

**OPINION ON THE CONSTITUTION OF THE RUSSIAN FEDERATION AS ADOPTED BY POPULAR  
VOTE ON 12 DECEMBER 1993**

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**COMMENTS BY PROFESSOR N.V. VITRUK, associate member of the Venice Commission in respect of Russia**

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**INTRODUCTION**

In March 1992 the Commission received from Mr Runyantsev, Executive Secretary of the Constitutional Commission of the Supreme Soviet, an urgent request for opinion on a preliminary draft constitution. The Task Force on Constitutional Reforms of the Commission was able to reply in writing within the short time limits allowed.

Further drafts were submitted to the Commission at its 12th (September 1992) and 13th (November 1992) meetings and gave rise to exchanges of view with a multiparty delegation of members of the Constitutional Commission.

The rapporteurs on Russia - Mr La Pergola, Mr Maas-Geestanus, Mr Beaudoin - took part in an exchange of views on 17 February 1993 with the Constitutional Commission of the Russian Federation together with some associate experts, Mr Herbiet, Mr Marques Guedes, Mr Rosas and Mr Schweisfurth.

Throughout 1993, several drafts of the Constitution in various stages of preparation were submitted to the Commission for comment. Those members of the Commission who gave their advice were Mr Bartole, Mr Beaudoin, Mrs Botusharova, Mr Economides, Mr Kedzia, Mr Helgesen, Mr La Pergola, Mr ?budun, Mr Pimentel and Mr Scholsem. Their advice was submitted to the Russian Authorities. The Russian Authorities, including the President, Mr Yeltsin at the Constitutional Conference in July 1993, expressed thanks and appreciation for the advice given by the Commission which was widely taken into account to a large extent in the final text adopted in December 1993.

At the request of the Committee of Ministers, the Commission embarked on an in-depth legal study of the Constitution of the Russian Federation, within the framework of the co-operation between this country and the Council of Europe.

The above-mentioned opinion of the members of the Commission follows below, including comments by Professor N.V. Vitruk, President a.i. of the Constitutional Court, associate member of the Venice Commission for Russia.

## GENERAL REMARKS

The Russian Constitution, adopted by popular referendum on 12 December 1993, does not give rise to any serious question as to its conformity with the principles of a democratic State governed by the rule of law and respectful of human rights.

Among the most important observations made herein by the European Commission for Democracy through Law, one can single out, apart from certain remarks of a technical character, the following points.

1. The main constitutional problem in Russia currently appears to be the struggle between the executive and the legislature. Power-sharing between the two tiers of government is not the problem, though it remains extremely important.
2. Will the proposed Constitutional Court perform the function it should? Is it well constituted? Does it have too many judges? There is certainly room for improvements. The interpretation of a constitution is just as important as its wording. That is why the Constitution and the independence of the Constitutional Court are a crucial issue in the current debate.
3. Who will interpret the Constitution in the last instance? Parliament? The courts? A constitutional council? The President appoints the "constitutional" judges. In so doing he wields considerable power. One of the mainstays of democracy is an independent judiciary.
4. The Russian Constitution is very detailed, reflecting an attempt to provide for everything. Is this a good thing? There are two schools of thought on the subject: one is to include as much as possible in the basic law, while the other is to lay down the basic principles and rely for the remainder on the normal evolution of the Constitution. It is an age-old debate. Each country chooses its own style of drafting for its Constitution.
5. The theory of legislative power as a watertight compartment in federal states is no longer what it was in the 19th century. Overlaps are becoming inevitable; there is such a demand for the intervention of the various branches of government.

In Chapter 1, setting out the basics of the constitutional regime, the Constitution speaks of the rights of the citizen (Art.6(2)) and not of human rights. However, the rights of non-citizens recognised in Chapter 2, concerning the rights and freedoms of the individual and the citizen, correspond largely to international standards in this field.

In general, Chapter 2 follows a distinctly modern and progressive approach. It provides in particular for social and collective rights, whose implementation in practice could nonetheless give rise to certain difficulties. The following three points might be emphasised:

- a) Article 55(3) provides for a general rule regarding restrictions on fundamental rights, while it would have been more consistent with international standards to clearly delimit which rights could be limited and for which reasons.
- b) One can wonder if it would not be desirable to establish full "*habeas corpus*" instead of accepting the 48 hours detention without judicial decision (article 22).
- c) Freedom of assembly is guaranteed by Article 31 only to citizens of the Russian Federation, whereas article 30 guarantees freedom of association as a human right, which conforms more closely to the international standards.

As regards the federal structure (Chapter 3), it may be questioned whether the placing on an equal par of all components of the Federation, and in particular in the composition of the Federation Council, does not entail particular difficulties.

As regards relations between the executive and the legislature (Chapters 4,5 & 6), only experience will provide an answer to the question as to whether the rules adopted will function correctly in the event of continuing conflict between the President and the Duma, *inter alia*, over the nomination of the Prime Minister.

It may also be noted that presidential and parliamentary elections do not coincide in time, which greatly increases the risk of conflict between the President and Parliament.

Only the future will prove whether or not the Russian system of semi-presidentialism is viable.

The position regarding the repartition of competences would benefit from clarification. In particular, the Constitution does not deal in detail with the question of local self-government (Articles 130 to 133).

The members of the Commission attach particular importance to the clear delimitation of the jurisdiction of the Constitutional Court (Chapter 7). The strength of constitutionalism is that political conflicts are settled by dint of reason and compromise. In this respect a decisive role can be played by the Constitutional Court whose function as the interpreter of the Constitution should be enshrined in the basic charter.

Semi-presidentialism becomes all the more legitimate when power is diffused throughout the various branches of government. Federalism can also contribute to this diffusion of power. And where there is a constitutional court to read the fundamental charter and determine how power has been distributed, constitutional democracy is protected by an additional safeguard.

## SECTION ONE

## **Chapter 1 :           The Basics of the Constitutional System**

### **Article 1 to Article 16**

The first Chapter lays down the "Basics" of the whole Constitution. As normally is the case in such chapters, the provisions are of a very general and abstract nature. This fact makes it somewhat difficult to submit detailed comments on the first Chapter. Furthermore, since the first Chapter is concerned with identifying the values on which the new democracy is built, these comments must be of a less technical/legal nature than the Venice Commission would normally make. Comments on these values may also depend on one's own political preferences. In view of these considerations, the following remarks may be formulated:

#### Article 2

The provision distinguishes between rights and freedoms for "individuals" and "citizens". As a general statement, this is legitimate. A complete answer depends, however, on the more detailed regulations which relate to these categories of legal subjects in other parts of the Constitution, in particular in Chapter 2.

#### Article 6(2)

The above comments also apply to Article 6(2). This paragraph declares that "every citizen" of the Russian Federation shall have equal rights (and responsibilities). It remains to be seen which rights are extended to non-citizens in other parts of the Constitution. The rights of non-citizens do not necessarily have to be equal to those of citizens; there are, however, certain minimum rights in international instruments which must be respected.

#### Arts. 7 - 9.

These articles contain some basic values which are declared to govern the relations between the Federation and individuals. Among them is the right to private property, as well as to "land and natural resources".

Article 9(1) restricts the exploitation of natural resources, to the extent that the principle is declared that the peoples of the different territories should profit from the natural resources within their territory.

#### Article 10

Article 10 is misleading to the extent that it states (after having introduced the separation of the legislative, executive and judicial powers) that the "bodies of the legislative, executive and judicial powers shall be independent". The legislative and executive powers are not "independent". A major objective of the new Constitution is to regulate in great detail the interdependence and cooperation between these two bodies of the State. What does, of course, remain an independent body is the judicial power.

#### Article 11

(Article 11(3) probably contains an error of translation: the word "reference" should possibly read "competence". The same problem appears in Article 12.)

#### Article 13(2)

The concept "ideology" is certainly open to different interpretations. Obviously, the past provides most of the explanation for this provision. One might argue, however, that when the Constitution declares (in the first Chapter) that such values as, *inter alia*, freedom of competition, private ownership, and the social State are protected under the Constitution, these values might constitute "ideologies" in one sense or the other.

#### Article 13(5)

This provision prohibits not only activities directed against the foundations of the Constitution and the State - the very "creation" of organisations for these objectives is also prohibited. This provision touches upon very sensitive problems, but cannot be claimed to be violating international standards.

#### Article 14

This article must be read in conjunction with article 28. The state is a secular one and freedom of religion for its citizens is given constitutional protection.

#### Article 15(3)

Such a general statement is of great importance. It may, however, be difficult to comply with in any democratic society during emergency situations.

