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The Constitution of Parliament

**Constitutional Brinkmanship
in Warsaw**

**Romanian Nationalism and
Minority Rights**

An Anomaly in the Czech Constitution

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Russia

Alexey Alyushin

Russia's current Federal Assembly (Parliament) was elected on December 12, 1993. At the same time, the Constitution was adopted by referendum. Anomalously, then, parliamentary elections were held under the obviously erroneous assumption that the Constitution, yet to be ratified, was already in force. Notwithstanding this unconventional birth of the Federal Assembly and of the Constitution itself, the first Parliament convened after the adoption of the new Constitution is governed by the latter's "Closing and Transitional Provisions." One sign that this is indeed only a transitional parliament is that its term runs two years instead of the usual four.

Experience with the current Parliament, however transitional, has revealed defects in some of the constitutional provisions governing its activities. This experience has also disclosed some gaps in the law which require correcting if parliamentary performance is to improve.

Bicameralism

One defect of the December 1993 Constitution lies in its inadequate provisions governing the formation of future Federal Assemblies. To begin with, the composition of future assemblies is unclear. For example, even though Art. 95.3 sets the number of Duma deputies at 450, the comparable provision governing the composition of the Federation Council is open-ended. Article 95.2 provides that "the Federation Council consists of two representatives from each subject of the Russian Federation: one each from the representative and the executive organs of state power." What this provision will mean in practice is further obscured by the absence of rules for determining the time, place, and manner of future elections to Parliament. All the Constitution says on this

matter is found in Art. 96.2: "The procedure for composing the Council of the Federation and the manner of electing deputies of the State Duma are established by federal laws." Because the Constitution does not fix the mode of elections, this important set of arrangements lies at the mercy of ephemeral majorities. So far, federal laws governing these elections do not yet exist, although the various draft bills governing elections to the next Federation Council are now being debated (see "Russia Update" in this issue).

The composition of the Federation Council poses important practical problems which remain unsolved by the Constitution. The first of these questions is whether members of the Federation Council should be nominated or elected. The language of the Constitution is ambiguous in this respect, although it seems to favor the nomination option. "Members" (*chleni*) of the Federation Council stand in verbal contrast to "deputies" of the State Duma (Art. 98). The potential significance of this language is also reflected in the transitional provisions. Representatives in the first and transitional Federation Council were elected, and the Constitution refers to them as "deputies of the Federation Council." Finally, the Constitution refers hazily to the "formation" (*formirovanie*) of the Federation Council, whereas "elections" will be held for the State Duma.

If the Federation Council is to be elected, who should elect it? Should local legislatures select the members, or should they be elected directly by the people in the component subjects of the federation? In April, a proposal allowing the component subjects of the Russian Federation to decide for themselves how their Federation Council representatives would be elected (and recalled). The provision would make the Federation Council members wholly dependent on

the regional electorate that sent them to the capital, thereby significantly facilitating regional lobbying. If selection by local legislatures is accepted, then one must deal with the fact that local legislatures themselves have not yet been elected in over 20 subjects of the Russian Federation. The fact that executive bodies alone exist in these subjects raises a thorny constitutional problem, as Art. 95.2 requires that one of the two representatives come from the "representative...organ of state power." Another problem is that nearly 60 current heads of local administration (nearly 70 percent) have been appointed personally by the president. According to one presidential decree, elections for heads of executive bodies in the subjects shall be held simultaneously with the federal presidential elections, scheduled for June 1996. This means that these presidentially appointed heads of local executives will still be in office during the 1995 Federal Assembly elections. Given the local influence of such leaders, many of them may well be elected or nominated to the Federation Council. In such a case, there is a chance that the next Federation Council will be packed with members beholden to the president.

Third, there is the question of the Federation Council's term, especially whether or not it should coincide with that of the State Duma. Furthermore, there is the question of whether the terms of individual members of the Federation Council should be staggered, in order to give the institution a greater sense of continuity.

That these questions have been all but ignored so far reflects the faultiness of the Russian Constitution. The haste of its authors in drafting this provision, and their indecision about how exactly to include the regional electorate and elites in the political process, has essentially turned over the formation of the legislature to unaccountable and shifting personal and corporate interests. As many current members of the Federation Council are eager to retain their positions, a self-interested, and perhaps myopic, electoral law is to be expected.

Legislation and relations between the chambers

Once the State Duma adopts a federal law, it must be sent to the Federation Council within five days (Art. 105). Once it receives the bill, the Federation

Council has 14 days to act on it. If it does not act within this period, the bill is considered approved. Should the Federation Council reject the law, the chambers may form a conciliation commission, pursuant to Art. 105.2, to overcome their disputes. Afterwards, the Duma may again consider the bill, and even override the Federation Council's veto by a two-thirds vote of the total number of deputies. This procedure clearly indicates that the Duma is meant to play a more active legislative role. The Federation Council seems to be designed primarily to slow down the legislative process, not to have an equal say with the Duma.

