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# EXCHANGE OF VIEWS ON THE DRAFT CONSTITUTION OF THE RUSSIAN FEDERATION (17 February 1993)

## THE CONSTITUTIONAL COURT IN THE DRAFT CONSTITUTION OF THE RUSSIAN FEDERATION

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1. Constitutional Courts go hand-in-hand with the rule of law.

The rule of law is conceived in accordance with the Aristotelian maxim that a just government is a government of laws and not of men (as we read in Section XXX of the New Hampshire Bill of Rights, drawn up at the end of the eighteenth century), in contrast to the Platonic ideal of unlimited power. A State based on the rule of law requires laws to ensure the coherent functioning of all its machinery, not only from the formal point of view but also, and above all, in order to secure a legitimate basis for its decisions and acts: justice prevails, predictability becomes the rule and the citizen can reasonably construct his plans for the future.

This paper deals with the Constitutional Court as provided for in the draft Constitution of the Russian Federation submitted to the Constitutional Commission of the Supreme Soviet on 13 November 1992.

I.

2. According to the draft, not only is the Constitution the supreme law of the Federation: it must also be directly applicable throughout its territory - laws and acts which are inconsistent with it being legally null and void (Article 3 (1) and (2)).

These provisions appear in Section I of the text, which sets forth the basic principles of the constitutional system which must govern the interpretation and application of all the provisions of the Constitution (Article 12 (1) and (2)). We might almost say that these principles constitute a "Constitution of the Constitution".

We must conclude that (in view of the proclamation in Article 2 to the effect that man and his rights and freedom shall be a supreme value in the Federation) the draft aspires to be the expression of complete adherence to the concept of the rule of law. This means, firstly, that the rule of law implies that all the machinery designed to safeguard this principle (including the administration of justice) must work in harmony to that end and, secondly, that no manifestation of political power, and the ancillary administrative power, must be exempt from the controls laid down for that purpose. This is why the Constitution institutes an ombudsman (the Parliamentary Commission of the Russian Federation for Human Rights mentioned in Article 48 (1) and (2)). It is also the reason why constitutional jurisdiction is attributed to all courts without distinction (Article 108 (4)), with the result that they are all Constitutional Courts. It also explains why the Constitutional Court has been set up over them, as the very last instance in constitutional matters and the "supreme organ of judicial power for the protection of the constitutional system of the Russian Federation" (Article 103 (1)).

II.

3. Let us attempt to evaluate the judicial component of the proposed supervision machinery beginning with courts in general and the role attributed to them in the administration of constitutional justice.

Where the question of constitutionality arises, each court, whatever its jurisdiction (civil, commercial, criminal or administrative - Article 102), must adjourn the case before it and petition the Constitutional Court, through the intermediary of the higher court of the place where the proceedings are being conducted, for a settlement of the matter (Article 108 (4)).

The competence in matters of supervision of constitutionality which is thus entrusted ex officio to every judge corresponds to the North American conception of judicial review and is complemented by the final and binding character of the decisions of the Constitutional Court, which are not subject to appeals and protests (Article 103 (6 )).

However, the draft does not specify whether such decisions given in concreto by the Constitutional Court have an effect solely inter partes or, on the contrary, erga omnes. In other words, we cannot know whether the decisions concern only the particular court action in which the matter of constitutionality was raised or, on the contrary, if they have universal validity and establish once and for all the nullity or legal non-existence of the norm, rule or act in question. Naturally, no doubt arises in respect of decisions of individual scope taken by the President of the Federation or Federal executive or administrative bodies, since they constitute one-off, non-recurring situations; on the other hand, obvious practical importance attaches to the force of such decisions in the case of rules or decisions of general scope, because they have recurring effects. The Portuguese Constitution adopts a pragmatic solution to this problem: where the Constitutional Court has judged a provision unconstitutional in at least three different cases, it may (this is an option, not an obligation) declare it unconstitutional erga omnes (Article 281 (3)).