#### Article 15(4)

The reference to "generally accepted principles" of international law is not without difficulty. There is an ongoing discussion as to whether such principles do exist in international law and as to their possible content.

This Constitution is much clearer than earlier Drafts as to the relationship between international and domestic law. It follows explicitly from Article 15(4) that both international customary law as well as treaties are part of the Russian legal system. The hierarchy between the norms of the system is also clear, international law being given priority over domestic legislation at the statutory level (and below).

#### Articles 16(1) and (2)

This article establishes some continuity as far as the basic values of the Federation are concerned. The procedure of amending these principles in Chapter 1 is more complicated than for most of the other provisions in the Constitution (see also Chapter 9). Furthermore, if other articles of the Constitution are later amended, such amendments cannot be violating the basic principles contained in Chapter I.

## **Chapter 2 :           Rights and Freedoms of the Individual and the Citizen**

### **Article 17 to Article 64**

#### **I.       GENERAL REMARKS**

Chapter 2 of the Constitution submitted to referendum on December 12, 1993, carries the title "Rights and Freedoms of the Individual and the Citizen." As such, it combines Chapters 1 and 2 of the earlier draft (articles 1-37 and 38-54) - CDL (93) 31.

As regards both the substance and the form of most of the provisions there can be no doubt that the new version is a marked improvement on the

previous one. Considerable progress has thus been made in the drafting of this fundamental text, which - as we already commented (CDL (93) 40) - follows an undeniably modern and progressive approach.

In general, the Chapter is written in clear and concise language. It constitutes an improved version of the draft Constitution approved by the Constitutional Assembly on 12 July 1993. The improvements consist primarily of: i) a better organization of the chapter relating to individual rights and freedoms, ii) a more precise formulation and better structuring of the provisions. Since the previous draft was in many respects unsatisfactory, it is not surprising that the amendments are particularly numerous. However, there are some provisions which continue to give rise to serious doubts.

The Chapter recognizes and guarantees all basic and social rights commonly found in modern democratic constitutions. As such, it should provide the basis for a democratic political order based on human rights and the rule of law.

The Chapter contains several references to international law, in addition to the more general reference in Article 15(4). These references are to be found in Article 17(1); Article 46(3); and Article 63. Thus, the Russian Constitution recognizes the supremacy of international law.

The preamble to the Constitution first confirms and declares the values of freedom, human rights, civil peace and harmony, equality, the self-determination of peoples and democracy. The normative general framework for the regulation of the legal status of the individual is established by articles 1, 2 and 7. The first of these provisions provides that the state shall be governed by the principles of democracy and the rule of law. Article 2 declares: "An individual, his rights and freedoms, are the supreme value. Recognition, observance and protection of inalienable rights and freedoms of the individual and the citizen shall be an obligation of the state." Article 7 characterizes the Russian Federation as "a social State".

Article 17 further states *inter alia* "that basic rights shall be inalienable and belong to every person from birth." It lays down that "rights and freedoms of the individual and the citizen shall be recognized and guaranteed according to the generally accepted principles and rules of international law." The next article reads: "The rights and freedoms of the individual shall always be in force. They shall determine the meaning, content and application of laws, impose responsibility on legislative and executive authorities, bodies of local self-government and shall be guaranteed by justice."

There is no doubt that this kind of constitutional provision establishes a good basis for the legal status of the individual. Moreover, it provides the courts with the procedural opportunity to grant legal protection to the individual if there is no specifically applicable legal procedure.

The constitutional catalogue contains an exhaustive catalogue of rights and freedoms in respect of those areas where human rights violations most commonly occur, such as the limitation of lawful periods of detention without a court decision to 48 hours (Article 22), the right to have a lawyer as of the moment of detention (Article 48), the banning of the use of evidence obtained in violation of the law (Article 50), the right to appeal to a superior judicial body (Article 50), and the possibility of alternative public service for conscientious objectors (Article 59(3)). Also commendable is Article 56(3), which enumerates the rights and freedoms that are not to be suspended even in a state of emergency.

The following articles can also be considered as contributing to the quality of the text:

Article 21(2) - prohibition of torture and other inhuman or degrading treatment

Article 26 - rights of ethnic groups

Article 34(2) - prohibition of monopolies and of unfair competition

Article 37(3) - protection against unemployment

Article 38(3) - obligation of children having attained the age of majority to care for their non able-bodied parents

Article 40 - right to housing

Article 42 - right to a favourable environment.

These enumerated rights are perceived as human rights, i.e. as rights enjoyed by everyone under the jurisdiction of the Russian Federation, and in both the content and the formulation they respond, in principle, to the legislative requirement of a modern constitution. In this connection, it may be noted that under the Constitution both the so called classical rights (civil and political) and economic, social and cultural rights are perceived as human rights. The opinion of the members of the Commission is not unanimous on this matter. Certain members consider that it is a positive change. Others emphasize, however, the difficulties of implementing these rights.

Chapter 2 contains a number of economic, social and cultural rights. However, it is not always clear whether some of these rights are meant to be judicially enforceable rights, or merely directives to law-makers on matters of policy. For example, does Article 40 allow one to go to court in the event of a failure by state authorities to provide housing? The rights to a favourable environment and to payment of damages caused by ecological violations (Article 42), the obligation to preserve nature and the environment (Article 58), the obligation to care for the preservation of cultural and historical heritage and to protect monuments of historical and cultural value and the right to participate in cultural life (Article 44), while noteworthy and progressive, raise similar questions.

It is clear that for all constitutional safeguards concerning basic rights to be effective, the independence of the judiciary has to be securely established in a system which enables and facilitates the judicial enforcement of such rights. In this respect, particular mention may be made of the establishment in Article 125 of the right of individual constitutional complaint.

In addition to such petitions, the Constitution is clearly perceived by its authors as a legal instrument which should provide the individual with the basis for a legal claim. This is visible in the precise form in which the provisions concerning rights and freedoms are formulated, an interpretation strengthened by the careful distinction drawn between social claims laid down in the form of subjective social rights and other State aims. In accordance with Article 15 of the Constitution, constitutional provisions are self-executing where sufficiently precise to be so.

Article 45 proclaims: "State protection of rights and freedoms of the individual and the citizen in the Russian Federation shall be guaranteed. Every person shall have the right to protect his own rights and freedoms using all means not prohibited by law." Although one has to assume that in some cases the notion "every person" refers to "every resident" of the Russian Federation rather than to every human being, the wider interpretation may be taken to be the general intention of the drafters, having regard also to the use of the words "every citizen" in relation to some of the classical rights (compare, e.g. articles 39, 40, 42 and 44(2)).

The above provisions should be read together in this context with Articles 47 and 48, concerning the right of access to the courts.

The present version of the Constitution has also brought significant improvements in comparison with the first version in relation to the following matters:

- the regulation of the protection of human rights in a state of emergency (Article 56)
- the right to asylum (Article 63)

- the formulation of social rights and the protection of national minorities (Articles 26, 68 and 69).

It should be noted that the new text takes account in particular of three comments we made concerning Chapter 2 of the previous version (CDL (93) 40), i.e.:

- a) The concept of *jus soli*, which was strictly imposed by Article 38 of the previous version, does not appear in the new text. Article 6(1) now states: "Citizenship of the Russian Federation shall be acquired and terminated according to the federal legislation. It shall be uniform and equal irrespective of the grounds of its acquisition."
- b) In Article 62(1), the word "or" has replaced the word "and" which appeared in the previous version.
- c) The principle of reciprocity no longer applies in Article 62(3).

## II. FURTHER REMARKS

### 1. Article 23(2)

It might perhaps be preferable to word the last sentence of this paragraph as follows: "Restrictions on this right may be imposed only in cases set out in federal legislation and pursuant to the decision of a court".

### 2. Article 25

At the end of the article, replace the word "or" by the word "and". The text has been partially improved because almost identical provisions contained in articles 29 and 34 have been dropped.

### 3. Article 29(2)

The new draft prohibits propaganda and agitation inciting social, racial, national or religious hatred and strife. One can always wonder whether it is better to retain such a prohibition or to reduce the limits imposed on the freedom of communication to those contemplated by international law. Additionally, the second sentence of this provision - "The propaganda of social, racial, national, religious or language exclusiveness shall be banned" - seems to be too vague and could be misleading (perhaps this is the result of an unfortunate translation).

### 4. Article 32(2)

The right to participate in referenda has been established within the framework of the provision in Article 32(1) on the participation of citizens "in the administration of their state". In this way the concept of political rights adopted in the Constitution has become more profound.

