard That The Mayor's Office Had Been Seized, I Realized That The Situation Was Critical*, Russian Press Dig., 27 October 1993, from Literaturnaya Gazeta, No. 43, at 10; Lafitsky, *What Will a Ruthless Politician do to Russia?*, Russian Press Dig., 17 November 1993, from Nezavisimaya Gazeta, at 1, 3.

¹¹ See President Yeltsin's decree O provedenii vsenarodnogo golosovaniia po proektu Konstitutsii Rossiiskoy Federatsii [On the Referendum on the Draft Constitution of the Russian Federation] [Sobranie aktov], Issue No. 42, Item No. 3995 (1993).

¹² See Fisher, In Review – The Year Gone By, L.A. Times, 4 January 1994, at 4. The coup leaders, including former Vice President Alexander Rutskov and former Parliamentary Speaker Ruslan Khasbulatov, eventually received amnesty from the State Duma; Auerbach, *Russia Legislators Vote to Pardon Hard-Liners*, Boston Globe, 24 February 1994, at 2. By a vote of 252 to 67 the State Duma called for immediate release of the imprisoned officials. *Id.* Twelve men accused of the coup attempt in August 1991 also received amnesty. *Id.* Although hesitant to accept the amnesty conferred by the State Duma, Yeltsin did not challenge the amnesty for the sake of national reconciliation. See Loginov, *Sword of Discord Raised Over Russia*, Russian Press Dig., 26 April 1994, at News, from Rabochaya Tribuna, at 1, 2; Erlanger, *Yeltsin Denounces Amnesty but Concedes to Parliament*, N.Y. Times, 5 March 1994, late ed. § 1, at 5.

¹³ The composition and functions of the Constitutional Meeting were defined by President Yeltsin's decrees "O merakh po zaversheniu podgotovki novoy Konstitutsii Rossiiskoy Federatsii" ["On Measures to Complete the Preparation of the New Constitution of the Russian Federation"], Sobranie aktov, Issue No. 20, Item No. 1757 (1993), and "O sozyve Konstitutsionnogo soveshchaniia i zavershenni podgotovki proekta Konstitutsii Rossiiskoy Federatsii" ["On the Convocation of the Constitutional Meeting and Completion of the Preparation of the Draft Constitution of the Russian Federation"], Sobranie aktov, Issue No. 21, Item No. 1903 (1993). The Constitutional Meeting consisted of representatives of the Federal administration, subjects of the Russian Federation, local councils, political parties, trade unions, associations of businessmen, groups of deputies of the former Congress of People's Deputies, the Russian Academy of Sciences, the Constitutional Court, the Supreme Court, the Supreme Court of Arbitration and the Procuracy.

¹⁴ For the President's draft Constitution, see Izvestiia, 30 April 1993, at 3.