But parliamentary experience has revealed in practice the inadequacy of many of the rules governing the institution. The practical result of these ill-designed rules is twofold. On the one hand, parliamentarians sometimes abide by them, in which case the result is undesirable because of the perverse incentives created by the rules. On the other hand, parliamentarians sometimes ignore the rules and settle on informal practices. This evasive tactic does not say much for having the rules in the first place.

Parliament has at times reached beyond its jurisdiction and attempted to deal with problems not assigned to it by the Constitution. For example, in the spring of 1994, issues such as the situation in the agricultural sector and the so-called crisis of non-payments, though clearly within the jurisdiction of the executive, were introduced onto the agenda of the Federation Council. The discussion of these issues was not particularly productive and ate into valuable legislative time.

The reason why the Federation Council took up these issues is that the upper house has begun functioning as the primary lobbyist for regional and local interests. Most of the members of the Federation Council represent institutions of local governments, namely their executive and legislative bodies, and therefore often view matters from a narrow local perspective, as they try to attain their regional and corporate aims as well as to improve their standing in the eyes of their local constituencies. This parochial approach does not help solve national problems, however. But so long as the Constitution's compatibility provisions allow officials to hold both local and

national offices, this conflict of interest will persist. When the local officials come to the center, they will not come with national, federal problems in mind, but with the aim of pushing narrow local agendas.

The simultaneous holding of local and national office in this first, transitional Federation Council also finds support in the Constitution's transitional provisions, which state that "the Federation Council members of the first convocation exercise their powers on a "non-constant basis" (Concluding and Transitional Provisions; paragraph 9). In practice, this means that members of the Federation Council need not view their membership in the Council as their main job. Eighty-six of 171 Federation Council deputies are either heads (or first deputies) of their respective legislatures or heads of the executive bodies in the respective component subjects. However, for the Federation Council to be effective, its members must first and foremost be Federation Council deputies and work on a constant basis. Whether such a rule change would lead the regional elite to lose any residual interest they may still have in the national legislature is another question.

The importance of concentration on the work of the Federation Council is apparent from another defect in the constitutional rules, namely the 14-day provision for reviewing legislation passed by the Duma. Given the reality of working on a "non-constant" basis, the Federation Council has experienced inordinate difficulties in meeting this deadline. Whereas the Duma holds a plenary session twice weekly, except for two annual vacations, the Federation Council meets only between long interruptions which may exceed 14 days. Thus, if the Duma passes a law during a Federation Council recess, the Federation Council may not even convene before 14 days have elapsed.

Parliament has attempted to solve these problems by convening extraordinary meetings when very important laws are being considered. The problem with this approach is that it is too expensive, unpredictable, and unwieldy. Not the least problem is lack of agreement over what constitutes "important" legislation. A second way in which the bodies have tried to overcome this difficulty is for the Federation Council to reject automatically any law it cannot consider within the allotted time. This rejection is then followed by

mediating sessions in an Art. 105.4 conciliation commission. Ironically, the work of the Conciliation Commission itself has no time restrictions. Neither solution, however, is practical or desirable. A better solution would be either a constitutional amendment extending the time period for consideration—from 14 to 30 days, for example—or an interpretation by the Constitutional Court stating that only days on which the Federation Council is actually sitting should count toward the 14-day period.

The awkwardness of this entire situation becomes even more apparent when we consider the tension between Art. 105 and Art. 106 of the Constitution. Article 105 states that the Federation Council only has 14 days in which to act on a law passed by the Duma. By contrast, Art. 106 states that certain federal laws adopted by the Duma "are subject to compulsory examination" in the Federation Council. The Constitution is therefore unclear about whether the 14-day rule should be strictly enforced in Art. 106 situations. This question has been officially referred to the Constitutional Court by the Federation Council (see "Russia Update" in this issue).

The inadequacy, vagueness, and mutual inconsistency of these rules predetermines the observed lack of coordination and insufficient interaction between the chambers. The only mode of interaction provided by the Constitution is the Art. 105.4 conciliation commission. This provision, however, does not seem sufficient, as information does not flow constantly and reliably between the two chambers. Personal communication between deputies and experts serving the two bodies is also lacking. One inevitable consequence of this lack of inter-chamber coordination is confusion in legislation. In the first few months after the elections, bills on the very same subjects were independently drafted by the two bodies, each unaware of what the other was doing.