### 5. Article 32(5)

The formulation of this provision is unfortunate - "Citizens of the Russian Federation shall have the right to administer justice". If the intention of this provision is to say that citizens are entitled to sit on a jury, it should have been expressed precisely. The present language is highly confusing and potentially undermines the judicial function.

### 6. Article 33

The inclusion of the right to petition in the chapter under consideration constitutes a significant improvement.

### 7. Article 35

The regulation of the right to property no longer gives rise to doubts. The deletion of the reference to natural law theory (see comments CDL (93) 41 and rev. point II.5.) is a welcome step.

### 8. Article 37(4)

The limitation of the right to strike by adding the words "including the right to strike with the use of methods of settlement established by the law" seems to be confusing and might be misinterpreted. Probably the intention of this provision is to establish the right to strike "after the exhaustion of the procedures/means provided for the settlement of disputes". In any case the present language needs a reformulation which would not put the right to strike into question.

### 9. Article 39(1)

The inclusion of the upbringing of children as an entitlement to social insurance is much better suited to constitutional regulation than the previous version (it is much more specific and less programmatic).

### 10. Article 42

The introduction of the right to "reliable information about the state of the environment" seems to be a proper step in order to make the right to a favourable environment more specific.

### 11. Article 46(2)

The qualification of the lack of action of State and other bodies as the basis for an appeal to the court constitutes an important clarification in the context of the protection of individual's interests.

### 12. Article 46(2), Article 62(1), (2) and (3), and Article 63

The phrase "international treaty of the Russian Federation" should be replaced by "international treaty to which the Russian Federation is a party" (see Article 2(1)(g) of the Vienna Convention on the Law of Treaties).

### 13. Article 46(3) (exhaustion of domestic legal remedies)

Although this provision is innovative and progressive in spirit, it would be wise not to include it in the Constitution. This sensitive matter is covered directly by the international treaties themselves.

14. Article 48(2)

This provision should be read together with Article 22(2). It would be desirable for lawyers to be able to act as quickly as possible after arrests.

15. Article 52

In the last sentence, it would seem appropriate to replace the term "the state" by "the latter", meaning "the law".

16. Article 55(3)

It would be desirable to highlight the exceptional nature of this provision, for instance by replacing the word "needed" with "absolutely necessary".

17. Article 56(3)

The numbers of the articles concerning rights which cannot be restricted during a state of emergency have been re-written from the last version but the numbering has been partially changed (between articles 24 and 32). In effect, the present numbering is probably inaccurate.

18. Article 61(2)

As we already stated (CDL (93) 40), it would be advisable to add at the end of this provision the phrase "in accordance with the rules of international law".

19. Article 62(3)

Certain members wonder whether, besides international treaties, it would not be appropriate also to add to this provision the phrase "the generally accepted rules of international law", which is used in Article 63(1).

### III. UNRESOLVED MATTERS

There are some critical comments on the first and revised drafts which have, unfortunately, maintained their validity. These are reproduced below from the comments on the revised draft :

"1. Like the first version of the draft, the second version lists jointly in article 55 ' 3 the reasons for which restrictions can be imposed on the applicability of rights and freedoms. It means that the drafters accept the imposition of restriction on all rights and freedoms for reasons mentioned in this article. This seems to be inconsistent with the international and European standards which clearly determine which rights could be limited and for which reasons. The proposed formula leads to a situation in which all the possible reasons of limitation might be applied with regard to all of the rights and freedoms. This could open the way to misuse of power by both the legislative and the executive. [One can add that the adoption in the Russian Constitution of a provision similar to that already contained in the Universal Declaration (article 29) does not prove the rightness of the text in this regard. The Universal Declaration was not laid down as a legally binding document.]

2. One can wonder if the 48 hours detention without judicial decision (article 22) should not be replaced by full "habeas corpus".

3. Article 31 guarantees freedom of assembly only to citizens of the Russian Federation. The international standards speak of a human right in this regard. This limitation is surprising, considering that article 30 guarantees freedom of association as a human right.

## Chapter 3 : The Federal Structure Article 65 to Article 79

### Introduction

Russia remains a federal state. It is common knowledge that the difference between a federal state and a unitary state lies in power-sharing, in the sharing of sovereignty within the same country. For example, the United States, Germany, Canada, Switzerland, Australia and India are federal states.

In a democratic system the legislative, executive and judicial powers are separate. The extent to which they actually form watertight compartments varies from one country to another.

The provisions on federalism are very important for the balance of powers in the future Russian State. A federal system is based on power-sharing between two tiers of government. This is established by the basic law of the country, which also provides for a constitutional court or a supreme court or other body to interpret and arbitrate the power-sharing arrangements between the two tiers of government.

Power-sharing varies from one federation to another. Some constitutions provide for two lists of exclusive powers, as in Canada. In other countries there is only one list, with the remaining powers being devolved to the other authority. Many federations have joint powers. Centralisation prevails in some federal states, while the reverse is true in others.

Just as crucial as the wording of the Constitution, however, is the manner in which it is interpreted.

The influence of an independent judicial system responsible for interpreting the Constitution cannot be overestimated. Without a powerful supreme court or constitutional court, power-sharing may become highly centralised.

In all federal states, however, there is a basic option at the outset; some countries opt for a centralised federation and others for a decentralised federation.

### General remarks

1. The crux of federalism is power-sharing. But power-sharing arrangements vary from one federation to another. National defence, foreign affairs, the monetary and banking system and a few other matters of national interest are normally dealt with by the central government, but the others may vary from one federation to another; examples include criminal law, social security, education and natural resources. There is no standard form of federalism.
2. There are, of course, basic rules. Central government retains authority over what is considered to be of vital interest to everyone and the regions are assigned what is best administered by local government. In other words, power-sharing must above all be functional. It must reflect the salient features of the country.
3. An analogy may perhaps be made on this point with the theory of "subsidiarity" in the Common Market. The central authorities in Brussels, at the

heart of the European Community, are allocated the sphere that genuinely and essentially transcends the interests of the Common Market member states and which is necessary to safeguard the general interest.

4. Movements to and from centralisation and decentralisation are the very essence of a healthy federation. There is nothing surprising in them. A federation that does not change may well fail to meet people's needs and wither away. In several federations the prevailing trend is towards centralisation, as in the United States and Germany in the 20th century. Canada, on the other hand, is more decentralised.
5. It is a delicate matter for a foreign lawyer to say what should be dealt with by the federal government and what should be assigned to the regions. Arrangements that work well in one federation may not work in another. Each country has its own history.
6. Residuary jurisdiction rests with the components of the Federation (Article 73 and Article 76(4) and (6)). This is a standard pattern of power-sharing in a federation.

### **Study of the Russian Constitution article by article**

Power-sharing is covered chiefly by Articles 71 (exclusive federal powers), 72 (common jurisdiction), 73 (residual power), 74 (free movement of goods, services and funds), 75 and 76 (predominance of the federal government). It is also dealt with in Articles 5, 7, 8, 9, 10, 12, 67, 68, 69, 70, 77, 78 and 79.

First and foremost, a distinction must be drawn between articles directly concerning the sharing of legislative powers between two tiers of government and articles concerning the basic principles of federalism, property, languages and democracy.

### **Remarks on the general provisions**

The importance of the provisions on federalism is highlighted in the very first sentence of the Preamble, which stresses the "multinational" character of the Russian Federation, whose people are united by a common destiny.

Emphasis is also placed on the principles of equality before the law and self-determination of peoples.

Under Article 3(1), sovereignty is vested in the multinational people of the Russian Federation, who are the sole source of power.

Article 4(2) establishes the principle of the supremacy of the Constitution of the Russian Federation and of federal laws throughout the territory of the Federation. Article 15(1) confirms the supremacy and direct effect of the Constitution.

Articles 5 (and 1) provide that Russia is a federal state and that its component subjects are republics, territories, regions, cities and autonomous regions.

Article 5 emphasises the equality of the components of the Federation, the autonomous regions and autonomous areas.

However, only the republics have their own constitutions and legislative power. The other components have statutes and legislation (Article 5(2)). Thus, despite equality in principle, there seems to be a difference in status between the republics and the other components of the Federation.

Article 8(1) guarantees the integrity of the economic area, the free movement of goods, services and financial resources, the protection of competition and freedom of economic activity in the Federation. This provision should be read together with Article 74.

This provision alone, which is included in Chapter 1 and subject to a very stringent revision procedure (Article 135), confers considerable powers on the federal government with regard to economic activity as a whole and to the maintenance of economic and monetary union.

