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Development of Constitutionalism and Federalism in Russia

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Abstract

Building up a rule of law is one of the objectives of transition. This objective, however, cannot be separated from the other main objectives, namely a market economy and democracy. These have all been developed simultaneously in Russia and the failure of one task affects the others. “Rebuilding a ship at sea” is an unavoidable vicious circle, but it is the only possible way of transition for Russia, even if it means constant failures and setbacks.

The Constitution of the Russian Federation from 1993 technically contains all the bricks needed to build constitutionalism. The separation of powers between the state organs is established as well as a judicial body to guard the Constitution. Newly gained independence of the courts is an important prerequisite for developing the rule of law. There is, however, an institutional setup hindering this development. The political culture still has a long way to develop to the stage of constitutionalism.

Authoritarian presidential power, which was the result of the hectic power struggle between the legislative and the executive after separation of powers, enabled an excessively powerful presidency to be the winner of the struggle. A weak party system and an underdeveloped civil society allow authoritarian rule of the president to go even further than the constitution permits. For the same reason corrupted politics can continue. The development of the rule of law has largely been left to the courts and lawyers. The Constitutional Court has, however, chosen a cautious attitude towards presidential power after having supported the legislative in the power struggle and being suspended by the President.

If the balance between federal state organs is not yet found, the question of federalism is at an even more underdeveloped stage. Federalism is not developed in an open, transparent and democratic way, but in a power struggle between the center and the regions. The Constitution of 1993 left a lot of questions open concerning the division of powers including fiscal federalism. The center has tried to regain the power, which was given to the regions during the power struggle at the federal center. This is done with the help of new federal laws increasing the powers of the federal center. The Presidential Administration has extended the federal executive power and the President has tried to change regionalist governors into “his own men”. The Constitutional Court has repeatedly interpreted the Constitution in favor of the federal center.

Decentralization has been developed through the back door with administrative treaties between the federation and different subjects of the federation. These treaties all differ from each other and usually contradict the federal constitution. They also contain secret provisions. These treaties have been a political necessity to prevent the federation from falling apart. In the hierarchy of legal norms they are, however, submitted under the Constitution, which makes them vulnerable from the legal point of view.

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Development of Constitutionalism and Federalism in Russia

Soili Nysten-Haarala

1. Introduction

1.1 Law and Transition

After the collapse of communism, Russia has been in a process of fundamental socioeconomic transformation, which can be described as transition to a market economy, democracy and the rule of law. A similar fundamental transformation is going on in the post-communist countries of Central and Eastern Europe. Even if these post-communist countries are all different, their main problems of transition are the same. The transformation process has not been as easy and technical as the first reformers and many foreign advisers may have thought in the beginning. Even if there has been a rapid change and a lot has been achieved, there is still a long and thorny road to the final objectives of transition. The result may also be a peculiar Russian version of a market economy, democracy and the rule of law.

In transition, law is an important tool in transforming society into a new trail and an institution which, itself, should be transformed. Law carries the values of society. In North's (1992) words, the major role of institutions is to reduce uncertainty by establishing a stable structure to human interaction. Institutions are the rules of the game and without them there is no economic or social activity. Institutions facilitate the interaction between people and organizations. They are essential to keep transaction costs on a socially acceptable level. As North and Thomas (1973) have shown in their studies of economic history, the results of changes usually differ from the originally intended, because institutions play an important role in change. Since moral values and attitudes of people change only slowly, radical changes from above are not going to be successful especially if they are not widely accepted in society. Too radical changes may even have a deteriorating effect on the general respect of law. This makes law a difficult tool in managing transition.

Law constitutes the official rules of the game, which can be enforced by coercive legal rules. An inadequate and contradictory legal framework has often been blamed for the chaotic circumstances, where industry and commerce must try to transform in Russia.[1] The legal framework is far from perfect, but a lot has already been done to create modern legislation for the needs of a market economy and democracy. There are even

[1] Inadequate and obscure law seems to be the first and foremost target of criticism among foreign businessmen working in the Russian markets (see, e.g., Ollila, 1999:31–35). According to IIASA's empirical research concerning forest companies in several regions of Russia, Russian managers themselves regarded tax and business legislation as well as violations of contracts as their main problems in business (Carlsson *et al*., 2000:7).

more problems in enforcement or legal norms. Implementing new official rules in Russia's extraordinary environment does not produce similar results to those in established democratic market economies. Unofficial rules of the game — the rules in use are at least as important as formal legal rules (Pejovich, 1998:23; Crawford and Ostrom, 1995). Law is an institution working within a larger institutional framework of enforced norms, routines, conventions and traditions. Law does not function in a vacuum but within the institutional framework of society. For this reason, a holistic view is necessary to understand transition and the role of law in this process.

According to abundant empirical research it seems that the rules of the game, both official and unofficial, are vague and that the absence of trust in business relations is usual (e.g., Suomen…, 1998; Kortelainen, 1997; Törnroos and Nieminen, 1999). The crucial question in developing the rule of law in Russia is the absence of trust (see Fell, 1999). In the Soviet Union, law was repressive and arbitrary. People did not have trust in their legal system. However, trust has to be re-established but it is not easy when the economy is in a chaotic situation and when a hectic political power struggle is going on. It should not be forgotten that the new legal system is not created from nothing but should replace the planned economy, which was based on communist so-called democratic centralism and one-party dictatorship. Institutions such as law are inherited from the Soviet past and as such they can even constitute a block for transition.

Institutionalists have criticized the reforms in post-communist countries of not taking institutions into account and presupposing the existence of an already well functioning institutional framework (e.g., Stiglitz, 1999; Carlsson *et al*., 2000). The result of the reforms has been that the old habits and attitudes have modified the intended reforms into something, which cannot be called either socialism or a market economy. A *Virtual economy* is what Gaddy and Ickes (1998) started to call the economy, which is a mixture of a pretended market economy and inheritance of socialism.[2] The same applies to democracy and the rule of law. They can also be called virtual. An old legal positivist approach connected with instrumental Marxism has a strong effect on Russian legal culture (Alekseev, 1999).

Legal positivism was an appropriate theory of law for building a façade of constitutionalism and the rule of law. Limiting law to legal technical issues and regarding the State as the ultimate source of law made law, in Lenin's words, "a weapon in the hands of the leading class". A written constitution with formal checks and balances does not yet create constitutionalism or the rule of law, if the rules in use do not support it. As Putnam (1993:183) illustrated in a study of Italian transformation, history changes slowly and current changes are decided by historical circumstances. This clear and obvious fact does not, however, mean that change is impossible or that failure is predictable due to historical reasons.

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[2] A Russian economist, however, explained that the peculiarities of Russian economy are due to a well-developed and wide "black market" (Boiko, 1999). During the planned economy a more flexible black market supplemented the rigid official system of production and distribution. This tradition continues with gray market phenomena. There is both smuggling and unofficial production, which does not appear in statistics. Taxation is completely avoided and the profit, which is shared by those who take part in the activity, does not show in the official profit rates of the company.

The crucial difficulty in transition is that the situation in Russia is far from ordinary. Economic reforms failed, politics are corrupted, and economic crime is common in everyday life. All these failures are connected with one another forming a vicious circle. Before the vicious circle can be broken, the reasons for its existence must be realized. It is in this context that it is essential to discuss the rule of law.

1.2 Constitutionalism, the Rule of Law and Democratic Federalism

In Anglo-Saxon legal culture the principle of the rule of law was developed in the 19th century. The rule of law meant that even the highest lawmaking authority might not lawfully infringe certain basic principles of justice. The source of those basic principles of justice was found in the English constitution, which is embodied in a chain of certain historical documents beginning with the Magna Carta of 1215 reaching until the Bill of Rights of 1689, as well as in English common law (Berman, 1996).

The concept "constitutionalism" is of American origin and still sounds strange even to English ears (Berman, 1996, p. 45). Constitutionalism is defined as keeping government in good order. The government is bound by rules laid down in advance of its actions. Constitutionalism implements the rule of law, bringing about predictability and security in relations between individuals and the government by defining, in advance, the powers and limits of that government (Alexander, 1998:4; Kay, 1998:17–19). The Americans added into the notion "rule of law" an emphasis on its foundations in written federal and state constitutions that proclaimed civil liberties such as freedom of religion, speech, press and assembly. The philosophy of American constitutionalism rests on an implicit theory of natural law.

The Americans also introduced a governmental system of checks and balances, entrusting to the judicial branch of government supreme authority to guard the Constitution. This added a new dimension to the rule of law concept, since it meant that in appropriate cases any citizen in any court could invoke it against the legislature itself. According to British tradition it is the Parliament, which is Sovereign and has the highest authority.

The roots of the rule of law are deep in the history of Western legal thinking. Berman (1983) claims in his book "Law and Revolution" that the rivalry between the Catholic Church and the States, which he calls the Gregorian Revolution, developed a new type of citizenship in Western culture. Because of several sources of legal power, these powers had to be limited and the citizens were allowed to challenge the power.

In the United States the idea of several sources of law was further developed in federalism. The core of American federalism is the States, which form the federation, not the federation governing its parts from above. Different sources of power have limited authority, which is measured with legal and political competence and no one has the "ultimate word" of the Sovereign. Justice is not a willful submission to authority, but a reasoned contention. The governmental authority is governed by a due process of law, which can be controlled. Federalism and the power of the states rest on a developed civil society controlling the state power from bottom up (Ostrom, 1987:67–70).

The Russian legal system has, however, been more influenced by continental European legal tradition. The German "*Rechtsstaat*" concept was developed simultaneously with the Anglo-Saxon rule of law in the early 19th century. In a *Rechsstaat* the supreme political authority should be based on, governed by, and bound by the law it made. This classical *Rechtsstaat* idea is formulated in Weber's (1978) formal rationality, which means that predictability and formal justice can be reached by following strictly formal legal rules. Weber, however, also saw the possibility of substantive rationality, but the starting point should still be the strict application of formal rules. It created predictability, which is needed for economic activity. The most notable difference to the Anglo-Saxon concept, which stressed the limits of governmental power, is that the *Rechsstaat* reflected positivist legal theory emphasizing the state as being the only origin of legal norms. Legal positivism separated law from politics, but both the presupposition that political leaders are bound by law and the Protestant individualistic legacy of challenging the legal system and the state power existed.

The positivist *Rechtstaat* concept influenced the Russian lawyers of the end of the 19th and early 20th centuries. The legal positivist idea of the State being the only and ultimate source of law appealed to the Bolsheviks, who adopted it as the official Soviet legal theory (Alekseev, 1999; Berman, 1996). The Bolsheviks, however, did not consider themselves to be bound by law, but rather used law as a weapon to coercively change Russian society to correspond to their own communist ideals. During the Stalinist Era, the Soviet State systematically violated its own laws. Stalin's successors continued along the same line. Thus, the *Rechtsstaat* ideology was used in a centralist way. Even though the constitution guaranteed the Soviet republics sovereignty and national minorities autonomy, the ultimate source of law existed at the federal center and was defined by the Communist Party, which had taken the position of the tsar.

On the other hand, legal romanticism existed among Soviet lawyers. This romanticism saw the potential in law to develop a better society with legal methods (Alekseev, 1999). Such romanticism is actually elitist by nature. The idea is that specialists and other intelligent and brave individuals have an important role in challenging the existing rules and developing society. The role of individuals was so significant because of the absence of a civil society. Law governs society when law is left to lawyers who can create rules, which others then have to obey. Law and the rights of citizens stemmed from the government and its Leninist ideology. A good government was regarded as one able to take care of its citizens and offer them social and economic benefits in exchange for their political rights. The citizens themselves had no right to challenge the state power.