The lack of coordination, symbolized by the physical separation of the two chambers (they meet in two separate buildings in the center of Moscow), is not accidental. In the wake of the events of September and October 1993, President Yeltsin was unwilling to allow Parliament to gain too much strength. Even though there were compelling arguments for allowing both chambers to reside in one building, Yeltsin, concerned that the

legislative bodies would again crystallize into an opposition as they had done under Ruslan Khasbulatov, chose a divide-and-rule strategy. The problems of years past, however, may not justify the current obstacles of parliamentary efficiency and inter-chamber coordination.

The two chambers, it is interesting to notice, have adopted an extraconstitutional mechanism for easing cooperation, thus compensating for some of the deficiencies of the Constitution. A Superior Coordinating Committee on Legislation has been created as part of the State Duma's Committee on Legislation, the most powerful Duma committee through which all legislation must pass. The Superior Committee, which has only consultative functions, includes representatives of the several bodies that possess the right of legislative initiative.

Another confusingly ambiguous provision of the Constitution is the enumeration of Parliament's powers in Art. 102 and Art. 103. The two articles enumerate certain limited powers as "belonging" to the legislature. These powers should not exhaust the legislative power, but a narrow reading of the articles could restrain Parliament's jurisdiction. To prevent such a restrictive understanding, the State Duma, for example, has incorporated in its Rules of Procedure norms that establish its prerogative to issue declarations and petitions concerning foreign policy and international relations. Similarly, the Federation Council has also enacted an internal rule that allows it to issue "conclusions, declarations and petitions" on "general political and on socio-economic issues."

Party discipline

The composition of Parliament is an important cause of its relative ineffectiveness and lack of focus. There is no majority party in the Duma, though perhaps the distribution of seats may be a faithful representation of the ideological composition of Russian society. Be that as it may, the absence of a majority party, coupled with the inability of deputy associations or parties to form consistent voting blocs, has made legislation unpredictable and slow. In fact, it has often proved impossible for a majority to form, which partly explains the low volume of legislation passed so far,

a failure that has left unregulated many areas of social life desperately requiring new legislation.

Contributing to the difficulty of forming majorities in support of any bill is the well-publicized lack of party discipline. Individual deputies often do not follow party leaders. To prevent deputy defections, the Liberal Democratic ("Zhirinovsky") faction, the most ambitious and aggressive parliamentary group, attempted to introduce a parliamentary rule whereby a deputy would lose his mandate if he systematically voted contrary to his faction's position. This proposal, of course, was a reaction to the way the Liberal Democratic faction had been losing deputy support due to Vladimir Zhirinovsky's bizarre, authoritarian leadership style. The proposed rule fell on deaf ears. What has kept parties working together, even if inefficiently, is the State Duma Council, created by the Duma when it was drafting its Rules of Procedure. This Council is composed of the Chairman of the Duma and of the leaders of factions and deputy groups. Its functions include scheduling hearings, agenda setting, forwarding bills to committee, and accepting bills from those empowered to initiate them. Its activities are subject to control by the plenum of the Duma.

As the Zhirinovsky experience suggests, strict adherence to party positions may not always be desirable. In this case, Zhirinovsky's charisma and hypnotic style has lured a group of irresponsible zanyies into the Duma who do not heed the needs of the electorate. From this experience, one might draw the conclusion that an exclusively party-list system of voting may not, in fact, accurately reflect the sentiments of the people.

The fault here lies with the electoral system. In the 1993 national elections, half of the Duma's deputies were elected through party lists, while the other half was elected directly in electoral districts. In retrospect, the proportion seems too heavily weighted in favor of political parties. The shortcomings of the 1993 electoral system are supposed to be corrected by the forthcoming bill on the Duma elections. As of May 1995, however, no consensus had been reached on this matter. The draft bill favored by the Federation Council provides that 300 Duma deput

be elected, with only 150 deputies running on party lists. The version preferred by most Duma members preserves the equal, 225/225 representation used in the 1993 elections. So, the question remains open.

Relation with the executive

In the present constitutional scheme, as a reaction to legislative overreaching in the past, the presidency is the most powerful branch of government. The government is controlled by the president and has only limited independence. The only power that can even begin to compete with the presidency is the federal legislature. Notwithstanding the great imbalance of power in favor of the presidency (Yeltsin, after all, had great influence over the drafting of the Constitution), Parliament still has some possibility to act independently and decisively, which is essential if there is to be an effective balance of power between the branches. An example is the power of amnesty, granted by the Constitution. In early 1994, the State Duma granted amnesty to all insurgents who participated in the events of October 1993. This action shocked Yeltsin, who realized that the new Parliament would not necessarily bend to his commands.