A further omission from Article 103 (6) of the draft raises a different kind of question: are the effects of the Constitutional Court's decision ex tunc or merely ex nunc? This question is extremely serious: it is inconsistent with justice, in some cases, and equity, in others, to settle it in a rigid, uniform fashion. The principles of good faith and legal certainty may be at stake. Should one simply disregard these considerations in such cases? Here again the Portuguese Constitution might help identify a flexible, balanced solution. It accepts that the Constitutional Court may, for reasons of legal certainty, equity or public interest of exceptional importance, waive the retroactive effect of its decisions erga omnes and give them a more limited effect. (Article 282 (4)).

4. Let us now consider the Constitutional Court itself.

The draft lays down that the Court shall consist of 15 judges (Article 103 (1), second sentence), elected by an absolute majority of the total number of the Deputies of both Chambers (Article 85 (1) k) and (3)). Let us examine this provision in more detail. As comparative law demonstrates, all countries attempt to safeguard the independence of the judiciary from the political authorities; this applies particularly to constitutional judges, because it is their duty to judge the political authorities and protect the basic law (or, in the more comprehensive wording of Article 103 (1) of the draft, to protect the "constitutional system"). To that end, in some countries the choice of judges is entrusted to several bodies, since it is one of the most sensitive issues; in others judges are co-opted, and in yet others a system of joint nominations is used. Since pluralistic democracy is one of the basic principles of the system adopted by the Constitution (Article (5)), it would be more natural for the judges of the Constitutional Court to be chosen on a qualified majority.

That would increase their legitimacy vis-a-vis the President of the Federation, the Supreme Soviet or the Government, whose acts and laws they will be called upon to judge. In order to achieve a greater majority, the candidates would have to win the confidence of several political parties and forces sitting in Parliament. Alongside their professional competence, their objectivity and impartiality would have to compel recognition. This is the system which the Portuguese Constitution adopts, combining it with co-opting (Article 224).

My second remark is that the length of the judges' term of office is not mentioned. This omission suggests that they are appointed for life, which might put a further question mark over their independence from the authority nominating them and the body electing them, and for the political parties and forces, ie those to whom they owe their rank as judge of the "supreme organ of judicial power for the protection of the constitutional system of the Russian Federation", to quote Article 103 (1). If the term of office were pre-established and a clause set forth to the effect that judges could, or could not, be re-elected, such risks would be minimised. This would therefore seem preferable.

My third remark concerns the candidates' personal capacities. Wherever the task of checking on constitutionality is assigned to a real court of justice, at least some of the members recruited must be professional judges. This is a further considerable safeguard against politicisation of the Court. The fact that the draft does not even stipulate that those elected must be jurists is further cause for concern, because it means that the choice is left to the mercy of interplay between political parties and forces.

5. Let us consider the Court's various fields of competence, as mentioned in the seven sub-paragraphs of Article 103 (2).

The variety and breadth of the subjects set forth in the seven sub-paragraphs are accounted for by the Constitution's twofold function - as the basis for mutual relations between the authorities and civil society, and as the framework for mutual solidarity between the Federation and its component parts. Furthermore, these components are bodies which are intended to be independent and free in their participation or relations, whether within the Federation or with third States or other international bodies (Article 78 and Article 76 (1) j) and k)). It is for the Constitution to provide harmonious rules on such matters, and it is for the Constitutional Court to evaluate the constitutionality of such rules.

In contrast, the reasons for the jurisdiction provided for in Article 103 (2) f) are different. The issue here is the community's freedom of organisation; the right, on the political front, to set up political parties and associations or non-governmental associations (Articles 62 to 66).

Two points emerge from this: respect for cultural and ideological diversity, which is encouraged by the federal structure imposed on the State (Article 7), and, as a counterpoise, the freedom of organisation secured for the community, as expressed in the principle of political pluralism (Article 5).

This is the reason for the wide variety of fields referred to in the various sub-paragraphs of Article 103.