Articles 8(2) and 9 concern property in the Federation. Property may be private, public, provincial, federal or municipal.

Article 10 clearly establishes that in the Russian Federation the legislative, executive and judicial powers are separate. Article 1 states that Russia is a democracy.

Article 68 concerns languages. The official language is Russian. The republics may keep their own languages. Article 9 provides for the land and natural resources to be used and protected. They form the basis of the activities of the different peoples.

### **Remarks on the specific provisions of Chapter 3**

The powers exercised exclusively by the Federation are very broad (Article 71). To this list should be added the powers conferred by other provisions (Articles 8, 74 and 75 in economic, financial and monetary matters, Articles 68 and 69 in matters of language and protection of the rights of native peoples).

Matters covered by so-called common jurisdiction are listed under Article 72. The concept of common jurisdiction calls for clarification. Article 76(2) suggests that it may coincide with the concept of concurrent jurisdiction within the meaning of the German Constitution, for example, in which federal law prevails. But it may also be interpreted as enabling the federation to lay down only the basic principles, which are to be expanded upon by the laws adopted by the federated units in accordance with the federal laws (the German concept of "Rahmengesetz"). This point needs to be clarified.

A comparison of the lists under Article 71 (exclusive jurisdiction) and Article 72 (common jurisdiction) shows that overlapping poses problems on many points. To cite one example only, the list under Article 71(c) includes "the regulation and protection of the rights and freedoms of individuals and citizens, citizenship of the Russian Federation, regulation and protection of the rights of national minorities". Article 72 (b) provides for common jurisdiction in the "protection of the rights and freedoms of individuals and citizens [and] the rights of national minorities, ensuring legality, law and order, public security, and the maintenance of frontiers." This is, outwardly at least, contradictory.

Articles 74 and 75, which are included in Chapter 3 (The Russian Federation), may be regarded as special measures designed to give practical effect to the concept of economic and monetary union by prohibiting protectionist measures (Article 74) and guaranteeing the monetary unit (Article 75).

The various provisions referred to above are consistent with the basic principles of federalism. Of course these principles need to be adjusted according to whether the federal system is of a continental type (United States, Canada, Russia) or concerns a small territorial unit (Switzerland, Belgium), whether it is multinational and multilingual (Switzerland, Belgium, Canada, Russia) or ethnically and culturally homogeneous (United States, Germany) and whether it is centrifugal (Canada, Belgium, Russia) or essentially centripetal (United States, Germany). Nevertheless, a number of basic principles apply to all these forms of federalism: equality of the components, federal supremacy, maintenance of unity in economic and monetary matters as well as in foreign policy and defence matters. These essential features are to be found in the text of the Swiss Constitution.

One of the points which seems to call for the closest attention is the very large number of federated units (Article 65). They are all subjects of the Russian Federation, but nevertheless differ in their constitutional status (Article 66).

Apparently, the various units do not simply border on one another in territorial terms, but some subjects of the Federation include others on their territory (see Article 66(4), which refers to relations between autonomous areas which are part of a territory or a region). This is likely to pose highly complex problems in terms of power-sharing.

The same applies to implementation of the principle of participation. This principle, which is essential to the proper functioning of a federal system, requires the federated units to take part in decision-making at federal level.

In the Russian Constitution this principle is reflected in the existence of a typically federal chamber: the Council of the Federation. This is a classic solution. The Council comprises two representatives from each subject of the Federation (Article 95(2)). Here the Russian Constitution adopts a rule which exists in the United States and Switzerland and is very effective in protecting small units. One wonders about the practical consequences of this rule in view of the large number of federated units in Russia. Furthermore, the Council of the Federation is a joint body, comprising two representatives of each subject of the Federation: one representing the representative body and the other, the executive. This is a sort of compromise between the German-style system (delegates of the governments) and the American-style system (elected senators). The procedure for election to the Council of the Federation is left to federal law to regulate (Article 96(2)). The Constitution does not specify the length of the representatives' term of office.

The Council of the Federation enjoys fairly extensive powers (Article 102). In legislative matters, opposition by the Council of the Federation compels the Duma to hold a second vote by a majority of two thirds of the number of members of the Duma (Article 105(5)). Constitutional laws must be adopted by a majority of three quarters of the total number of members of the Council of the Federation and two thirds of the total number of members of the Duma (Article 108). The Council of the Federation thus has considerable powers of obstruction. This raises two questions:

1. In view of the powers conferred on the Council of the Federation, is not the composition of the Council on a strictly egalitarian basis, while admittedly consistent with the principles of federalism, likely to hamper the smooth functioning of the State?
2. Should not the possibility of dissolving the Council of the Federation, which does not appear to be considered, be provided for in the Constitution?

### **Specific remarks on the Russian Constitution**

1. The theory of legislative power as a watertight compartment in federal states is no longer what it was in the 19th century. Overlaps are becoming inevitable; there is such a demand for the intervention of the various branches of government.
2. There is no list of exclusive powers of the regions or member states. This is a priori a surprising omission.
3. There is, on the other hand, a list of exclusive federal powers.
4. The list of common jurisdiction, in whose exercise central government carries the greater weight, is long - in fact very long. It includes education, health care and the implementation of treaties.
5. Residuary jurisdiction would appear to be conferred on the member states under Article 73. This seems perfectly acceptable. It is the case in many federations. However, one wonders which powers might come under the head of residuary jurisdiction, since the lists of federal powers and joint powers are so exhaustive.
6. Labour law, family law, natural resources and environmental protection are matters for the federated regions or states.
7. It would seem, on paper, that Russia has opted for a centralised federation.
8. This Russian Federation has many member states, which may explain the wish for a strong central government.
9. The members of the Commission believe that the ideal framework for power-sharing comprises a list of exclusive federal powers, a list of exclusive provincial powers and a list of joint powers specifying which tier of government predominates. This may in some cases be the federal government and in others the provincial or regional governments.

### **Conclusion**

The new Russian Constitution, which was ratified by the people on 12 December 1993, establishes a fairly centralised federal system. A degree of centralisation may prove advisable in one federation and prejudicial in another. This depends entirely on the country's history and distinctive features. A strong central government in Russia may be the appropriate remedy at this point in history.

A strong, independent judiciary may possibly improve the balance of Russian federalism.

## **Chapter 4. The President of the Russian Federation Article 80 to Article 93**

### **I. THE PRESIDENCY**

According to the Russian Constitution, the form of government is based on a novel and interesting conception of presidentialism. To some extent, the presidential office is also linked to the federal structure of the Russian state. The presidency designed by the Constitution does not fit within a neat division of powers such as we find in the US Constitution. It does not embody, constitutionally speaking, the whole executive power. There is a dualism at the apex of the executive branch as the Constitution establishes both a Head of State and a Head of Government. Although the form of government seems to have been inspired more by the vicissitudes of the democratic transition in Russia than by any foreign models, it is patterned along the lines of what scholars have defined as semi-presidentialism, with a Head of State elected by the people and independent of the legislature, and a Head of Government responsible to Parliament. This type of dualism is exemplified by the French form of government.

However, there are fundamental differences between the Russian Constitution and the constitutional context in which the French presidency is set. Other considerations aside, while Russia is being structured as a federation, France is a unitary state. The presidency created in the Constitution is in many ways original. The best approach to its evaluation is to see whether the overall design of the presidential office is a coherent one.

The provisions that call for comment are laid down under Chapter 4 comprising Articles 80-93. Cross-reference will be made to other constitutional norms where necessary. Chapter 4 deals with the definition of the President's role, his mode of election, the termination of his office and his powers. The President's position under the Constitution can be viewed in terms of his relationship to the other state organs; the legislature, the federal government and the judicial branch of the Federation. It is equally important to examine how the President's powers are related to the federal structure of Russia.

#### **a. The President's role**

Under Article 80, the President is the Head of State whose foremost function is to guarantee the Constitution and defend the rights and freedoms of



citizens. Moreover, Article 80 grants the President power to protect the sovereignty, independence and integrity of the Russian Federation, and to assure the co-ordinated functioning and interaction of all state bodies, i.e. all constitutional organs. The final version of Article 80 has furthermore provided that the President determines the basic orientations of the internal as well as foreign policy of the State. He is thus given a broad and leading role in the context of what can be called high policy. Article 80 is therefore the key to understanding how presidential powers are articulated in the rest of the chapter.