It was in the beginning of *perestroika* that the conception "*pravovoe gosudarsvo*" was brought into Soviet legal theory. This simply meant a return to the original *Rechtsstaat* idea according to which the state is bound by the laws, which it has previously promulgated and can only modify or repeal them by previously promulgated lawful procedures. Gorbachev also adopted, according to both American and German examples, the Constitutional Court as a judicial body to check the constitutionality of laws. After the new Russian Constitution of 1993, there has been a modern written legal source for interpreting constitutionality — the Russian principles of human rights and the rule of law. The Constitutional Court has played a significant role in developing constitutionalism because the new Constitution left many important issues open. Among the unsolved crucial questions are the principles of Russian federalism.

It seems obvious that, after the collapse of communism in Eastern Europe, American constitutionalism has become a model for both Russia and post-communist Central European countries. A written constitution and especially the judicial control of a Constitutional Court are understood as a necessity for constitutionalism (cf. Shul'zhenko, 1995:116). American constitutionalism can, however, not be the model through which Russian constitutionalism should be assessed, since the *Rechtsstaat* conception and legal positivism are closer to Russian tradition. The other even more significant difference in traditions is that there is no history of Russian rule of law but a history of more or less dictatorial autocratic rule (Istoriya…, 1999:260; Alekseev, 1999:56). Russian legal history has a lot in common with Western legal history, but there is one significant difference. In the Orthodox Christian world the church was always under the rule of the earthly Sovereign. Different rival sources of law never developed, and therefore citizenship did not develop in the Western way either. In Russian tradition, citizens are obedient subordinates who can complain and a good tsar may listen to them, but a citizen is not allowed to challenge the state power. The history before the Bolshevik revolution was one of delayed reforms and rule of law, which never managed to develop. Finally, the communists managed to develop a fallacy of constitutionalism, a repressive legal system and society without trust in the law and the judicial system. Before communist rule a constitutional monarchy existed for a while and constitutional democracy was tried before the Revolution without success (Istoriya…, 1999:260).

The problems not only include the absence of tradition but also the exceptional circumstances in Russia with corruption, crime, economic failure and social problems. Therefore, it is obvious that constitutionalism cannot function according to the highly developed and well-established American model due to the exceptional circumstances prevailing in Russia.[3] Legal and political culture has to develop simultaneously with legal rules. This is the real challenge for Russian transition.

Even if in many parts of the world constitution is regarded as a formal legitimizer of political power not as a guarantor of rights to the citizens there are, however, some minimum requirements, which can be set for constitutionalism to function. Rules should be acknowledged and transparent. Decision-making should be decentralized and rules and norms regarded as legitimate. It is not enough that the formal setting is correct with all the bodies of modern constitutionalism. It is the actual legitimacy that counts. At this stage of development constitutionalism and the rule of law can already offer a predictable environment and transparent rules of the game for industry and commerce.

1.3 Aim and Structure of the Report

This report aims at describing the Russian transitional process towards constitutionalism, decentralization and the rule of law by applying a holistic approach.

[3] It should not be forgotten either that the American model of constitutionalism is not the only one and does not constitute a self-evident model or starting point for evaluating the level of the rule of law in new or developing democracies. A good recent example representing more the earlier European traditions is the new Finnish Constitution of 2000, the drafters of which found a constitutional court unnecessary. Judicial control of the Constitution is, however, given to ordinary courts.

The starting point of the analysis is that the main reasons for the bad functioning or failure of constitutionalism are not legal technically but depend on the broader institutional framework: unstable economy, underdeveloped politics and corruption. Adopting a new constitution does not yet make a fundamental transformation. Legal and political culture must also be transformed.

The obvious vicious circle of transition gives weight to the unpleasant conclusion, which some scholars have drawn, claiming that it is impossible to develop democracy, a market economy and the rule of law at the same time (e.g., Tolonen, 1996; Elster, 1993). Rule of law, economics and politics are usually studied separately. Therefore, we do not know enough about their interaction. Eastern and Central European countries are now laboratories where this interaction occurs. These countries have been forced to rebuild the ship at sea (Elster *et al*., 1998). Social scientists, economists and law scholars have a lot to learn about the transformation process. The crucial question of transformation is whether the vicious circle can be broken down and how.

The question whether institutions can be changed and how, cannot be answered in this report; it can only be discussed. Institutions tend to maintain old mentalities and cultural habits, which again might prevent institutions from changing. Before anything can be said about whether or not institutions can be changed, we have to know how they function. The author of this report shares the point of view of institutionalists and the presupposition that the existing institutional setup in Russia is hindering the development of the rule of law, a market economy and democracy (Carlsson *et al*., 2000).[4]

The reforms have changed the Russian socialist economy into a virtual economy, which definitely was not the objective. We can also question whether the rule of law is also virtual at the existing stage of Russian transition. Another difficult question that is focused on in this study, is the role of law in transition, its limits, dependency on the surrounding society, and predominant institutional setup.

Even if the rights of an individual are the crucial question of constitutionalism, this report focuses only on the analysis of the legal framework, which constitutes a minimum requirement for the rule of law, and should be able to offer adequate predictable rules of the game for industry and trade.

The first part of the study focuses on the separation of powers between the federal legislative, executive and judicial organs. The Constitution of 1993 is presidential and emphasizes the executive power. However, the balance between the State organs has not yet been found. The Federal Constitutional Court has a significant judicial role in interpreting the unclear and disputed Constitution.

The second part of this study aims at analyzing the development of federalism. Russian federalism has traditionally contained an inner conflict between official centralism and unofficial decentralism. If the conflict cannot be solved, economic growth is effectively blocked.

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[4] Ramazzotti (1998) discussed the idea of dominant institutions or "dominant institutional setup persistent over time and extensive over economic space".

The third part briefly focuses on the attempts to introduce another form of decentralization — local self-governance into Russia.

2. The Power Struggle on the Federal Level and the Constitution

2.1 Origins of the Russian Constitution

2.1.1 Background of the Power Struggle after the Collapse of the Soviet Union

The Russian Federation was born as the successor of the collapsed Soviet Union. The collapse was finalized with an agreement between the Presidents of Russia, Ukraine and Belorussia on 8 December 1991 (The Minsk Treaty). The Russian Socialist Federal Soviet Republic (RSFSR), a former part of the Soviet Union, continued its existence from 1 January 1992 as a new independent state called the Russian Federation and as the State Successor of the Soviet Union responsible for the commitments of the Soviet Union. The Russian Federation carries on all the international treaties that were signed and ratified by the Soviet Union. This was one of the reasons why the United States demanded nuclear weapons to be moved from Ukraine and Kazakhstan to the territory of the Russian Federation. The other new States had to accede to international treaties and join international organizations.

There were several reasons for the collapse of the Soviet Union. The gradual reforms of the economy and the leading party, which Mikhail Gorbachev tried to push forward in a new political atmosphere of glasnost "openness", proved to be inadequate. When the Soviet citizens were finally allowed to criticize the State and the powerful Communist Party, the dams were broken and the prohibited nationalist feelings burst out. The total collapse of the economic system, which was based on pretended success, was suddenly visible to everybody.

The Union broke up even if the majority of the RSFSR had voted to retain the Union in March 1991. According to an opinion poll of 1994, 68% of the respondents thought that the Minsk Treaty was the wrong decision and only 16% were convinced that it was the right decision.[5] Furthermore, 76% of the respondents thought that the disintegration of the USSR worsened living standards (Rose and Haerpher, 1994:41). However, for Boris Yeltsin who won the Presidential Elections of the Russian Republic in June 1991, the splitting up of the Union gave him the opportunity to start economic and political reforms in Russia. He also received the full support of the leaders of the Western market economies, who regarded him as the guarantor of transformation into democracy, a

[5] According to another more recent opinion survey in 1999, 31% of the respondents saw the collapse of the Soviet Union as inevitable. Still a great majority (55%) of the respondents thought that the collapse of the Union should and could have been avoided. Almost half of the respondents of this survey (48%) also thought that the former Soviet republics are not capable of surviving and will be dependent on Russia also in the future (Kääriäinen and Furman, 2000b:66).

market economy and the rule of law. It was the proposed signing of the Union Treaty on 20 August that prompted the attempted putsch, and its failure gave Yeltsin and the Russian authorities victory. In the flush of victory Yeltsin even banned the Communist Party, which he himself had served for decades. The ban of the communist party, however, caused a lot of criticism and the Constitutional Court found it inconsistent with the constitution (see p. 35).

The Russian Republic did not have its own "republican elite" like the other republics. Therefore, the USSR federal agencies became Russian institutions as did most of the ministries, too. The new federation inherited a large and cumbersome federal bureaucracy, officials of which were accustomed to thinking in Union terms and obeying party orders. Republican elites in other Soviet republics were as authoritarian, but not as federal and center oriented as the former USSR federal bureaucracy. Even if the governmental organs had earlier been only ceremonial or bureaucratic organs and the party, which had decided everything, did not exist any more, there was both institutional and organizational continuity. The re-modeling, which had occurred, was the introduction of a presidency.[6] Under the old model, Yeltsin had worked as the chair of the Congress and its smaller Supreme Soviet, elected among the deputies, with a presidium of ministers and committee chairs to draft legislative proposals and to put them before the Soviet of Congress.

The new model separated the executive from the legislature. Since the executive was earlier officially submitted to the legislature, the separation of powers seeded a potential conflict between the legislature and the executive. In the new model, the president proposed leading ministers to the Congress, which could reject them as well as presidential legislative proposals. The President directed policy making but also the role of the Congress and its Supreme Soviet became much more significant. The deputies of the Congress, which had been elected with the Communist Party controlled elections, constituted the potential to oppose the reforms.

At the beginning of 1992, Yeltsin authorized price reforms and started the privatization program with his decrees without collaborating with the Congress. This shock therapy soon started inflation, which cut the savings of the citizens. The people, who had wished that democracy would bring a better life, were disappointed. The enthusiasm for democracy and a market economy started to cool. The regions found themselves in a new situation, where the federation now controlled the resources of the former Union, and where the reformers talked about decentralization. Three important issues namely, (1) the direction of economic reforms, (2) the nature of the federation and (3) the relationship between the President and the Congress, which lead to a power struggle and finally a total clash at the federal center.

By December 1992, the Congress started to challenge both the presidential powers and the reforms. President Yeltsin had to sacrifice Prime-Minister Yegor Gaidar and dismiss

[6] Presidency was first introduced to the Soviet Union during Gorbachev's era. The President (Chair of the Congress) was earlier a ceremonial figure, and the General Secretary of the Party led the country with the Politburo. Gorbachev was the first party leader who let himself be elected by the Congress as a President. Legal specialists proposed this change and Gorbachev hesitated because he thought that the Presidency did not belong to the Soviet conception (Kuznechov, 1996).

him. The reforms, however, continued under Viktor Chernomyrdin, and so did the conflict between the President and Congress. The Chair of the Supreme Soviet, Ruslan Khasbulatov, whose career in Moscow was dependent on his post and whose own home region Chechnya was one of the most separatist republics, had no other possibility than to encourage the power jealousy of the deputies. Most of them had no party or any other organization to support them when their careers as deputies would be over. The deputies knew that in the new environment most of them might not have the chance to be re-elected.