Is this vast array of responsibilities duly backed up, from the functional angle, by the supervisory machinery laid down for the Constitutional Court? This is the question we shall now investigate.

6. From the strictly organisational angle, the overall supervisory set-up determines the Constitutional Court's scope for action.

Thus, the Court is not the highest and last level of constitutional jurisdiction (as is the Supreme Court of the United States of America in the case of judicial review); it is the one and only authority on the subject.

It does not take its decisions in concreto, to settle a problem of constitutionality arising in a given set of proceedings, but rather decides in abstracto, dealing with a rule or act as such, at the request of bodies specifically designated as having the power to issue such requests (Article 103 (5) a) and e)).

Such decisions are not subject to appeals and protests (Article 103 (6)), and their effects are by definition erga omnes. In such cases, as Kelsen stated, the Court is acting as an "anti-legislator", which means that its decisions must have as much force as the laws or other sovereign acts which it is sanctioning. The Court's decisions have the same effects as a suspension or repeal. In short, they are simply the embodiment of Montesquieu's cherished maxim, "Pour qu'on n'abuse pas du pouvoir, il faut que le pouvoir arrete le pouvoir" (If we are to prevent the abuse of power, power must put a stop to the power). In other words Montesquieu was stressing the importance of manifestations of the "power to prevent".

There remains the question whether the effect of decisions taken in such cases by the Court should be ex tunc or merely ex nunc. On this point, we would refer to the reservations and misgivings expressed above regarding supervision of constitutionality in concreto.

7. There are two different ways of approaching the abstract appraisal with which we are concerned here: ex ante, ie before the conclusion of the procedure leading up to the issuing of the legal rule or decision in question; and ex post, after the rule or decision has been adopted and put into effect. These two different methods of supervision are generally known as preventive abstract supervision and punitive abstract supervision. The former was the rule in the French Fourth Republic, and continues to be so in the Fifth Republic. The 1958 Constitution stipulates that the Constitutional Council can issue an opinion for preventive purposes only.

The draft Constitution of the Russian Federation provides for preventive supervision only in the case of the ratification of international treaties and the approval of similar agreements (Article 103 (4) c)). Is this desirable?

Let us begin by excluding so-called political or governmental acts. Both these, whether originating from the President of the Federation, the Supreme Soviet, the Executive or the legislative or executive bodies of the components of the Federation, are, in the cases covered by the Constitution, purely political, even exceptional, acts which are beyond supervision. This holds, for example, for the exercising of the right of veto (Article 88 (5)), acts directing the activities of the Government (Article 93 (1) c)), and the declaration of a state of emergency (Article 93 (1) m)).

The draft indicates that, except in the case of either of these two types of acts, the preventive appraisal permitted for international treaties and agreements is the only form of appraisal possible. Is this a wise option, even if it is restricted to international agreements?

Preventive supervision is situated midway between the political decision giving rise to the legal rule or act subject to supervision and the supervision itself. The subject of the supervision is a draft rule or act. It is at this point that consideration is given to what is suitable or appropriate and what is not. It is at this point that the pros and cons are weighed up. Whatever the Court's decision, there will always be someone who considers it politically motivated. A particularly acute form of this problem arose in connection with the proposed legislation decriminalising clinical abortion in certain circumstances in Portugal, Spain and Italy. The Spanish Constitutional Court subsequently persuaded Parliament quite simply to delete responsibility for preventive appraisal from the statutory list of its powers, a step actually taken in 1985. On the other hand, the main reasons for the maintenance of preventive supervision in France are political, examples being those which persuaded General De Gaulle to include it as the sole method of supervising constitutionality in the 1958 Constitution and persuaded his successors to maintain it. There were also practical reasons connected with the pre-empting of potential disruptors of public order. However, this amounts to mixing justice and politics, which brings us back to the same problem.