Not only does the President represent Russia in external relations as would any Head of State represent his country under international law. He also conducts international negotiations and thus participates actively in diplomacy and foreign affairs. He signs international treaties, and appoints and recalls Russia's diplomatic representatives to foreign states and international organisations. Foreign ambassadors, extraordinary envoys and plenipotentiary representatives are accredited to the President. He is the Supreme Commander in Chief of the armed forces. Under Article 83 he appoints and releases the High command of the Armed Forces. These attributions tie in with the clause of Article 80 according to which the President protects the sovereignty and integrity of Russia.

Moreover, Article 80 must be read in conjunction with the other provisions of Chapter 4 which spell out the President's responsibility as guarantor of the Constitution. The extent to which the custodianship of the Constitution is exercised through presidential powers must of course be determined by way of interpretation. Despite the mechanism of direct election which calls for a presidential majority, the President's authority to protect the Constitution tends to emphasise his position of a "neutral" power above party politics. This feature of the presidential office is an important clue to the Head of State's relationship to the government and the legislature about which more will be said later.

Only the President's authority as a guarantor and arbiter of institutions can explain the exceptional powers granted to him particularly under articles 85 and 88-89. He can introduce a state of emergency and martial law, although his decisions must be confirmed by the Federation Council under article 102(1)(b)(c). According to article 83(g), he leads the Security Council. The reference to leadership could be read to mean that he is the exclusive head of the Security Council.

Another important set of presidential attributions relate to arbitration of disputes. These powers bring his status as guarantor of the Constitution into sharper focus. Article 85 concerns disputes that may arise between state bodies or components of the Russian Federation. The President must try to seek agreement among the interested parties or, if there is no agreement, refer the dispute to the Constitutional Court for examination. The President thus acts as a political referee who cannot invade the sphere of the judiciary. A similar criterion is adopted where acts of public organs of the subjects of the Federation contradict the Constitution or federal laws or international engagements of the Russian Federation, or violate the rights and freedoms of the individual. In that case, the President suspends the operation of the acts he challenges and petitions the appropriate court for their removal. Here the President becomes a defender of rights and legality who cannot rule on legal issues but who can promote a judicial decision which will eliminate the violation of the Constitution, the federal law, international law or individual rights. These are novel formulas. They are commendable for having provided a concrete answer to what presidential custodianship of the constitution actually means, in keeping with the separation of powers envisaged by article 10.

#### **b. Mode of election**

Direct election of the President is established by article 81. Yet this article, which deals with the eligibility requirements of presidential candidates, is not free from ambiguity. Article 81 stipulates that the President is elected for four years and that the same person cannot hold the post for more than two consecutive terms. Does the article mean that the same person can serve more than two terms if they are not consecutive?

#### **c. Termination of office**

The termination of the President's office does not require any comment except with regard to the impeachment process. The procedure involves an accusation by the State Duma which must be confirmed by the Supreme Court. The final decision to remove the President rests with the Federation Council. The President may be impeached on the grounds of state treason or other high crimes. Two points may be made. State treason must be a clearly defined felony under the criminal laws, and the notion of "high crimes" should be made clear.

Another point is that the impeachment process is fundamentally political in nature. The Federation Council could conceivably reject an accusation upheld by the Supreme Court. The consistency of the procedure may be questioned: what is the sense of having a judicial pronouncement on the matter of impeachment if it can be disavowed by a political body? The standard practice of present-day constitutionalism is to vest either judicial or parliamentary bodies with the impeachment power. The Constitution adopts a compromise solution. Perhaps this can be explained by the preoccupation that the power to remove the President should not entirely devolve upon parliamentary bodies. The judiciary is thus called upon to verify that the accusation stands on a tenable legal basis before the Federation Council can exercise political discretion in determining whether the President should be impeached or excused.

The President is not politically responsible to the legislature. Therefore the Federation Council could not resort to impeachment to disguise what in substance would be a no-confidence vote to remove the Head of State. This principle exists side by side with that of presidential immunity established by article 91. One would think that this article also means to grant the President immunity from criminal jurisdiction for all felonies other than those for which he can be impeached.

#### **d. Powers of the President**

##### 1. Appointment of the Head of Government and Dissolution of the Federal Assembly

The President's immunity and exemption from political responsibility stem from the fact that he is the Head of State and not the Head of Government. Yet the President's office is not cut off from the conduct of actual policy. Under the present text, it would seem that he is reserved a high sphere of political authority, consistent with his role as arbiter of conflicts and custodian of the constitution. The President has the power to influence political decisions he does not directly make and this power is a crucial one. Reference will be made here to the provisions which establish how the government is formed and under what circumstances the President can effect an early dissolution of the legislature.

The President is authorised to appoint and release federal ministers on the Head of Government's recommendation. However, the Constitution does not permit the President to appoint the Chairman of Government directly. Under article 83 he submits to the State Duma a candidacy to the post of Chairman of the Government, and article 111 prescribes the procedure whereby this office is filled. Once a candidate is proposed by the President the State Duma has one week to appoint or reject him. Should the State Duma reject his nominee the President may resubmit the question for fresh examination. If the State Duma rejects three times the proposal of the President, the President may appoint a Chairman of the Government, dissolve the State Duma and set new elections.

The State Duma will have to bear in mind that it faces dissolution if it refuses the candidates proposed by the President. The matter of the appointment of the Head of Government and its relation to the possible dissolution of the State Duma has been rigidly regulated. Neither the President nor the legislature has any room for manoeuvre after the procedure laid down in the Constitution has been exhausted. The President will have no other choice but to dissolve the State Duma if it refuses his candidates for Head of Government, and to choose an acting Chairman he must first dissolve the State Duma. Only experience will prove if and how these provisions work, but one can legitimately ask what would happen if a new State Duma is elected and refuses again to confirm the candidates proposed by the President.

##### 2. The question of confidence and the motion of no-confidence

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Constitutional democracy is a balanced system of government. The version of semi-presidentialism adopted in the Constitution attempts to establish a reasonable balance between the powers of the President and those of the legislature. The novelty of the text lies in the attempt to find a middle way between a pure form of presidentialism where the President unmakes cabinets singlehandedly and modern parliamentary government, which is based on two pillars :

- i. the question of confidence which can be put by the Government to the legislature to reaffirm its hold on the parliamentary majority ; and
- ii. the motion of no-confidence as a prerogative of Parliament with which the Head of State cannot interfere.

The final text adopted on 12 December 1993 gives the President a discretionary power to dismiss the Government (Article 117(2)). According to this Article, the question of confidence can be put by the President of the Government; in that case, the Head of State can choose between dismissing the Government or dissolving the State Duma. The procedure relating to the motion of no-confidence is different: the President of the Federation can refuse to agree with the decision of the State Duma; then the Government remains operational unless the State Duma expresses again its no-confidence within a three month period, in which case the State Duma is automatically dissolved.

These provisions as well as those on the appointment of the Government are aimed at reducing the powers of the State Duma in the field of the designation of the Government.

It must therefore again be pointed out that the question of a permanent disagreement between the President and the State Duma is not really settled. Of course, the State Duma can be dissolved, but it is possible in that case that the newly elected State Duma will have more or less the same composition as the old one. If the President persists in proposing candidates refused by the majority of the State Duma, he can of course dissolve the lower Chamber again - but democracy could eventually be endangered by the repetition of such scenarios. At the very least, there is a risk of the balance of power being tilted in favour of unfettered presidentialism.

Another remark is in order. The Constitution does not prescribe any of the modalities of the no-confidence vote raised by the State Duma other than the absolute majority needed to carry it. It does not indicate how many deputies are required to introduce the motion. Such a rule could be useful.

### 3. The resignation of the Government

The presidential character of the system is still confirmed by the fact that the President is free to accept or reject the resignation of the Government without consulting Parliament.

True enough, extra-parliamentary government crises - those originating from the resignation of the government without a previous vote of no-confidence being passed by the legislature - have been a frequent bane of countries like France under the Fourth Republic and Italy. Constitutional lawyers have often debated how to prevent or discourage governments from resigning. The problem does not easily lend itself to technical solutions. Extra-parliamentary crises have in Western experience largely been the result of manoeuvrings of party leaders accustomed to making or unmaking governments outside of Parliament.

### 4. Other powers of the President

The remainder of the presidential powers established by the provisions of Chapter 4 round out the scope of the President's authority. He is allowed to preside over the meetings of the Government. He can make direct appointments or submit candidacies for appointment depending on the nature of the post to be filled. The President appoints and releases his plenipotentiary representatives in the regions. He can introduce legislation and can sign and promulgate federal laws after their adoption by the legislature. He calls legislative elections and can dissolve the State Duma not only when a government cannot be formed but also in other instances when a crisis of state power cannot be resolved on the basis of the procedures established by the Constitution. He can adopt decrees and issue directives. He calls nationwide referendums. Like most Heads of State he bestows honours, ultimately decides questions of Russian citizenship and grants asylum and pardons. Some of these powers are linked to the presidential position as the head of a federal state.