It would, however, be unfair to label the aspirations of the deputies with pure power jealousy. There was a legal basis for the claims of the Supreme Soviet for a leading role since, according to the then existing constitution of 1977, the Congress was the most important state organ. Sovereignty of the Parliament is one established form of democracy existing, e.g., in England. The leading role of the Supreme Soviet in Russia is, however, understood to have the same meaning as in 1917 when all the power was demanded to be given to the Soviets.

In April 1993, President Yeltsin tried to solve the deadlock with a referendum in which he was given a clear majority of votes in support of his policy. Yeltsin had already threatened the Congress several times before with a referendum. He counted on his popularity and Russian willingness to support their leader when asked and, not dependent upon their personal opinions about the dispute. Results of an opinion survey made in June and July 1993, showed that the opinions of the citizens on the debated issue were quite dispersed. About 30% were in favor of a strong Congress, which should have the power to stop the President taking actions that it objects. Another 30% were in favor of a strong presidency. The rest would have preferred some kind of checks and balances and no supremacy of any state organ (Rose *et al*., 1993:38).

The Russian political elite showed its incompetence by compromising. The Supreme Soviet did not change its position. Nor did Yeltsin try to find a compromise, but used his victory in the referendum to legitimize his “more democratic” standpoint. A new constitution was needed, but the drafting process did not make any progress. The President had set his drafting committee, while the Supreme Soviet worked with its own competing draft. Such round-table discussions as the post-communist Central European countries organized to draw the whole population, including the opposition of the former communist rulers, to take part in the decisive historical turning point of values, morals and philosophy would not have been possible in the bitter power struggle circumstances in Russia.

Yeltsin broke the deadlock by dissolving the Parliament in September 1993. Whether the President had the right to dissolve the Parliament is still a disputed issue among Russian lawyers (see p. 35). However, from a purely legal point of view dissolving the organ, which according to the constitution was the Sovereign, was actually a presidential *coup d’etat*, which lead to an armed conflict. Some of the deputies refused to leave their posts and found also armed forces to defend them. There was a hectic struggle behind the curtains for the support of the army. Yeltsin won even this struggle and the armed forces stormed the parliament building, the so-called White House in October 1993.

Compared to the development in post-communist Central European States, such as Poland, Hungary and Czechoslovakia, there is a difference in both the values and means of introducing democracy. In those countries, the people saw the change as a return to their earlier European values (Skapska, 1999a). Multiethnic Russia, which had been unified with the help of super power mentality, had lost Eastern Europe, the Union and, as the Russians soon found out, also its significant international position. Instead, it had gained only an unstable economy and a shaky "democratic" governmental structure with a hectic power struggle. The Russians are clearly aware of their genuine cultural character. Opinion polls show that a great majority of Russians (78%) in the poll prefer to develop Russia according to their own traditions. Only 22% of the respondents answered that Russia should rather be developed according to Western European traditions (Rose and Haerpher, 1994:23).

Another significant difference between Russia and the above-mentioned post-communist Central European countries is that in the latter a non-communist opposition already existed, while the power struggle in Russia occurred between former communists who seem to be people drawn to politics to get economic and social benefits from the party.[7] The unwillingness of the communist bureaucracy to refrain from power and the fear of losing both the earlier benefits and the fruits of privatization caused other even more violent struggles in such former Soviet republics, where the nationalist movement managed to get into power. *Coups* and civil wars in Georgia, Azerbaijan and Tajikistan are typical examples of the authoritarian mentality of the *nomenklatura* and unwillingness to accept other fractions in power. Only the Baltic States are an exception; the former communist leaders accepted to wait for the next elections. Roeder (1994), in his article analyzing authoritarian and oligarchic tendencies in post-soviet states, claims that the Soviet bureaucracy preferred an autocratic leader to keep its own position secured. This is most certainly a significant factor hindering development towards democracy, a market economy and the rule of law.

Authoritarian rule is typical in all post-soviet states. In Russia, President Yeltsin was determined to push the reforms ahead to make it impossible to return to communism. Principles of democracy were forgotten in the power struggle. Similar situations are well known from Latin America where democracy has been sacrificed for economic reforms. Latin American experiences also show that democracy has been even more difficult to develop after its rude rejection. It is often claimed that economic reforms will slow down or stop if they are not pushed ahead determinedly or even dictatorially. In democratic circumstances shock therapy is definitely going to face resistance (Elster, 1993). President Yeltsin, however, chose a pretended democracy and authoritarian leadership instead of either an open dictatorship or democracy.

In the Russian environment, Yeltsin's choice may not have been a conscious choice between different alternatives but a result of path-dependent development.

[7] However, according to Skapska in Poland the historical moment to create a constitution as a new social contract was lost. The post-communists, who won the next elections because of their heavy criticism of the results of the shock therapy of the government formed by the coalition of Solidarnost and the new conservative, took over the constitutional process leaving the opposition out of the drafting process (Skapska, 1999b). Communist uncompromising and authoritarian mentality in dealing with politics does not change easily.

Authoritarianism is a tradition in Russia and the Soviet Union. The attitude to State power is totally different from Western approaches. The ultimate power center of the State always has the last word. The citizens are obedient subordinates who can complain but cannot challenge the State power. While in the United States constitutionalism is regarded as limitations of the State power, the state in the Soviet Union existed to take care of the needs of the obedient citizens. Berman (1983) shows, in his study on the formation of the Western legal tradition, that the rivalry between the church and the states developed a new type of citizenship in Western culture, where citizens could challenge the power. The development, which started from what Berman calls the Gregorian revolution, gradually developed into the rule of law and democracy. Leaning on Max Weber's famous "Die protestantische Ethik und der 'Geist' des Kapitalismus" from 1904/05, he also claims that the Protestant revolution in the 16th century shifted the development into a more individualist trail allowing liberalism and capitalism to grow.

In Russian Orthodox Christian tradition, only one absolute power center existed, which did not allow its subordinates to challenge the earthly power, which also represented God on earth. Stalin was able to use this mentality of the people and threaten them with terror. Intellectuals, who had or could have had differing opinions, were made examples of what happens when one might want to challenge the power. President Yeltsin, on the other hand, was supposed to be a good tsar, who puts things in order. When he withdrew from power asking the people "to forgive his failure", the same hopes were vested in Vladimir Putin.

2.1.2 "Yeltsin's Constitution" — Legacy of Authoritarian Rule

Elections for a new Federal Assembly were announced for December 1993 and a new presidential constitution was drawn up.[8] The reformers, however, lost the elections and failed to win a majority in the new parliament. The peace between the executive and legislative was an uneasy one. As a result of the fight, the executive rule strengthened. The result of the elections shows that not only the economic reforms had disappointed the people but also that the bloodshed at the White House had been a deep disappointment to many Russians. "Democracy" had brought them bloodshed and economic difficulties. The president, who had resorted to arms, was the same man who had become a hero of the unarmed resistance against the putsch in August 1991.

The constitution, which had been drafted under the Presidential Administration, was accepted in a referendum on 12 December 1993. The citizens were asked whether they accepted the constitution or not. Textbooks of constitutional law explain that the referendum was considered to be the most democratic way to accept the constitution (Shul'zhenko, 1995). The reason for using a referendum was, however, that President Yeltsin could not push his constitution through in the Supreme Soviet in a parliamentary procedure. The text of the constitution was officially published only on 9 November 1993. The citizens had a whole month to become acquainted with the constitution. There was no time for wide democratic discussions. The constitution was introduced

[8] The first commentary on the constitution, which was written by the specialists who drafted it, explains that the draft was chosen because it was more "juridical" than its competitors (Konstituciya..., 1994).

with an attack, leaving the citizens only an opportunity to vote either for or against President Yeltsin. In such situations, Russians tend to support their leader. Knowing that elections and referendums in the Soviet Union was simply a ritual to legitimize already made decisions and that in elections the citizens were supposed to show loyalty to the state power, the results of the referendum turned out to be even worse. Almost half of the voters did not bother to go to the polls and almost half of those who did, voted against the President. The result of the referendum also reflected the dispute between Yeltsin and regional leaders.

According to the Presidential Decree on Referendum (N. 1633) of 15 October 1993, the Constitution had to be supported by more than half of the voters. The Central Election Committee announced that 56.63% of those entitled to vote participated in the referendum and that 58.6% of them voted in favor of the Constitution. From these figures, Yeltsin's critics have calculated that only about one fourth of the voters actually accepted the Constitution.[9] It is not difficult to agree that in spite of the formally democratic way to introduce the Constitution — a referendum — the legitimacy of it is rather low. It hardly received the needed support from the citizens, who could not have been well informed about the contents of the basic legal document that they were asked to support. Besides, they were unsure whether a constitution matters at all. According to an opinion survey half a year after the elections, 57% of the respondents thought that they did not believe that the constitution could ensure a lawful and democratic state. Only 17% held the opinion that it would. 79% of the respondents who did not vote in the referendum explained that the primary reason was that it would not make any difference. 56% of those who did not vote admitted that they did not understand what it was all about (Rose *et al*., 1993, 38–39, 46).

The referendum formally legalized the Constitution. Since the citizens were drawn in the process only formally, the Constitution cannot be called a "Social Contract" of the new society, unless it is accepted that a social contract can be forced upon the citizens. However, the idea of social contract itself as the other ideals of Enlightenment, which constitute the foundation of existing European and North American constitutions, were neither born in a democratic process nor without bloodshed. Introducing "Yeltsin's constitution" reflects traditional Russian understanding of the citizens as obedient subordinates. The omnipotent state changed the basic document containing the division of state powers and the aspirations of the state to take care of its citizens. The citizens could participate in the process by casting their vote for the new basic document.

Drafting a Constitution in such a short time is a remarkable achievement by Russian constitutional specialists. However, such a Constitution does not necessarily reflect either widely shared values of the population or an agreement of the political elite on the division of political power and economic resources in the huge multicultural and multiethnic State. It is a typical constitution of a young and still shaky democracy with a fierce power struggle. Political power was more important than legality, but this fact has not been openly admitted. Rather, it has been disguised in a pretended rule of law and pretended democracy. The word democracy suffered a serious inflation in the

[9] Anatoly Luk'yanov, Chair of the Duma Committee of Legislation and Court Reform, even suggested that the referendum did not fulfill the requirements of the law on elections and that there were "millions of extra votes included" (Luk'yanov, 1999).

power struggle between the legislature and the executive. Democracy is understood cynically as a slogan covering autocratic rule.

2.2 Powers of the President

2.2.1 Strong Presidential Power

Legislative power in the Russian Federation belongs mainly to the Federal Assembly, which has two chambers: the Federal Council and the State Duma. The President is the Head of the executive power but also has important legislative and nomination powers. The Government works under the President and is responsible both to him and the State Duma. The President can dismiss the Government, but he can also dissolve the State Duma when he disagrees with its lack of confidence given to the Government. The modern judicial control, which is typical in Central and Eastern European countries in transition, also exists in Russia. The Constitutional Court is the judicial organ, which can resolve disputes between federal state organs as well as federal and regional organs and consider the consistency of legal norms with the Constitution. The Court also examines the constitutionality of laws in a concrete case upon the request of individual citizens.

The Presidential nature of the Russian Constitution is clearly a result of the power struggle, which the president won. Strong presidential power seems to be quite typical for young and unstable democracies. Carl Schmitt favored strong presidency for the Weimar Republic because he saw that in exceptional circumstances there has to be one person who can act quickly to defend the fundamental rights of the nation (Dyzenhaus, 1997:70). The Weimar republic had a strong presidency but President Hindenburg was too weak to defend the weak democracy against an even stronger aspirant to power. Perhaps transition to democracy does not only need a strong leader but also enough democrats? In Russia, there is a huge bureaucracy willing to support authoritarian rule and for which democracy may constitute a threat.