Should we expose the Constitutional Court to such a risk, at the risk of forfeiting its reputation of objectivity and impartiality in political matters albeit only in connection with international treaties and agreements?

8. There remains the Court's role in defending individual and social rights.

Here again, comparative law shows that some national legal systems entitle the citizen to appeal personally and directly to the Court. This is true of the Verfassungsbeschwerde in German law, the Bescheidbeschwerde in Austrian law, the recours de droit public in Swiss law, the derecho de amparo in

Spanish law or the juicios de amparo in the Mexican and other Central and South American legal systems where the influence of the Spanish legal tradition subsists. In all these countries, the flood of petitions resulting from allowing appeals of this kind has prompted expeditious measures aimed solely at stemming what proved to be an unreasonable influx of applications. That is why other national legal systems, such as the Portuguese one, have preferred the indirect method of extending the number of supervisory mechanisms, supplementing in concreto appraisal, allowed under the Constitution since 1911, with in abstracto appraisal in the two aforementioned forms (preventive and punitive) and adding appraisal of unconstitutionality by omission - ie in the absence of the additional legislation required for the implementation of constitutional rules which are not directly applicable. This is what often happens in the case of some of the numerous programmatic provisions in contemporary Constitutions defining the State's broad aims in terms of cultural, social or economic policy as well as the citizens' rights in these areas, both aims and rights being intended as a means of securing social justice instituting a welfare state. To some minds, allowing the supervision of unconstitutionality by omission entails the same risks as preventive appraisal, or even greater risks, since in the case of omission there is no legal rule or act in fieri; there is only a vacuum. The suspicion that the Court is involved in politics might seem well-founded and, as an indirect consequence, criticism of the Court's decisions and doubt about its impartiality might become more believable.

It is perhaps fortunate that the draft does not mention supervision by omission - though it does proclaim the direct applicability of the Constitution (Article 3 (2)) and extensively expounds the economic, social and cultural freedoms of the citizen (Articles 34 to 43), firmly guarantees them (Articles 43 to 46), and is itself a basic law of a programmatic nature.

9. Let us address one final point.

The rules set forth in Article 103 (2) are public rules, ie rules created and implemented by political bodies with legislative or statutory powers. This is in keeping with the general opinion in countries with a liberal ideology and a market economy, where the supervision of constitutionality is permitted.

However, one of the corollaries of these two features (liberal ideology and market economy) is what is known as the autonomy of private intention. Legally speaking, this means that, for instance, the regulations governing contracts are such as the parties themselves establish, in the form of stipulations or clauses. The public rules contained in codes and laws governing each type of contract are non-mandatory and are consequently only applicable in the absence of stipulations or clauses agreed by the contracting parties. The great majority of contracts currently concluded are standard contracts, enshrined in clauses unilaterally pre-established by one of the parties. The other party has merely to accept or refuse. This applies to most contracts, including collective agreements, and this is a particularly serious matter in the case of contracts of employment. It is precisely in the latter type of contract that the most serious violations of fundamental and social rights are to be found. Nevertheless, experts in civil and commercial law consider that such violations do not constitute real infringements of the constitution and cannot be subjected to the appraisal of constitutional justice.

The Portuguese Constitution provides expressis verbis for the principle of direct applicability of its text in connection with rights, freedoms and safeguards, making them binding on both public and private bodies (Article 18 (1)). However, this has unfortunately not been sufficient to induce experts in civil and commercial law to alter their traditional points of view. Even among experts in constitutional law it cannot be said that these new views have been completely accepted.

The draft Constitution contains no provisions as clear as those in the Portuguese Constitution just referred to. It only sets forth, in much more general terms, the direct applicability of the Constitution, in Article 3 (2). This provision certainly embraces the direct applicability of the constitutional provisions relating to the fundamental rights of citizens, including cultural, social and economic rights. However, should it not be clearer and expressly mention norms and rules of a private nature, including those set forth in collective agreements, as being among those norms and rules which may be subject to the scrutiny of constitutional justice?

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