The legislature's independence, however, is limited. Currently, Parliament is completely dependent on the president financially and materially. By presidential Decree N. 1400, September 21, 1993 (section 11), all organizations and establishments previously supplying goods and services to the Supreme Soviet were withdrawn from its jurisdiction and placed under the supervision of the federal executive (the Council of Ministers). As a result the total reorganization of these organizations and establishments introduced by the decree, crucial economic supply functions were taken over by the president's Administrative Management Department (*Upravlenie Delami*). The provision of everything from office buildings to hospital rooms, from limousines to computers, is under the president's control, a humiliating situation for Parliament.

The basic problem of legislative/executive imbalance can be traced to the Constitution. The Russian Constitution does not exhaustively enumerate the subjects on which Parliament may pass laws. Neither does it clearly delineate the scope of presi-

dential lawmaking powers. The enumerations appearing in the Constitution are only partial lists. As a result, there is a recurring confusion about whether the president or the legislature has the exclusive right to make rules governing a certain domain. In practice, because of the above-mentioned deficiencies in the legislative process, the president has taken over the active lawmaking function, further threatening the integrity of Parliament. Similarly, the executive, including both president and government, is much more active in initiating legislation than the chambers themselves.

The new Constitution as a whole clearly favors the president, especially if compared with past Russian Constitutions. The 1978 Constitution, for example, gave the Congress of the People's Deputies of Russia "the right to accept for consideration and to decide on any question which lies within the jurisdiction of the Russian Federation" (Art. 104.2). The present Constitution, by contrast, was meant to resolve such doubts in favor of the president.

The Constitution's pro-presidential bias is reflected in the contrast between the power of the president and that of the Federation Council to review the Duma legislation. If the Federation Council misses the 14-day deadline, the law is considered approved. If the president misses his deadline, no legal consequences follow. The president of Russia may thus keep a law unsigned and unreturned for as long as he wishes, something he does quite often.

Another example of presidential prerogative in practice is the appointments process. According to the Constitution, the Federation Council has the power of appointing the attorney general (Art. 102.1). It is unclear, however, what time restrictions apply to the president for presenting candidates for this and other appointed positions on which the Federation Council or State Duma must finally decide. The Federation Council's Rules of Proceeding now establish a two-week deadline. But it is not obvious that the making of such a rule lies within the competence of the Federation Council.

The president may simply decline to come up with nominees. Or, if his nominee is rejected, as has been the case with the current attorney general, Alexei Ilyushenko, the president may nevertheless decide to appoint his original choice as "acting" officer.

Ilyushenko, for example, is now serving as acting attorney general. Under this title, the president's choice may actually hold the office, and wield all its powers, without having been approved by Parliament.

Or consider the State Duma's right to consent to the president's nomination for prime minister (Art. 103.1a). If the Duma three times rejects the president's candidate, the Constitution gives the president the power to dissolve the Duma and announce new elections (Art. 111.4). A similar situation holds with no-confidence votes, also a right given to the Duma. Yet, once again, the Constitution checks the exercise of this right by allowing the president to dissolve the Duma if it passes two votes of no-confidence within a three month period.

The war in Chechnya has clearly demonstrated Parliament's inability to control the executive in situations where military force is used by the government. Notwithstanding Parliament's initially sharp criticism of the interior and defense ministers' handling of the war, the assembly could not remove them, because these two "power" ministers are directly appointed by the president (Art. 83 and Art. 112.2). The bitter irony is that the only figure over which the State Duma has exercised its constitutional right of dismissal was Sergey Kovalev, the commissioner on human rights, who worked to try to resolve the conflict peacefully.

Parliament and legitimacy

Parliament has been unsuccessful in its legislative efforts, partly as a result of constitutional rules, partly because of its interim character, and partly because of its makeup and factionalism. It has, nevertheless, served one very important function: legitimation of the political and governmental sys-

tem established by the 1993 Constitution. By dissolving the old Parliament, Yeltsin had clearly violated the Constitution in force at the time. But he rested his right to dissolve the legislature on what he believed was a more fundamental law: the basic principles of "Recht," as opposed to positive law, which asked the president to fulfill his duty to protect national security and socioeconomic reforms. The parliamentary elections, however, demonstrated to the president that his justifications had not persuaded the electorate and that he had suffered a serious loss of legitimacy.

At the same time, the new parliamentary elections presented an opportunity for many former deputies to run for office again and be elected. Presenting themselves as political martyrs, they easily found their way back to the legislature. Even though they may not have countervailing legal powers, the parliamentarians' political prestige does effectively counterbalance that of the president.

All of this, in a roundabout way, gave a boost of legitimacy to the president. By running for office, being elected and taking up their posts, the new deputies, including Yeltsin's enemies, were recognizing the legitimacy and legality of both the "usurper president" and "his" Constitution. For voters opposed to the president, the placement of opposition deputies in Parliament was a recognition of the legitimacy of the president's new system. These developments have been crucial to the maintenance of whatever political stability Russia has experienced during the past year.

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