In France, de Gaulle supported similar ideas of strong leadership to pilot the country through difficulties. In Latin America, strong presidency is also typical causing heavy power struggles for the presidency. The disadvantage of a strong presidency is that it is very much dependent on the personality of the President. A power-seeking president may start to act in a dictatorial way. Critics of a strong presidency referred to foreign examples and saw that a strong presidency tends to hinder parliamentarism to develop (Kulyabin, 1992). As a compromise, the presidential term was limited to two four-year terms to prevent the president acting in a dictatorial way (Konstituciya…, 1994). A strong presidency also seems to be a system, which is difficult to get rid of.[10] Authoritarian rule is quite persistent to changes.

[10] In Finland, where a strong presidency was established as a result of the civil war in 1918, it was abolished only with the new constitution of 2000. One reason for the long survival of the strong presidency was the threatening foreign political situation, which was explained to require a strong leader above the political parties. In fact, this expression meant that democracy could not always have been taken into account.

A strong presidency itself is a new phenomenon in Russia (see p. 8). Strong leadership, however, is not new in Russia. Yeltsin actually continued the style of party secretaries and those of the tsars before them. The need for a strong authoritarian leader is an established tradition and something that people start to long for when they are lost and need someone to make the decisions for them. Opinion surveys, however, show that the Russians do not necessarily trust a strong presidency. In 1996, only 4% of the respondents accepted that the President was ruling by decrees without any parliamentarian veto, 44% accepted the rule by decree but with parliamentarian veto, 31% rejected the rule by decree and approved parliament overruling the president, and 21% rejected either unilateral power ruling by decree or vetoing. In the same poll, 65% of those questioned were in favor of some kind of checks and balances (Rose, 1996). Compared to the survey of 1993, it seems that the disappointment in President Yeltsin showed increasing distrust in a strong presidency. Those who preferred a strong parliament remained about the same, but those who trusted a strong presidency earlier seemed to have been disappointed (cf. Rose *et al*., 1993). Rose (1996), however, interprets the results that they do not necessarily prove that a strong presidency itself is rejected or that the people would consider some other alternative. The trust in President Putin before the presidential elections, without knowing anything about his political or economic program, shows that people are ready to put their trust in a new Savior with the likely result of being disappointed again.

2.2.2 Presidential Elections

The President is elected for four years (Article 81 of the Constitution). The candidates must be at least 35 years old and have had a permanent residence in Russia during the last 10 years. The elections are general, direct and free. If there are more than two candidates and no one receives a majority of the votes, a second election must be held between the two candidates who received the most votes. According to the constitution, the same person cannot be elected for more than two terms. Limiting the terms was considered to be important because the Russian president has so much power that unlimited terms could make him a lifelong "dictator" (Konstituciya…, 1994).

A new and extremely detailed Act on Presidential Elections was passed on 31 December 1999 (No. 228). It regulates, in a detailed manner, the pre-election campaign and rules for sponsoring the candidates. Sponsoring and advertising by state or municipal officials, army officials, and other than Russian citizens or organizations are forbidden. The act also forbids any propaganda against the unity of the federation, the constitutional structure (!) or containing social, racial or nationalist hatred or any other misuse of publicity (Article 53).

The background for such rules is President Yeltsin's rallying for the second round and defamation of his competitors. The campaign was sponsored by the oligarchs whose wealth stems from dubious privatization and who found it appropriate to threaten people with a return to communism. The present rules for campaigning are such that anything negative said about the competitors may, in principle, cause a lawsuit. The new rules

actually improve the possibilities of a sitting president who receives free publicity because of his official tasks. He already has the advantage of his existing power.[11]

2.2.3 The President and the Government

According to Article 83 of the Constitution, the president appoints the head of the government with the consent of the State Duma. The president chooses a candidate and presents him to the Duma, which can either accept him or not within one week. If the Duma does not accept the candidate, the president must make another proposition. If the Duma disapproves of the candidate three times, the president can order new parliamentary elections (Article 111). This system enables a fast nomination of the Prime Minister. The threat of premature elections is a strong weapon in making the Duma agree with the president. The first commentary of the constitution explains that this provision is to make sure that the parliament and the president agree on the candidate (Konstituciya…, 1994, p. 483).

In 1998, President Yeltsin used the possibility of threatening to have new elections in order to force the Duma to accept his candidate. When he chose Kiriyenko and the Duma disapproved, he proposed the same candidate two more times. Twice the Duma disapproved, but finally approved so as to avoid new elections. Refusing to change his candidate after the disapproval of the Duma is quite an interesting interpretation of Article 111 from President Yeltsin. It is not mentioned in the Constitution that it should be a different person every time. President Yeltsin's interpretation, which has become the leading interpretation, however, contradicts the original idea of the drafters of finding a compromise.

The president also appoints the ministers upon the proposal of the chairman of the government. There is no such practice that the government should represent the majority of the parliament. In fact, it seems that it is personal relations that count most. This is possible because the party system is still so weak in Russia. The ministers do not represent their party in the first place, but the president. The Prime Minister is a humble assistant of the president. According to Article 83, the President can also preside at sessions of the government; he can also overrule government decrees. President Yeltsin very often used these powers, too.

President Yeltsin also used to dismiss and appoint ministers according to his own wishes. According to the constitution, the president is entitled to dismiss the government even in the absence of a lack of confidence from the Federal Assembly. President Yeltsin used this power in 1998 when he dismissed Chernomyrdin's government. Also, the Duma has the parliamentary right to dismiss the government by giving its lack of confidence. However, in such situations, the president has the right to

[11] Acting President Putin's popularity, on the other hand, was based on the Chechen war, which has been carried on with the help of a propaganda campaign against an ethnic group — the Chechens. Furthermore, President Putin's decision not to publish his program before the elections thereby preventing it from being "torn apart" in the campaign reflects the Kremlin's leadership strategy of counting on the people's readiness to support a leader simply because he is the leader. Tsar Boris chose a successor who is hopefully going to be a "good tsar".

dismiss the Duma if he disagrees with its lack of confidence. Such a provision reduces parliamentarism to a minimum and the role of the government to a tool of the president.

2.2.4 The President and Legislative Power

The president also has a lot of power in the legislative process. Firstly, he has the initiative right for federal acts to the Federal Assembly (Article 104). The initiative right is largely spread in Russia. It is also given to the Council of the Federation or its representative, the State Duma or its deputy, the Government, as well as similar organs of the subjects of the federation.[12] Also the Supreme Court, the Supreme Arbitration Court and the Constitutional Court have the same initiative right. Even if the initiative for laws is widely spread, the President has the best resources for drafting them. The Presidential Administration has been active in initiating laws, which have been better drafted than those of many other initiators. The largely spread initiative right produces drafts of various quality and sometimes drafts competing with each other.

Before any act passed by the Federal Assembly comes into effect, the president has to sign and confirm it (Article 107). If he refuses to sign the act within 14 days, the draft law has to be sent back to the Federal Assembly. The Federal Assembly can break the veto of the president by accepting the draft with a qualified majority of two-thirds of the votes in both chambers. In such circumstances, the president has to sign the act within seven days. A refusal to sign under these circumstances on the ground of irregularities in the voting has been held as unconstitutional by the Constitutional Court in April 1998 (6 April, No., 11, P).

President Yeltsin used his veto rights often, but the Federal Assembly was seldom able to break his veto. This was due to the absence of political consensus in the State Duma.[13] While President Yeltsin had to struggle with the Duma, which often had different ideas about legislation, President Putin managed to pave the way for a strong and quite undisputed presidency mainly by creating a new party "Unity", the only program of which is to support the sitting government.[14]

The most important of the President's legislative powers has obviously, in practice, been the power to give decrees (*ukaz*) and regulations (*rasporjazhenie*) (Article 90). Usually decrees are used for the most important enactments and regulations for individual administrative matters. In the hierarchy of norms, presidential decrees are under the federal laws (*zakon*). Above the laws there is the constitution, which laws and other norms are not supposed to contradict. In the hierarchy of norms, presidential decrees supplement federal laws with more detailed rules which, however, should not contradict the law above.

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[12] The common concept for the republics, regions, territories, cities and areas is subject of the federation, see p. 43.

[13] In the Duma, elected in 1995, the presidential veto was a powerful weapon because of the absence of political consensus in the State Duma. The Communists and the Liberal Democrats would have had a qualified majority had they only been able to agree on breaking the President's veto. Those parties, however, detest each other and were, therefore, unable to resist the President.

[14] In the elections of the State Duma in 1999, the "Kremlin Party" won 77 seats, which made it the second largest party after the Communists, who received 113 seats. A great number of independent deputies (100) gave more influence to the power party "Unity".

Under presidential decrees there are governmental decrees (*postanovlenie*) and regulations (*rasporjazhenie*). As a rule, decrees are normative and regulations treat routine administrative matters. The President has the power to repeal governmental decrees if he finds them contradicting the constitution, federal laws or presidential decrees. Ministries, state committees and other departments issue decrees, instructions and regulations, which are not a matter of constitutional regulation. Ministers can issue orders (*prikaz*) and instructions (*instrukzija*). Earlier, such administrative regulations were important but nowadays the large amount of more detailed parliamentary laws and presidential decrees have diminished their importance.

Constitution (*Konstituciya*)

Law of the Federal Assembly (*zakon*)

Presidential Decrees and Regulations (*ukaz, rasporjazhenie*)

Governmental Decrees and Regulations (*postanovlenie, rasporjazhenie*)

Instructions and Orders of Ministries, etc.

Diagram 1: Hierarchy of Federal Norms.

Presidential decrees have gained an extraordinary status in Russia because there are gaps in legislation. In many important fields of jurisdiction, there is no legislation or the legislation stems from the Soviet period. In such cases, the country has been governed by the decrees of the President. Such a decree is supposed to be intermediary until the law of the Federal Assembly has been passed. The Constitutional Court has accepted this practice due to gaps in legal norms (30 April 1996, No. 11, P). Yeltsin was, however, often accused of misusing his power by refusing to sign the new law prepared by the parliament only to continue the lifetime of his decrees.[15] The privatization of state enterprises was governed by presidential decrees even though a law existed.

President Yeltsin even widened the presidential veto with his own interpretation of the constitution. Citing Article 80, part 2 of the constitution, which describes the president as the guarantor of the constitution, he took the right to return without signature any piece of legislation that he believed to be unconstitutional or if "procedural violations" were committed in its passage. In practice, the president can return any bill he does not like and can therefore block legislation even without having to use the official veto right. The constitutional court has denied only the use of such unofficial veto in such cases where the Federal Assembly has broken the veto of the president (cf. p. 16).

Presidential decrees also enter an astonishingly wide range of subjects. There is, for instance, a decree on the legal system presenting the division of different branches of the law, an issue that would belong to jurisprudence in most countries. The President signs his decrees independently without the consent of the Government or the

[15] Of the 897 laws passed by the Duma over the period 1994–1997, 262 (25.9%) were vetoed at least once by the Council of the Federation and 263 (29.3%) were vetoed at least once by the president. Furthermore, 30 bills were vetoed more than once by the Council of the Federation and the president exercised multiple vetoes 23 times (Remington, *et al*., 1998:301).

corresponding minister. The drafters of presidential decrees work for the Presidential Administration and are appointed by him.