A special relationship exists between the President and the Federation Council. The Federation Council is composed of two deputies from each component of the Federation. It embodies the notion that in a bicameral legislature one of the two branches should reflect the sub-division of the state into autonomous units while the other should represent the people as a whole. The Council's powers, listed in Articles 102 and 106, strongly suggest that it has been conceived as the Russian version of a Federal Senate which in the areas of foreign affairs and defence as well as in other matters is called upon to co-operate with the Head of State.

Bicameralism is an often debated topic in constitution making. It may be a matter of discussion whether some of the powers the Constitution reserves for the Federation Council would have been better placed with the State Duma. The logic of the Constitution is to link the Council and the Presidency to the federal structure of Russia. And if the form of government is to accord with the federal structure of the state, the Council's powers under the Constitution can hardly be questioned from the standpoint of constitutional wisdom.

One last point may be made. While the President has the power to call a referendum, nothing is said in the Constitution about the matters on which it can be called, the terms of which issues can be put to the people, and the effects of the popular vote. All these aspects will be left to constitutional federal legislation. The importance of the subject matter is such, however, that it would be advisable to outline the modalities of the referendum directly in the constitution.

### e. **Role of the Constitutional Court**

Needless to say, if the President and the Head of Government are sustained by different majorities, the balance, politically speaking, may become a more sensitive one as the French experience with cohabitation (1986-1988) has shown. The strength of constitutionalism is that political conflicts are settled by dint of reason and compromise. In this respect a decisive role can be played by the Constitutional Court whose function as the interpreter of the Constitution should be enshrined in the basic charter.

Semi-presidentialism becomes all the more legitimate when power is diffused throughout the various branches of government. Federalism can also contribute to this diffusion of power. And where there is a constitutional court to read the fundamental charter and determine how power has been distributed, constitutional democracy is protected by an additional safeguard.

## **Chapter 5. The Federal Sobranie Article 94 to Article 109**

The adoption of a Constitution is a matter to be decided by each particular state, its politicians, members of Parliament, constitutional experts and citizens in conformity with its specific national features and constitutional traditions. One should note that the Russian Constitution incorporates many fundamental principles typical of a democratic Constitution.

These comments concentrate on Chapter 5 - The Federal Sobranie.

## **1. Description of the Federal Sobranie**

Article 1 of the Constitution defines the Russian Federation as a democratic state (see also Article 3) without making any explicit statement as to what form of government is adopted i.e. parliamentary or presidential. Aside from this, Article 10 provides that "the state power shall be exercised through separation of the legislative, executive and judicial powers". These principles underlie the bodies which exercise such powers (Article 11).

In accordance with the constitutional provisions of Article 94, the Federal Sobranie is the parliament i.e. the Federal Sobranie exercises the legislative power of the Federation.

Is the use of the two terms "legislative" and "representative" in the Constitution related on the one hand to the functions of this state body being the legislature and, on the other hand, to the way in which it is constituted through general, direct and equal elections by secret ballot?

## **2. Structure of the Federal Sobranie**

Pursuant to Articles 11 and 95 the Federal Sobranie consists of the State Duma and the Federation Council. It is worth noting that the Council of the Federation is mentioned first. It seems that the Council of the Federation will be the leading house of Parliament.

## **3. Composition of the Federal Sobranie**

The Constitution provides for different size of the membership of the two Houses and a different way of their formation as stated in Article 95 (2) and (3).

In comparison with the draft, the final text of the Constitution has simplified the composition of the Council of the Federation, which now comprises two representatives from each subject of the Federation (Article 95 (2)).

## **4. Status of Deputies**

The status of deputies is regulated in Articles 97 and 98 of the Constitution. From a systematic perspective, it would be advisable to lay down the conditions for eligibility and non-eligibility for election as well as the conditions for incompatibility in one place.

The wording does not make it clear when the term of office begins and ends and under what conditions it may be terminated before expiration. Probably some of these issues will be tackled in separate laws.

## **5. Powers of the Federal Sobranie**

The Constitution builds on the separate and joint exercise of the powers of the Houses of the Federal Sobranie. Their distribution is a matter of constitutional regulation which can be seen in the text.

The way in which the powers of each House are systematised separately might be subject to improvement. The provisions of Article 102(1)(a) would be more accurate if the words "approval of" are replaced by the words "decision on". This is to clarify that an imperative confirmation of the act of the President or a similar action is not implied.

One should note the degree of complexity with regard to the legislative process and the type of laws passed. Article 104 invests a number of subjects with the right to initiate legislation. The members of Parliament, the President and the Government are the usual subjects of this right. How is this right going to be exercised by collective subjects such as the State Duma, the Federation Council or the legislative (representative) bodies of the components of the Federation?

The efficiency of legislative activity is related to legislative procedure and particularly to the majority required for passing laws.

## **6. Relationship of the Federal Sobranie with other State bodies**

It should be pointed out that the President of the Russian Federation is a separate body, i.e. the Head of State (Article 80). At the same time the Constitution enshrines the principle of separation of powers. It would be advisable to define the limits of the presidency, which has extensive and various powers especially in the executive branch (Article 83), in the context of this principle.

It would be better to specify with greater clarity the relations between the Federal Sobranie and the President, the Federal Sobranie and the Government, the Federal Sobranie and the judiciary, the Federal Sobranie and the Constitutional Court as well as to provide clearly for the respective balance in these relations.

## **Chapter 6. The Government of the Russian Federation Article 110 to Article 117**

### **THE GOVERNMENT**

The Government heads the executive branch of the Russian Federation. It is therefore an autonomous body and one of the fundamental powers of the state. In the foregoing remarks its position has been assessed with reference to the President's powers since semi-presidentialism calls for a dual executive. A key constitutional issue is to what extent the role of the Head of the Government may be distinguished from that of the federal ministers. The answer provided by article 113 is unchallengeable on the grounds of western constitutional experience. The Government is a collegiate body and the Chairman is invested with special authority. The way article 113 defines his role is in keeping with the practice of parliamentary government. The Chairman determines the basic guidelines of policy and activity of the Government and bears responsibility for the exercise of this mandate. Each minister is responsible for implementing the Government's policy in the sphere of which he is in charge.

In parliamentary governments the relationship between the Head of State, the Prime Minister and the other members of the government is not only defined by the provisions that allot state power, but also through a special technique known as the countersignature, which is not adopted in the Constitution. The President promulgates laws and decrees, but since he is not by definition responsible to the Parliament, his acts need to be countersigned by the Head of Government or the competent minister, depending on the subject matter they deal with. The countersignature may be a formality. Nevertheless, it is a useful indicator of how power is distributed between the President and the executive branch. If a countersignature is required for a particular act, it is reasonable to assume that the President has no more than the power to issue the act formally.

There are instances, however, for which the Constitution may reserve decision making power exclusively to the President. In these cases the technique of the countersignature does not apply. The basic charter must therefore establish which presidential acts need a countersignature and which do not. This is a useful distinction in systems where the Head of State coexists with the Head and members of the Government. And it may be worth making in

the context of the Constitution.

Another aspect that deserves comment is that the enumerated powers listed in article 114 are in part a repetition and in part an extension of the powers listed in article 71 pertaining to the Federation. It must be clear that the enumeration of powers in article 114 is not exhaustive and that the federal Government's responsibility extends to all matters of federal competence.

As regards the structure of government, the Chairman of the Government, no later than one week after his appointment, submits to the President a proposal regarding the structure of federal bodies of executive power within the government. Do these proposals fall within the provisions according to which the organisation and activity of the Russian Federation are defined by federal constitutional law?

One question is raised by how the Constitution lays down the normative powers of the Government. The Government issues decrees and directs and assures their implementation. But it can adopt these measures only on the basis of constitutional laws and presidential decrees. The Chairman issues directives and the federal ministers issue orders. What room is left for executive decrees (that would seem to be authorised as a general function of the federal executive power under articles 113 and 114) which concern matters not covered by law or presidential decrees or directives under article 90?

The Government's place in the constitutional plan must be considered in terms of the overall design of semi-presidentialism. The crux of the matter is to what extent the Government is truly an autonomous body. It seems to be hamstrung on the one hand by the far-reaching authority of the President and on the other by parliamentary controls. The text provides for a double kind of dualism. Not only is executive leadership divided between the President and the Chairman of the Government but the Government is responsible both to the Head of State and to the State Duma. This type of constitutionalism must be put to the test of experience to see if it can develop into a working model of semi-presidentialism.