On the other hand, President Yeltsin also used his veto right several times quite wisely in acting as the guarantor of human rights (Article 80.2). The Law on the Freedom of Religion is one good example. This law was corrected to a more equal form after Yeltsin's veto. The first law, which Yeltsin refused to sign, favored the Orthodox Church so much that representatives of other churches regarded it as unequal and violating the principle of the constitution that Russia is a secular State, which does not favor any particular religion. Another example of a law that Yeltsin vetoed on the basis of violating human rights is the law, which would have forced every foreigner entering the Russian Federation to take an AIDS test.

2.2.5 Nomination Power and Other Important Powers of the President

The president also has the power to nominate the candidacies for the Constitutional Court, the Supreme Court, and the Supreme Arbitration Court of the Federation (Article 83, e). It is the Council of the Federation that appoints this high judiciary. The same goes with the Procurator General (see p. 33). According to the Constitution the President appoints all the other judges of federal courts. To ensure the separation of executive and judicial powers a collegium of judges approves the candidates before the appointment of the President. Such nomination power is not regarded as supremacy of executive power over the judicial one but reflects the idea of the President functioning above the whole political system.

In practice, the Federal Assembly has rejected the candidacies nominated by the President several times. Yeltsin also used his power to propose dismissals of high judiciary. Dismissing the Procurator General Yuri Skuratov in January 1999, who was too eager to investigate financial transfers of the family members of the President and those of his assistants to Swiss banks, caused a scandal. The official reason for dismissal was exceeding his authority, which was seasoned with a secretly shot sex video of Mr. Skuratov with prostitutes that was broadcasted on national television news. With the video, the Kremlin suggested that the Procurator General may also have connections with the organized crime and was not more reliable than those whom he investigated. The Council of the Federation did not agree with Yeltsin. In December 1999, the Constitutional Court, however, approved that the President had the right to suspend the Procurator General during the investigations of him potentially exceeding his authority even without the consent of the Council of the Federation (1 December 1999, No. 17, P).

The President also appoints the Security Committee (Article 83 g). This organ, lead by the President, became very important during the Chechen War. The Security Committee made all the important decisions concerning the war completely without asking the consent of the parliament. Such an arrangement means, in practice, that the President can direct military operations within the Russian territory against the Russian population when he considers that the unity of Russia is threatened. According to the Constitution, the President has the power to introduce an extraordinary situation on the Russian Federation or in a particular locality, but he must immediately notify the Council of the Federation and the State Duma. The Chechen war was, however, started in 1994 on the basis of secret Presidential Decrees without introducing an extraordinary

situation and without notifying the Parliament. The Constitutional Court found Yeltsin's decrees not contradicting the constitution because he acted to defend the unity of Russia. The decision of the court was not unanimous and the dissenting opinions show that the judges have a high respect for the rule of law. The majority of them, however, seemed to have been more concerned in maintaining the legacy of the executive than opening the dangerous discussion on the limits of power and the rights to challenge power when the unity of the federation is at stake (see p. 46).

The President also nominates his own administration (Article 83, i, j). He governs a huge bureaucratic administration with a lot more personnel than the parliamentary administration. This administration prepares drafts for laws and presidential decrees. Also the coordination and supervision of the executive power of the subjects of the federation is located in the Presidential Administration. Such a huge administration guarantees the president good resources to lead the country. The presidential administration has gradually developed into a super agency governing the whole executive power in the federation and in its subjects.

As the Head of State, the President represents Russia in international relations and directs its foreign policy (Article 80.4). The President conducts negotiations with foreign States and signs international treaties, signs the instruments of ratification, etc. (Article 86). The President is also the Supreme Commander-in-Chief of the Armed Forces of the Federation (Article 87.1). The President confirms the Basic Provisions of the Military Doctrine (Article 83, h). He also appoints and dismisses the high command of the Armed Forces (Article 83, k). The President has the right to declare a military situation which he must immediately inform the State Duma and the Council of the Federation about (Article 87.2). However, he does not have the right to declare war.

2.2.6. The Future of a Strong Presidency

At the end of 1997 there was a discussion on constitutional reform.[16] One of the most important reforms was considered to be diminishing the power of the president and strengthening the role of the parliament. There was even a draft for changing the constitution in the Duma in 1998, but it did was rejected there.[17] There are a lot of legal specialists who consider that such strong powers of the President leave almost no room to develop parliamentarian democracy in Russia.[18] The arguments that were expressed against a strong presidency before introducing the constitution of 1993 have proved their value. A strong presidency was then already argued to lead to half-democracy and authoritarianism (Kulyabin, 1992). Authoritarian rule, once established, is not likely to

[16] The discussion was launched by V.L. Sheinis, a deputy in the Duma (Sheinis, 1997). A lot of specialists in constitutional law took part in the discussion. Finally, even a specialist, who worked in the Presidential Administration, recommended drafting a completely new constitution (Satarov and Krasnov, 1999).

[17] After President Yeltsin's resignation, new parliamentary and presidential elections, there is still a draft on constitutional reforms. During his election campaign, President Putin took part in the discussion suggesting that the presidential term should be extended to six years. President Putin's success in the elections created a new political environment, where the president's opinion on his powers is a crucial factor in the direction the potential constitutional reform should take.

[18] Nersesyanc (1999:380–382) put this opinion by clearly stating that the excessive powers of the President make the separation of powers asymmetric and unbalanced and is the main weakness of the Russian Constitution.

easily change into a balanced democracy. There is a huge presidential administration backing authoritarian leadership and the gains of a strong presidency.

President Yeltsin interpreted his powers quite widely and even exceeded them when he felt that he had a good reason to. His wide interpretations of the constitution also paved the way for a strong presidency in the future. Russians seem to complain about authoritarian mentality, at least when the President is not able to solve the economic and social problems of Russia. Complaints about President Yeltsin's rule by decrees did not, however, prevent Acting President Putin from succeeding by using the image of a strong president.[19]

In other post-communist European countries, reforms and their results have lead to changes of government. In Russia, President Yeltsin dismissed and appointed one government after another but directed the policy himself. Even if economic reforms have been lead by a strong president, in spite of the resistance of the Federal Assembly, economic policy has not been steady and firm. President Yeltsin chose to try to keep his own popularity at the cost of changing governments and a jumpy economic policy. Even if his leadership was autocratic, he was not immune to the opinions of the people. Opinion surveys show that the Russians largely blamed President Yeltsin, the Government and the Presidential Administration for the economic problems. Only the Mafia (whatever the respondents may have understood by Mafia) scored even "better" in being responsible for the economic problems (Rose, 1996:12–13). However, in spite of all the complaining, the people eagerly elected the same corrupted Kremlin power clique to stay in power even in the absence of any economic program.

Even if presidential powers were to be diminished, changing the Constitution is very difficult. It would require no less than three-quarters majority of the total number of the members of the Council of the Federation and no less than two-thirds of the total number of deputies of the State Duma and, of course, the signature of the President within 14 days (Article 108). In addition, a change of Constitution does not come into force before the two-thirds of the legislative organs of the subjects of the Federation have approved the change (Article 136). Changing the Constitution was deliberately made difficult to prevent constant changes in the constitution, which the earlier Supreme Soviet had made with two-thirds majority, and to also secure authoritarian presidential power in the future.

2.3 A Parliament without Parliamentarism

2.3.1 Structure of the Federal Assembly

According to the Constitution the two chambers of the Federal Assembly are equal but have different powers. In enacting legislation the State Duma is, in practice, more important since the process starts there.

[19] A typical Russian phenomenon was that Putin's image and power encouraged ordinary people to turn to his election campaign office with their own personal social problems.

The model for the structure of the Council of the Federation has obviously been the United States Senate. In the Russian press the Council of the Federation is often called the Senate and its members senators. The members, two from each subject of the federation, represent the interests of the regions. According to the constitution, one of the members representing the subject comes from the legislative and the other from the executive body of the State Authority (Article 94). The Constitution does not regulate how the members are chosen. The members were elected for the first Council of the Federation under the new Constitution. Even then 67% were officials of regional and local governments. Their term was, however, only two years. In June 1995, a new law made the Council of the Federation a permanent organ, the members of which are the head of the legislative organs and the heads of the executive organs of each of the subjects. This means that there are no general elections and changes of individual members occurring every year. However, the Council cannot be dissolved. It is, in principle, always in session but in practice the heads of the subjects of the federation are busy with leading their own regions. The rise in the status of the Council made it less effective in the legislative process. The new law also increased the power of the president. By 1995, the President had done a lot to make governors loyal to him in each corner of the federation (see p. 42).

The State Duma consists of 450 deputies and is elected every four years. The elections are held on the basis of the Federal law on the Elections of Deputies of the State Duma of 2 June 1999 that was passed to replace the previous law of 21 June 1995, which had been in force for only four years. Half of the deputies (225) are elected according to the majority rule from one-man constituencies. The other half (225) is elected according to proportional vote. This compromise between two electoral systems was already created with the electoral law of 1995.

The new electoral law regulates detailing the registration of candidates, the duties and contents of the electoral committee, rules for financing the campaign, and advertising on television, in a similar way as the presidential electoral law (see p. 14). According to Russian lawyers a detailed law should establish clear rules.[20] However, detailed regulation does not necessarily lead to the rule of law. In the last elections in 1999, the election committee applied the strict rules of sponsorship and the obligation to inform about all sources of income to arbitrarily drop some candidates out of the list, but did not apply the rules to every candidate in the same way. In this way, the election committee managed to drop a lot of Zhirinovski's liberal democratic candidates out of the lists with the help of obscurities in formalities.

Financially, the Federal Assembly is autonomous, determining its own expenses in the State budget. It also determines its own internal structure and procedures being guided only by the constitution itself. In practice, the chambers sit separately, in different buildings in Moscow and also have their own support personnel. The reason for the sharp separation is that the chambers should work autonomously (Parlamentskoe…, 1999) and not be able to unite to challenge the president.

[20] Matejkovich (1998) whose opinion is expressed in the context of regulating the parliamentary and governor's elections of the subjects of the federation.

The constitution requires that both chambers form committees and commissions to prepare and give advance consideration to draft laws and hold hearings. There are a lot of committees and commissions and each member or deputy must serve on at least one committee.[21] The State Duma elects the chairmen of the committees and commissions. In the Council, the election is done at a session of the committee. If the contents of the government do not have to reflect the result of the elections of the Duma, the distribution of the chairmanship of the committees and commissions do not either. The election of the Chairman and the chairs of the commissions and committees caused a scandal in the Duma, which started its work in 2000. President Putin's party[22] Unity (Bears) allied with the communists and elected communist Gennady Seleznyov the Chairman, shared the chairs among themselves and left the others almost without anything (Russia Today, 2000a,b). Specialists of constitutional law have, however, suggested that the memberships and chairs of committees and commissions should be delivered according to the principle of proportional representation of each party, arguing that in other countries such a rule exists even without any legal regulation (Gorobec, 1998:34). Russian politics, however, does not cultivate skills of cooperation and compromise. It even seems that harsh authoritarian crushing of enemies is regarded as successful leadership in Russian underdeveloped political culture.

2.3.2 The Legislative Process

In principle, the Federal Assembly is independent in enacting legislation. However, the powers of the Federal Assembly are not unlimited. Some laws can be adopted by referendum, bypassing the Parliament, and during a military or extraordinary situation laws may be suspended. The Constitutional Court may declare laws of the parliament unconstitutional. International treaties may take precedence over laws. The President has a veto right to laws, which a two-thirds majority of both chambers can break. There are also certain laws on finances, which may be enacted only when the Government has submitted an opinion regarding them.

The legislative process of the Russian federation may be divided into eight major stages (1–8). Legislative initiative (1) is rather widely spread. However, all draft laws must originate in the State Duma, including those initiated by the Council of the Federation. Draft laws are registrated and supervised by the State Duma.