Forms of government may evolve, and they generally do. The inbuilt balance of a system where presidential and parliamentary power must coexist, and where the government is responsible to both powers, does not preclude an evolution towards a French type of semi-presidentialism. The Russian Government may acquire a better focused profile of cabinet responsibility through parliamentary investiture, the vote of no-confidence and the other instruments of control such as parliamentary questions, motions and inquiries. The President, in turn, may play a varying role depending on whether the majority that sustains the Government is the same as his own or not. Ultimately, it is only the consolidation of political parties underlying the election of the President and the Parliament that can give shape to the majorities which will make the system work.

Under the Constitution the election of the President is divorced from that of the two branches of the legislature. The stage has thus been set for a situation where the presidential majority differs from the parliamentary majority. In that case, the Head of Government will be chosen from a political grouping other than that to which the President belongs. The President will in essence be compelled to "cohabit" with the Head of Government. His power to influence government policy will consequently diminish. But the important issue is that there be a balance both when the presidential and parliamentary majorities coincide and when they do not. This balance must be insured first of all by developing the notion that the Government is an autonomous body whose powers cannot be invaded by the Head of State. The typical presidential role is to provide inspiration for the Government's policy, not to usurp its conduct from the Government. The Constitution contains this all-important concept but it must be reinforced by additional constitutional guarantees.

#### **Chapter 7. Justice Article 118 to Article 129**

1. Article 118 of the Russian Constitution sets forth the basic principle whereby judicial functions devolve on the courts alone. While acknowledging the validity and the necessity of such a principle, we wonder whether the absolute character of the wording will be prejudicial, in that it sets aside the possibility of alternative non-judicial procedures being established for the settlement of disputes in certain matters. However, any deviation from the principle of exclusive jurisdiction should be carefully restricted and in no circumstance should it prevent access to the ordinary jurisdictional organs. The addition to Article 118(3), of a provision on the inadmissibility of emergency courts being created has been welcomed and merits emphasis.

2. Article 121 recognises the principle whereby judges on the Bench shall not be removed from office, a corollary to the independence of the judiciary vis-a-vis other sovereign organs (Article 120). Such a principle prevents the termination or suspension of the term of office of judges on grounds and according to procedures other than those set forth by the federal law.

Nevertheless, the pressures to which judges may be subjected during the course of their term of office are not tied in solely with the "suspension" or "termination" thereof. It would therefore be advisable that, as a consequence of the principle of irremovability of the judiciary, a provision should be added to Article 121 according to which judges will not be transferred, retired or dismissed, except as provided by law.

3. As a general rule, modern constitutions either provide for limits to the liability of judges for acts done and words spoken in the exercise of their judicial functions or contain general rules governing the way in which such liability will be laid down by the law.

The new version of Article 122 is much less absolute than the previous one. It allows federal law to provide for exceptions to the inviolability of judges. Nevertheless, the provision on the immunity of judges vis-a-vis criminal prosecution remains the general rule. If the aim thereof is to ensure the independence of the judiciary, then the provision at stake still continues to be excessive. Such a provision goes far beyond the "Basic Principles on the Independence of the Judiciary" promulgated by the United Nations in 1985, and introduces distortions, which can be hard to justify, into the principle of the equality of citizens before the law.

4. Following our previous comments, the substance of Article 118 of the previous draft has now been transferred to Chapter 2, relating to rights and freedoms. One could wonder however, whether the best place for Article 123 (formerly 119) would not also be in Chapter 2.

5. We note with satisfaction that our views on Article 121 of the former draft were generally incorporated in the text of the new Article 125 relating to the Constitutional Court. This article now describes in a clear wording the powers of the Constitutional Court, enumerates with accuracy the entities entitled to request the Constitutional Court's intervention, clarifies the effects of rulings of the Constitutional Court, and confers thereon exclusive powers to interpret the Constitution.

Article 125(5) concerns some of the effects of the decisions of the Constitutional Court. However, it would be better if it were clearly established that all the decisions of the Court have effect *erga omnes*.

6. Articles 126 and 127, dealing in a general manner with the powers of both the "Supreme Court of the Russian Federation" and the "Higher Court of Arbitration of the Russian Federation", state that these jurisdictional organs "exercise judicial supervision" over the activity of both ordinary and arbitration courts.

It is nevertheless doubtful whether powers of "supervision" which go beyond jurisdictional control to ex officio control are consistent with the powers usually exercised by a higher court, which hears in the last instance appeals against decisions of the next lower court in the hierarchy. This question should be clarified. Any deviation from the rule of exclusive jurisdictional functions and appellate jurisdiction does not seem to be desirable: the "supervision" activities (no matter what this means) and the ordinary powers of the "Supreme Court of the Russian Federation" and of the "Higher Court of Arbitration of the Russian Federation" should be kept apart.

7. We do not understand the rationale of the provision establishing a specific category of courts with jurisdiction for trying "economic disputes". Apart from the difficulty in determining the meaning of "economic dispute", withdrawing such disputes from the ordinary courts' jurisdiction appears to be somewhat inconsistent with the liberal model upon which a new economy is supposed to be introduced.
8. Article 128 is concerned with rules governing the appointment of judges to the Federation higher and lower courts. There seems to be a risk of an excessive politicisation of the said Courts' members, which is likely to jeopardise the principle of separation of powers set forth in Article 10.  
Access to higher court judicial office (at least insofar as the Supreme Court of the Federation and the Supreme Court of Arbitration are concerned) should be available preferably to professional judges on the grounds of merit.
9. Article 129 sets forth the powers of the *Prokuratura* and the appointment of the general prosecutor of the Russian Federation.  
The remarks made on the previous draft concerning the independence of the Prosecutor's Office and the appointment of the Prosecutor General have been taken into account in the final text of the Constitution.
10. However, we wonder whether it would be better to frame the functions of the *Prokuratura* of the Russian Federation (Article 129(5)) at the constitutional level rather than to refer to the federal law.
11. We note with appreciation that the Superior Judicial Office was omitted from the current version; it made the apex of the Russian judicial system too complex.
12. A brief comment must be made, although it may seem disconnected from the chapter under consideration, in respect of the fact that the new draft does not make any provision for an institution that often exists in a state based on the rule of law: the Ombudsman. The brief reference contained in Article 103 (e) (the Plenipotentiary Representative on human rights issues) is not consistent with the trend in modern constitutions, whereby entities that are neither connected with the machinery of justice nor dependent on political power are vested with important powers to protect citizens vis-a-vis the administrative authorities.  
In our opinion, consideration should be given to such an omission in the framework of a future draft amendment to the Constitution of the Russian Federation.

## **Chapter 8. Local self-government Article 130 to Article 133**

CHAPTER 8 deals with LOCAL GOVERNMENT; it draws inspiration from article 12 which recognises and guarantees local self-government in the Russian Federation, ensuring its independence "within its terms of reference" and also providing for the separation of bodies of local self-government from the system of state bodies. Local self-government shall be exercised in cities and villages and other territorial units with due regard for historical and other local traditions (art. 131(1)). Cities of federal importance, Moscow and Saint-Petersburg, as well as Autonomous Areas, are treated as subjects of the Russian Federation (article 65).

According to article 72 (m), the establishment of the general principles of organisation of local self-government falls under the common jurisdiction of the Russian Federation and of the subjects of the Russian Federation, but article 131(1) states that "the structure of bodies of local self-government shall be determined by the population independently". A balanced equilibrium of all these three sources of law (federal laws, laws of the subjects of the Federation and autonomous local acts) must be found.

Article 130(1) combines with article 132(1) to give a definition of local self-government and of its functions. But the resulting provisions give a very vague definition of the matter so that the task entrusted to the Russian Federation and the subjects of the Federation under article 72 (m) is extremely important to the implementation of the principles of the Constitution as well as to the detailed enumeration of the fields of activity of local self-government. The content of the guarantees established by article 133, which provides for the judicial protection of the rights of local self-government and for compensation for additional expenditure "arising as a result of decisions adopted by the bodies of state power", also therefore effectively depends on such legislation. The Federation shall, on the other hand, take care to introduce a similar provision in respect of legislation of the subjects of the Federation, which are not mentioned in article 132.