Excluding the law on the budget, laws undergo three readings in the State Duma (2). The basic provisions of the draft law are discussed during the first reading. The Duma may adopt the law at the first reading and establish a time for the second reading, reject the law, or in principle even adopt it as final at the first reading. Amendments to the first draft are sent to the committee responsible for the draft. The revised draft is then submitted to the Duma for the second reading accompanied by the tables of rejected and supported amendments. The version adopted at the second reading is then sent to the committee, which edits the draft to eliminate internal contradictions and correct style. After this task is completed the draft it sent again to the Council of the State Duma within seven days for inclusion on the agenda. After the third reading the draft cannot

[21] A complete list of parliamentary committees and commissions can be found in Parlamentskoe… (1999, p. 49).

[22] The leader of the party is Mr. Sergei Shoigu.

be returned for further amendments or discussion as a whole. The majority of votes is required to adopt a federal law and a two-thirds majority for a federal constitutional law.[23] A constitutional law is one that touches the constitutional rights and duties of the citizens.

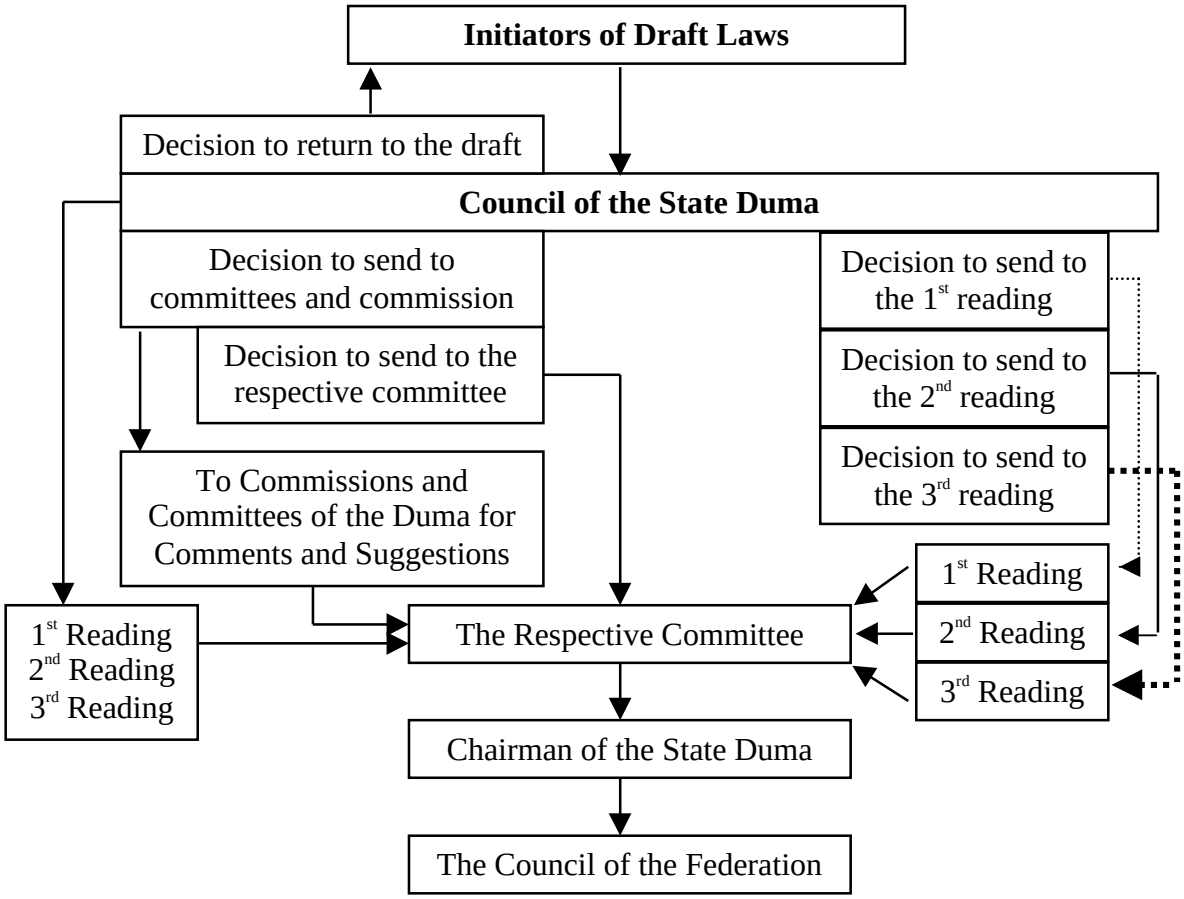

Diagram 2: Legislative Process in the State Duma.
(Source: Parlamentskoe…, 1999, p. 106).

After being adopted at the third reading, the draft is sent to the Council of the Federation (3) within five days (Article 105 [3]). If the law involves expenditures to be covered from the federal budget, the draft law has to include the Opinion of the Government.

According to the Article 105 (4) of the Constitution, the Council of the Federation must consider federal laws within a 14-day period. According to Article 106, federal laws

[23] A constitutional law concerns a question that has not been taken into account in the constitution and is a law, which would require changes or amendments to the constitution (Krest'yaninov, 1995). Such a law requires a two-third majority in the State Duma and a three-quarter majority in the Council of the Federation (Article 108).

relating to the federal budget, federal taxes and charges, financial, currency, credit, and customs regulation, monetary emission, ratification and denunciation of international treaties, the status and defense of the state boundary of Russia, and war and peace have to be considered by the Federal Council. Other federal laws, which the Council has not considered within the 14-day period, are sent to the President for signature and promulgation. In practice, this period has been impossible to comply with. The Constitutional Court interpreted the Constitution in March 1995 (23 March, No. 1, П) considering that the 14-day period refers only to the commencement of consideration by the Council of the Federation. It is not required that the consideration be completed within that period. There have been plans to change the Constitution to extend the period. Especially after the law of 1995 that made the heads of the subjects of the federation permanent members of the Council of the Federation, the short consideration period in practice diminishes the power of the Council.

If a law is considered and does not receive the required majority, the rejection is formalized by a decree of the Council of the Federation. This decree contains a list of provisions, which the council considers should be discussed with the State Duma or by a conciliation commission between the two chambers. It is sent to the Duma within five days. If the Duma adopts the law a second time, taking into account all of the proposals of the Council of the Federation, it is returned to the respective committee of the Council which confirms acceptance of the proposals and recommends approval of the law without further plenary discussion. If the Duma accepts only some of the proposals, the law is reconsidered as though it were an entirely newly adopted text.

A law rejected by the Council of the Federation is sent to a conciliation commission, which is formed from representatives of each chamber (4). The commission considers only those provisions of the law, which were the subject of disagreement and seeks to work out agreed provisions in the form of a unified text.

The decrees adopted by the conciliation commission are sent to the State Duma within five days (5). Only proposals contained in the protocol of the conciliation commission are discussed in the Duma. No amendments going beyond those proposals are considered. Each proposal of the commission is voted upon individually by the State Duma and each must obtain the majority of the total number of deputies of the chamber. The law adopted in the version of the conciliation commission is then sent to the Council of the Federation.

If the Council of the Federation rejects the law at the second consideration, or the State Duma did not accept the proposals of the conciliation commission and disagreed with the decision of the Council of the Federation to reject the law, the law is put to a vote in the State Duma in its original form before the conciliation procedures. If no less than two-thirds of the deputies vote in favor of the law, it is considered to be adopted and sent within five days to the President for signature.

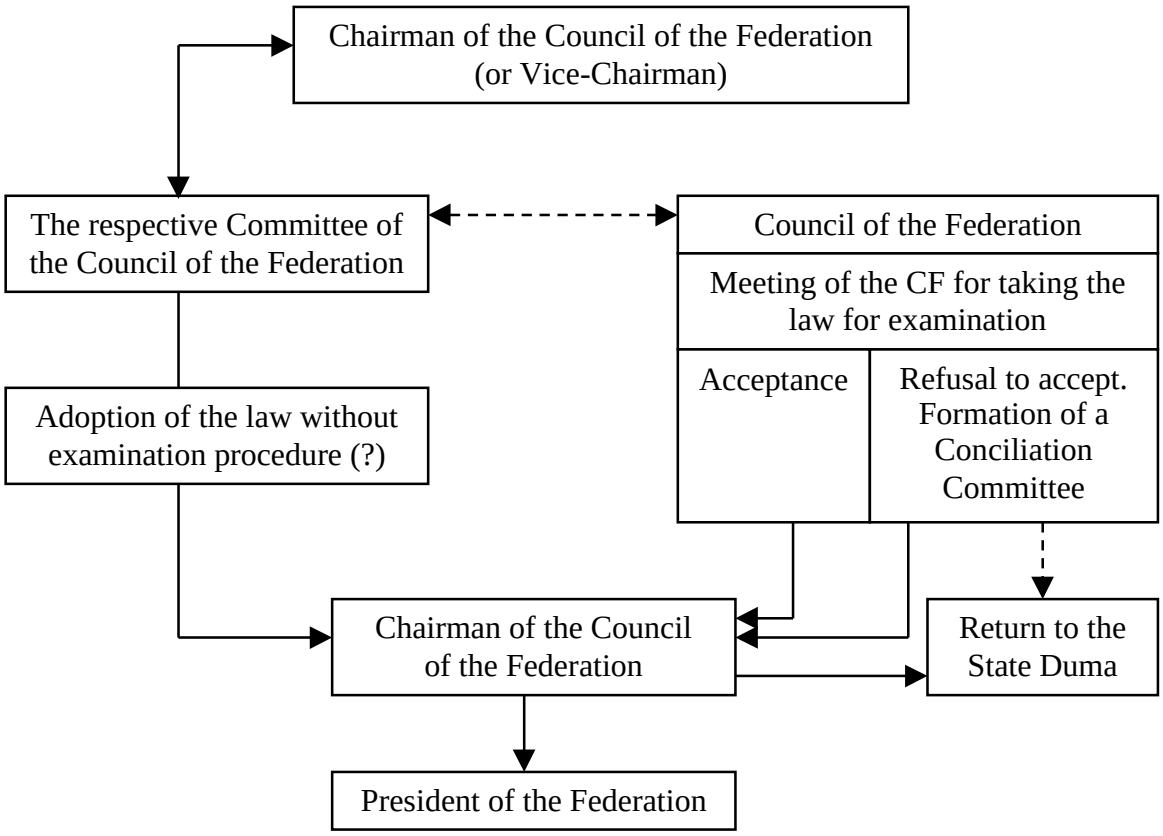

Diagram 3. Legislative Process in the Council of the Federation.
(Source: Parlamentskoe…, 1999, p. 114).

Under the Constitution, if the President of the Russian Federation within 14 days of receiving the federal law for signature rejects it, the State Duma gives a second consideration to the law (6) within ten days. The Duma can either approve the law in the version proposed by the president with a simple majority or overrule the veto with a two-thirds majority.

Overriding the Presidential veto has to be considered also in the Council of the Federation where it requires also a two-thirds majority of the members (7). Approval of the law vetoed by the President is sent in the form of a decree to the President, who is obliged to sign and promulgate it. The signature and promulgation of the President is the last stage of the legislative process (see p. 16).

The budgetary process is even more complicated and requires four readings in the Duma. The federal budget, which in the Russian Federation is twice as large as the regional and local budgets together but only about the same size as that of the Netherlands, raises a lot of discussion and struggle. Therefore, it is very seldom decided on time and the expenditure has to occur on the basis of alleged budget at least during the first quarter of the year (Parlamentskoe…,1999:121–124). The revenue of the federal budget for the budgetary year 1997 was 712,635 mrd. rubles and the expenditure 839,489 mrd. rubles (Byudzhetnaya…, 1999). There are, however, a lot of extra budgetary funds, which do not show in these figures (Kirkow, 1996).

2.3.3 Other Powers of the Federal Assembly

The Council of the Federation has special competence concerning the changes of the boundaries between subjects of the federation (Article 102, a), confirming Presidential decrees on introducing military or extraordinary situations (Article 102, b; c), possible use of armed forces beyond limits of the Russian territory (Articles 102, d). The Council of the Federation also appoints the highest ranking judges and the Procurator General from the candidates nominated by the President (Articles 102, g; h). The Council can also expire the presidential term (Article 102, e) but not without the consent of the State Duma (Konstituciya…, 1994:457). The Council of the Federation also has powers to impeach the President on the basis of an accusation put forward by the Duma for treason or committing another grave crime (Article 102, t). In practice, the impeachment weapon is impossible to use. However, it was tried against President Yeltsin. Some members of the Duma raised the impeachment process against the President for starting the Chechen war but they did not find enough support in the Duma.

The State Duma appoints the Ombudsman for Human Rights (Article 103, e) and the Chairman of the Central Bank (Article 103, c). The latter is proposed for candidacy by the President and the former by the President, the Council of the Federation, or deputies of their associations. The State Duma can also proclaim amnesty (Article 103, t).

The most important powers of the State Duma outside the legislative process are also limited in favor of the President. The Prime Minister is appointed by the President, which has to be approved by the Duma (Article 103, a). The same goes with the situation when the State Duma has expressed a lack of confidence in the Government (Article 117) (cf. p. 15).

2.3.4 A Weak Party System, Corrupted Politics and a Weak Duma

According to Russian constitutional specialists, the mandate of the deputy from his constituency is nowadays free, not imperative. The Constitution is silent about this issue, but earlier the deputies were responsible for the electors and could even be recalled when failing to fulfill their promises. Nowadays, they are not dependent on the opinions and wishes of the voters from their own electoral district (Butler, 1999).[24] There is no party discipline either. The parties are no more than clubs of people who have gathered around a strong personality. The only real party with permanent grass-root level support is the Communist Party, which relies on the pensioners and other groups, who have lost their earlier economic and social security.

Parties, which are clubs around some influential individuals, are created and die with the charisma or political influence of the leader. Former Prime-Minister Viktor Chernomyrdin's party "Our Home Russia" already lost in the elections of 1996 and in 2000 managed to get only 7 seats, all from the one-man constituencies in the gas producing regions of Northern Siberia. Creation of a "Kremlin Party" (Unity) with no other program than supporting the existing Kremlin policy and President Putin, explains

[24] There are, however, some opinions expressed that since there is no law, which would have ended the imperative mandate, it cannot be clear whether it exists or not (Vedeneev, 1995).

a lot about the Russian political environment. Unity became the second largest party in the elections of 2000, probably due to the media control of the Government and the popularity of Acting President and Prime-Minister Putin, which was based on the dirty war in Chechnya.

Primakov's and Luzhkov's party, OVR, based its campaign on digging out the scandals connected with the corruption and money laundering of the so-called Kremlin Family consisting of president Yeltsin's family members and close assistants. The Kremlin was, however, more successful in its defamation campaign against the critics. The case concerning possible money laundering of the Kremlin Family was closed and the Procurator General suspended for investigations of possibly exceeding his authority. As soon as Mr. Putin became the Acting President, he gave President Yeltsin immunity as a former president. It was actually the first decree, which he signed in his office after being appointed to the Acting Presidency (No. 1763 of 31 December 1999).

Since both the party system and civil society are weak, corruption is wide and open. The Russians do not seem to respect party politics. In many opinion surveys, people give the opinion that a deputy should be a good specialist, preferably a professional lawyer or an economist (Rose *et al*., 1993:39). People seem to vote for a person instead of a party. In the elections of 2000, 100 out of the 225 seats from one-man constituencies went to independent non-party candidates. The great amount of independent deputies only exceeds the power of "the Kremlin party" and the bureaucracy of the presidential administration.

The common opinion of the Duma among the people is that it is a weak and corrupted organ that cannot work properly.[25] Russians actually do not trust any political organ. According to an opinion survey, only 13% of the respondents answered that they trusted the Duma; 14% declared trust in the president (Yeltsin), and only 7% trusted the parties (Rose, 1999:21). Corruption is one reason why strong leadership is tolerated in Russia. The parliament is no better. The President represents state power more clearly; he is the personified state power, the modern day tsar. Yeltsin, however, lost his popularity and the same is probably going to happen to Putin, too.

One typical phenomenon has been that criminal bosses, or people who are afraid of criminal investigations, try to get seats in the Duma because the deputies have immunity against criminal investigations. In the elections of 2000, two "oligarchs", whose role in the privatization process has been dubious namely Boris Berezovski and Roman Abramovich, managed to gain immunity against potential criminal investigations. During Primakov's Government, there was already a warrant against Berezovski, but Primakov's attack on the oligarchs and illegalities in the privatization process lead to the dismissal of his Government.

[25] According to Russian political scientist, Boris Kagarlitsky, votes can be bought in the State Duma. When the approval of Mr. Kiriyenko for Prime Minister was sought in the Duma, the decisive vote could be bought for 30,000 dollars. Usually votes cost between 2,000 and 3,000 dollars. Another corrupted practice is that enterprises can buy authorization from a person responsible from the parliamentary committee (Kagarlitsky, 1999).

The general opinion in Russia seems to be that either most officials (53% of the respondents) or almost every one (36% of the respondents) is corrupt and that, in comparison with Soviet times, corruption has increased a lot (52% of the respondents) (Rose, 1998:37). The Russians seem to have adapted to corruption — it has become part of their culture. A survey, comparing attitudes in Russia, the Czech Republic and Korea, showed that Russians were most likely to pay bribes and use connections. 38% of the Russian respondents declared that they would be likely to pay bribes to get into university, 44% were likely to bribe to get a flat, and 62% were likely to bribe when there was a delay in obtaining a government permit. Almost half of the Czechs and Koreans would have written a letter to the head of the office, which Russians thought would make no difference (Misher and Rose, 1995). It is typical in Russia that corruption is admitted openly. Corruption is, in principle, disapproved but people still admit openly that they are ready to bribe because it is the easiest and sometimes the only way to get things done.

Corruption and alienation of citizens from the political system does not encourage the desperately needed emergence of a civil society to control politics. Earlier, other than party controlled and established civil institutions would have been illegal, but now when the citizens are allowed to form free civil institutions, they do not care for such an activity. According to Putnam (1993) social capital of the people should be able to be turned into political activity through learning to cooperate and trust in the people in voluntary civil organizations. There are a lot of social networks among Russians and many surveys show that trust is common among relatives and friends. People seem to help even their friends' friends with devoted altruism without requiring reciprocal favors. However, Russians generally have a low level of trust in other people. In a comparative survey, only 34% of the Russian respondents said that they tended to trust other people, while the rate was 55% in the Czech Republic and 77% in Korea (Rose and Shin, 1998:16). Russians have learned, and are learning all the time, not to trust in political organizations. Democracy requires trust in political institutions, but why should people trust in untrustworthy institutions?

The way out of corrupted politics cannot be centralism and the strengthening of presidential powers. Choosing such an authoritarian way does not break the vicious circle of corrupted politics. On the contrary, a strong authoritarian presidency weakens the parliament and the parties and is, in itself, one reason for the miserable situation.

2.4. The Judicial Power of the Federation

2.4.1 The Federal Courts

Introducing Regional First-Instance Courts

According to the Constitution the court system is federal in Russia. Thus, the courts from the first to the third or fourth instance are all federal. The federal law of 31 December 1996 regulating the court system, however, recognizes also regional courts. They can be courts of the first instance (*mirovye sudi*) and are also regulated by regional legislation. Appeals from a regional court to the federal courts is available but how it happens and to which level is not yet certain. The subjects of the federation have,

however, not started to establish their own competing regional court systems except in Chechnya.[26] Making *mirovye sudi* regional is, however, one of the compromises giving the regions more weight but making them partly responsible for the costs. As a result, a lot of hopes have been put on these new courts both because of their regional nature and for historical reasons. Local first instance courts were first introduced in Russia with the reforms of Alexander II in 1864 but were abolished by the Bolsheviks. The overall experience of these courts was positive (Stecovskii, 1999; Malyi, 1999).

There is a federal law on regional first instance courts from 17 December 1998. These courts, however, have not started to function yet. There should also be a law on the regional level, but the primary reason why these courts cannot function yet is that the present Codes of Criminal and Civil Procedure do not contain regulations for a procedure, which is required in such first instance courts. In regional courts, only one judge examines minor criminal and civil cases. In the modern version, the judge is required to have legal education. Salaries should be paid from the federal budget but the facilities are financed from the regional budget.

Courts for Commercial Disputes

The federal courts are divided into two different systems — ordinary courts and courts for commercial disputes. The latter are for disputes between commercial enterprises, individuals and enterprises, and enterprises and the State. There were already commercial courts in the Tsar's Russia that settled cases dealing with bills of exchange and other commercial matters. In 1931, when the planned exchange of goods system was introduced on an obligatory written form basis, economic courts were established to settle the disputes between State enterprises. These courts started to be called arbitration courts; they were permanent courts administrative in nature. The arbitration court system was preserved after the collapse of the planned economy, since the judges of arbitration courts were regarded as the only judges with at least some kind of experience in business transaction disputes although within a planned economy. Preserving the arbitration courts and turning them into commercial courts was actually a result of successful lobbying by the judges. Most of the cases in arbitration courts deal with taxation but also a lot of cases dealing with breaches of contracts, company law disputes and bankruptcies are taken before arbitration courts. Other civil law (mostly family law), criminal, and administrative cases go to ordinary courts.

The structure of the arbitration court system is regulated in the Law on Arbitration Courts of 28 April 1996. The arbitration courts function on four different levels and the country is divided into arbitration districts. The highest instance is the Supreme Arbitration Court in Moscow, which gives binding regulations to the arbitration courts, instructions and even rules of interpretation in concrete cases. Like the Supreme Court,

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[26] Chechnya is also an example of double standards in legal systems. Both official Soviet legal norms and their own traditional law exist, which is primary especially in the countryside. Traditional law had nothing to do with criminal organizations, which created their own norms. However, a young man, who is already used to double standards, is probably more likely to accept criminal standards, in addition to exchange of wealth and security, which the official state can not provide. Unfortunately, double standards and subcultures were not studied in the Soviet Union because they did not officially exist (see, e.g., Chesnov, 1999).

the Supreme Arbitration Court also has the initiative in drafting laws and they both give statements and comments on draft laws. Under the Supreme Arbitration Court there are 10 *kassacija* courts, under which there are 85 *appellyaciya* courts in centers of the subjects of the federation. The first instances are called *arbitration* courts and they are situated in towns in *appellyaciya* districts.

Commercial arbitration in the western meaning of the concept also exists. In Russian it is called *treteiskii sud*, which can be either on an *ad hoc* basis or in a permanent board, such as the Board of Arbitration at the Moscow Commercial and Industrial Chamber. *Ad hoc* arbitration is rare, but local chambers of commerce have permanent boards where judges can be picked up. The Russian *treteiskii sud* system is regulated in the Civil Code (Article 11), in a temporary decree on *treteiskii suds* settling economic disputes of 1992 and in the Law on Arbitration Courts of 1996. The Moscow Chamber of Commerce settles international commercial disputes and functions according to the rules, for which the model has been the UNCITRAL arbitration rules. It can compete successfully with other international arbitration boards such as Stockholm or ICC board in Paris. It is considerably less expensive than its western competitors and the quality of the judges is high.