The independence of local self-government is guaranteed by the decision-making powers exercised by citizens through referenda, elections, other forms of direct expression of will and through elected and other organs of local self-government. Provisions about the powers of checking and vetoing the activities of local self-government by bodies of state power (Federation and its subjects) are absent. Therefore any decision is probably left in the hands of the Russian Federation and of the subjects of the Russian Federation. The danger has to be avoided that the legislatures of all of them concur in restricting the independence of local self-government without any justification.

Article 131(2) provides that any alteration of the borders of the "territorial units" requires that the public opinion of the population of the respective territorial units is first taken into account. This last provision may be the source of misunderstandings if the interpreter of the constitutional text does not take account of principles requiring the consent of the interested population (CDL (93)43) and a referendum of the same population prior to the alteration of such borders (CDL (93) 31).

Some reconciliation may also be required between article 71 (c), which entrusts the Russian Federation with the regulation and protection of the rights of national minorities, and article 72 (1) (b), which provides for a common jurisdiction of the Russian Federation and of the subjects on the Russian Federation on the same topic and on "the protection of the indigenous habitat and traditional mode of life of ethnic minority communities".

## **Chapter 9. Constitutional amendments and revision of the Constitution Article 134 to Article 137**

Article 134 does not give the people the right of submitting proposals for amendments or revision of the Constitution of the Russian Federation: one might argue against this policy but it is coherent with the exclusion of the people from the right of initiating federal legislation (article 104).

Notwithstanding article 135 (1), which forbids the revision of Chapters 1, 2 and 9 of the Constitution of the Russian Federation by the Federal Sobranie, article 135 (2) and (3) and article 136 provide for two different procedures for revising the Constitution. The first one concerns the amendment of Chapters 1, 2 and 9 of the Constitution of the Russian Federation, which implies the election of a Constitutional Assembly in conformity with a federal constitutional law, providing the proposal is supported by three-fifths of the deputies of the Federal Sobranie.

The adoption of the draft of a new Constitution of the Russian Federation requires the vote of two thirds of the total number of the members of the Constitutional Assembly or a nationwide vote and the approval "by a majority of voters casting their votes, provided that more than one-half of voters have cast their vote". Article 135 does not say when and by whose decision a nationwide vote has to be preferred to the adoption of the draft by the Constitutional Assembly.

Amendments to the provisions of Chapters 3-8 of the Constitution of the Russian Federation are adopted following the procedure envisaged for the adoption of federal constitutional laws (article 108), but additionally require approval by the legislative bodies of at least two-thirds of the subjects of the

Russian Federation (article 136). This procedure looks in some way heavier than the procedure envisaged by article 135. It is aimed at the preservation of the internal political equilibrium between the subjects of the Russian Federation, while article 135 has the purpose of protecting the basis of the constitutional system of the Federation and the constitutional guarantees of citizens.

Article 137 (2) apparently recognises as automatic changes to the Constitution of the Russian Federation arising from the inclusion of the new name of a member of the Russian Federation in article 65 of the Constitution itself when the name of that subject of the Russian Federation (Republic or Territory or Region or City with federal status or Autonomous Region or Autonomous Area) is independently changed and a new name adopted. The provision does not say which is the procedure that has to be followed for this automatic change of the constitutional text (a parliamentary deliberation? or a presidential decree?). It does not take account of cases similar to the Macedonian case, when an independent decision concerning the name of a subject of the Federation might not be accepted by other subjects. But this provision can be construed as a rule establishing the right of all the subjects of the Federation to freely choose their own names.

## SECTION TWO

### Concluding and Interim provisions

Article 2 provides for a power in all judges to adjudicate upon the conformity with the new Constitution of the Russian Federation of laws and other legal acts which had been in force in the territory of the Russian Federation before the entry into force of the Constitution itself, and for a power to decline to apply them when they contradict the Constitution. Perhaps this provision substantially reduces the jurisdiction of the Constitutional Court as it is established by article 125 of Section One. This article could be construed as if the jurisdiction of the Court should cover the adjudication of the conformity with the Constitution of all laws and other legal acts actually in force in the Russian Federation without taking into consideration the date of their approval. The possibility of different decisions of different judges on the same question has to be kept in mind also.

Article 5 (2) probably forbids the adoption of any lustration act affecting the members of all Courts of the Russian Federation, but it is not certain that this was the original intention of the framers of the Constitution who perhaps only envisaged guaranteeing the continuous functioning of the Courts only. The provision that vacancies have to be filled in accordance with article 128 and its new rules can produce effects of disequilibrium in the membership of the Courts, which retain members appointed under the old rules.

Article 6 (2) contrasts with article 22 (2) of Section One whose second part ("before the decision of the Court a person may not be detained for more than 48 hours") might not require specific legislation for its implementation.

The last provision allows the members of the State Duma to be - at the same time - members of the Cabinet. This is an unusual facet of a (presidential or) semipresidential government. But the provision will be in force for the first legislative term only; it is an *ad interim* provision. Correctly, the Constitution provides for the exclusion of the parliamentary immunity with regard to "actions/inaction" of the members of the State Duma when connected with the implementation of the Cabinet duties.

## COMMENTS

**by Professor N.V. VITRUK, associate member for the Russian Federation of the Council of Europe's European Commission for Democracy through Law, on the Commission's comments the Constitution of the Russian Federation, adopted by referendum on 12 December 1993.**

I was very gratified to see the general assessment by the European Commission for Democracy through Law of the Constitution of the Russian Federation, adopted by referendum on 12 December 1993, to the effect that the text is in line with the principles of a democratic state governed by the rule of law and respectful of human rights. At the same time, the valuable comments and opinions expressed by the Commission on certain problems and certain provisions in the Constitution of the Russian Federation have been studied with great interest.

It is quite obvious that the Constitution was drawn up under extremely complex political conditions, at a time when the struggle between different social interests took the form of opposition between the legislature and the executive, each of which sought to use the recently created Constitutional Court for its own purposes. This situation was further aggravated by various rivalries between the Federation and its components and among the components of the Federation themselves. As a result, the compromise nature of the Constitution, which was unavoidable in such a situation, led in certain cases to rules being formulated in a way which could be considered defective from a purely legal point of view. We shall seek to ensure that any legal conflicts which may arise will be settled on a strictly legal basis.

Since the Constitution of the Russian Federation is a legal document which is already in force and which, moreover, lays down very strict conditions for revision, it is not currently possible to implement some of the Commission's proposals (for example, those concerning the introduction of provisions relating to popular initiative, the definition of the joint powers of the Federation and of its components and a more rational distribution of rules in the text of the Constitution).

However, the Constitution itself stipulates that in certain areas constitutional laws must be enacted for the purpose of regulating constitutional matters (without, of course, derogating from the basic text of the Constitution), as well as other federal laws. When it comes to formulating these laws, we will be in a position to take into account and implement several of the Commission's comments and proposals concerning, for example, more precise formulation of the rights and freedoms of individuals and citizens; the right to strike - Article 37 (4); the protection and defence of citizens outside the country - Article 61 (2); the independence of judges (prohibition of transfer to another post without the agreement of the judge) - Article 121 (2); immunity - Article 122 (2), etc. These laws will also answer questions raised by the Commission in its reading of the text of the Constitution, such as whether a person can be elected to a third term of office as President if this term does not immediately follow the two preceding terms as President - Article 81 (3).

In any event, all the comments and suggestions put forward by the Venice Commission will be communicated to the corresponding committees of the Chambers of the Federal Assembly.

Nonetheless, a number of the comments are perhaps the result of an inadequate understanding of the text of the Constitution. The Commission believes that the maintenance of courts of arbitration is inconsistent with the liberal model of the economy, thinking, perhaps, that the former State Arbitration was basically an administrative body. Although they are special courts, the existing arbitration courts are courts in the full sense of the word. The existence in several liberal economy countries of special commercial courts is not prejudicial to this form of economy.

Some of the Commission's comments are due to the fact that the exact meaning of the Russian terms is not the same as the equivalent English and French terms. For example, the comment on Article 118 (3) of the Constitution, to the effect that it sets aside the possibility of alternative non-judicial procedures, is due to a failure to grasp that the Russian word for "justice" does not cover all forms of judicial action but merely signifies the settlement of judicial conflicts by the courts on the basis of a special judicial procedure.

Certain shortcomings in the text of the Constitution could be corrected through interpretation by the Constitutional Court of the Russian Federation. Moreover, the real meaning of several constitutional provisions will undoubtedly be clarified by the application and implementation of the Constitution.

Finally, I should like to take this opportunity to express again my profound gratitude to the Commission for its detailed analysis of the new Russian Constitution, which will contribute to the strengthening of democracy and the rule of law in Russia.