Ordinary Courts and Court Procedure

Ordinary courts function in three instances. The first instance is the *rayon*-level court. The appeal level is a *city court* in big cities or *oblast courts* in oblasts. The highest instance is the Supreme Court of the Russian Federation in Moscow.

Both Russian civil and criminal procedure is oral. The decisions, however, are often based on written documents and it is therefore important not to rely on the oral procedure. The principle of *lis pendens* is not quite established in Russia. There can be several competing decisions from different courts on the same case. This problem is, however, diminishing. Human rights organizations have repeatedly paid attention to the long pretrial detentions. The judge is entitled to send a case back for investigations several times, if he thinks that the case has been badly prepared by the prosecutor. In practice, pretrial detentions can extent to several years. Suspects often confess only in order to get better conditions in the ordinary prisons (Country…, 1999).

Jury trials have been introduced in Altai, Krasnodar and Stavropol territories as well as in Ivanovsk, Moscow, Rostov, Ryazan, Saratov and Ulyanovsk regions. Jury trials are known in Russian legal history; they were used in the 16th century and from 1864 until the Bolsheviks abolished them in 1918. They were reintroduced during the transition period in the RFSFR constitution as an amendment. The present Constitution guarantees that an individual, who is accused of a crime, has the right to a jury trial (Article 20, 47).

There are 12 members in a jury, which agree on a verdict of guilty or not guilty in criminal cases. In those regions where juries are introduced they function both in the *rayon* and appeal levels. Jury trials are regulated in the Criminal Procedural Code. Juries can even be used in more serious crimes without the consent of the accused. There are plans to limit the number of cases brought before juries due to high costs. On the other hand, they are going to be introduced to regions where they are not yet in use (Stecovskii, 1999).

Even if the jury trials in the United States are regarded as one of the cornerstones of democracy, they are unfamiliar in the continental legal tradition relying on professional judges. There is a lot of skepticism towards the jury system but the official opinion is that democracy has worked in the jury system (Bozrov and Kobyakov, 1996:19–28). The jury system is one of the foreign transplants, which is unfamiliar for the Russian legal system and as such is in danger of not functioning as originally planned. An often-heard opinion from Russian lawyers is that if the ordinary people could decide, then every accused would be found guilty. Such opinions are based on the common inheritance from the Stalinist Era and the People's Courts during the Civil War. Such an opinion can also be supported by Russian public opinion surveys. According to a survey reported by Mikhailovskaya (1995), the courts are considered as punitive bodies primarily aimed at fighting crime, which is seen as the worst problem of society by 67.2% of the respondents. The majority of the respondents thought that letting a genuine criminal go unpunished poses a greater danger to society than condemning an innocent person. Even more striking is that about one-fifth of the 400-practicing jurist respondents gave priority to the repressive functions of the judicial system.

In his book Stecovskii (1999:246), however, comments on a legal sociological survey made by the Institute of State and Law in 1988, which claimed that laymen understand justice better than repressive judges. In that survey, only 44% of the judges informed that they would not condemn an accused when the evidence is not complete. A reference group of teachers and scientists understood the basic principles of justice better, since 56% of them would have discharged the accused in the absence of complete evidence. Probably the results would have been different if the reference group had represented ordinary people and not scientists and teachers.

2.4.2 Independence of the Judicial System

A separation of powers was unknown in the Soviet Union and the judicial system was not independent from the legislative and the executive power. Actually, it was the Communist Party that also controlled judges and the judicial system. Nowadays, people call the Soviet legal system "telephone law", indicating that a judge could get a telephone call from the party secretary dictating how to decide a case. The constitution emphasizes the independence of judges and the judicial system from the executive and legislative power (Article 120). According to the Constitution, it is the President of the Federation who appoints judges. He is considered to be above the political parties. A panel of judges accepts the candidates prior to the appointment in order to make sure of the independence of the courts and the quality of the judges. Earlier, judges' posts were not permanent and they were elected. Independence has also been guaranteed with regulating that a judge cannot be accused without a legal criminal basis. Charges can be raised only after a panel of judges has approved them.

Judges belonged to the *nomenklatur*a and had a lot of privileges during the Soviet era. The high status and respect was ensured with a social and economic position and immunity. The police were not entitled to even impose a fine for a traffic violation or drunken driving. Many economic privileges, such as free apartments, have been preserved in many places. Immunity is still guaranteed by the Constitution and in the federal law on the court system (Article 122). In practice, however, the working conditions especially in the countryside are often poor without telephones or other equipment and official residences are not available (Country…, 1999). Legislation

regulating the court system emphasizes the right for a salary and that it should not be diminished. The State has paid a lot of attention to the salaries of judges compared to others. It is understandable in the present situation, since temptations for accepting bribes increase when the salary is low or not paid on time.

The constitution also emphasizes that the financing of the judicial system from the federal budget should be sufficient (Article 124). Since independence of the judicial system is new in Russia, especially political leaders seem to have mental difficulties in adapting to the new situation. The difference to the earlier role of the judicial system is so big, that the change cannot occur overnight. On the other hand, Russian judges are proud of their newly gained independence. Quoting Nersesyanc (1999, p. 358) "the building of the rule of law depends on the judges because no one else is instead of judges or without the help of judges able to take care of the correct application of law and protect the rule of law". Bribery and harassment of judges is, however, a problem. Organized crime does not hesitate to bribe or threaten or even revenge a judge or an attorney. Judges are given protection on the basis of a law of 20 April 1995. They and their family members are entitled to bodyguards and special protection when needed. The protection system has, however, not been able to prevent the murders of judges every now and then.

Threatening does not always have to come from organized crime. In a case reported by the Lawyers Committee of Human Rights, a judge had discovered that the police had attacked the wrong household in Moscow, killed one person, and then brought charges for hooliganism and resisting lawful arrest against the survivors. After refusing to sentence the accused, the judge started to receive threatening letters and phone calls.[27] (Human…, 1993:72). Previously, such cases did not see daylight at all. A case like this indicates that there can be pressures to cover-up for the police even by sentencing innocent people. The police still have a Soviet "fulfilling the plan mentality", which does not exclude framing to keep the Russian exceptionally high rate of settled crimes up. Human rights organizations constantly report about the police framing people by placing narcotics or arms in their belongings or apartments (Country…, 1999). Such stories, which unfortunately do not seem to be rare, show that the police have been able to work for too long without any effective outside control, without publicity or criticism. Such an environment has created cynical attitudes, which do not take the suspect's rights into consideration at all. Misusing the threat, which people feel against organized crime, are attitudes that can even be defended as opinion surveys show (cf. p. 31).

In spite of all the difficulties in developing the rule of law in a corrupted and economically weak society, the courts have been able to develop the rule of law considerably. The role of the courts is important in Russian transition. Independence has

[27] The judge found that the weight of the evidence showed that the policemen had been drunk, unlawfully entered the apartment without cause and used deadly force without justification. Throughout the preliminary investigation, policemen visited the judge to persuade her of the defendants' guilt. A Moscow policeman, a member of the Moscow City Council, also visited the judge regularly. It was then the City Council that elected people's court judges to their terms of office. After the judge handed down the ruling, she received notification from the regional city council that a new apartment, which had been allotted to her as a perquisite of her judgeship, had been denied.

given them both prestige and confidence. The development of a commercial law has given new tasks and more power to the legal system. The rule of law is emphasized in legal education in the Weberian meaning of the concept and the courts have been able to apply formal legal rules emphasizing their importance instead of informal rules. Court cases were previously not an official source of law. Only the law text was emphasized as the starting point of judgments. Nowadays, court cases are increasingly commented upon and criticized in textbooks. In this way, the importance of case law has grown and has also raised the importance of courts and judges.

However, it seems that criminal law and procedure has deep repressive traditions. It is not the development of a trade law but criminal law, which shows the level of the rule of law in any country. Citing Mizulina (1992:52–61), independence (of the judicial system) is not the only guarantee for the rule of law.

2.4.3 The Procuracy

The procuracy is a very old and very Russian institution stemming from the times of Peter the Great. In the original model the procurator was an official, independent of local influence, who acted as the "eye of the Tsar" in supervising the conformity of law of the actions of all government departments, officials, and courts, including the Senate itself. After the Revolution the procuracy was first abolished but reinstalled within the USSR Supreme Court with powers of constitutional, general, and judicial supervision (Butler, 1999:173).

In the Russian Federation the decision to create a unified Russian procuracy was taken on 15 November 1991. The Procurator General of the RSFSR accepted jurisdiction over all procuracy agencies on Russian territory. In January 1992, the RSFSR Supreme Soviet adopted the Law on Procuracy, which was amended on October 1995 to incorporate the provisions of the Constitution of 1993.

According to the constitution and the federal law the procuracy is a unified and centralized system of procuracy agencies and institutions of the General Procuracy under which the procuracies of the subjects of the federation function. In practice though, procuracy is not completely centralized. In some republics such as Tatarstan, Bashkortostan and Tuva, the procurator works under the supervision of the legislative organ of the republic. Some subjects of the federation also have republican procurators as well as the federal procurator, who are responsible for the republic (Dmitriyev and Shapkin, 1995:29). Besides the general procuracy, there are also a number of specialized procuracies, for instance military and transport procuracy. Apart from being the prosecuting authority, the procuracy is also a supervising institution. It has general supervision over the execution of laws by federal ministries and departments and the respective bodies of the subjects of the federation, agencies of local self-government, military administration agencies and officials and over the conformity to the laws of legal acts issued by them. A procurator may react on a violation of law by submitting a recommendation to eliminate the violation, bring a protest against a legal act that is contrary to a law, or apply to a court to demand that a legal act be deemed invalid. The procurator may also initiate civil proceedings for recovery.

Protest does not mean that the agency, which issued the act, must necessarily accept the protest — it can also be rejected. The procuracy cannot protest decrees of the

government or laws of the Federal Assembly being inconsistent with the constitution, but the Procurator General has the right to bring inconsistencies to the attention of the President of the Federation. The Procurator does not have the power to take a case before the constitutional court.

Supervision over human rights is new to the procuracy. The procuracy also supervises the execution of the laws by agencies effectuating operational search activities, inquiry, or preliminary investigation. Inquiry and investigation fall within the field of criminal procedure. Procuracy has jurisdiction over all investigators. The procuracy also supervises prisons and compulsory medical treatment. Conflicts may be raised between different interests of the procuracy. The procurator must act as a prosecutor on behalf of the State and yet initiate objections to procedural or substantive violations by the court. It has been attempted to avoid this conflict by keeping the prosecutor tasks and supervision in a separate department. The huge amount of violations of legal rules and the human rights of citizens suspected of crimes show that the procuracy has probably not been very effective and impartial in its supervising tasks during Soviet times.

Corruption, illegalities and poor control are reflected in the deep distrust in the courts and police. According to an opinion poll, 40% of the respondents declared trust in the courts in 1993, but the rate fell the following year to 17%. The courts have been able to gradually regain at least part of the lost trust of the people. In 1998, 24% of the respondents declared trust in the courts. Scandals that were reported in the media may have further decreased the rate of trust among people. Such things were previously not discussed openly. The police are even more distrusted; only 27% of the respondents declared trust in 1993 and 18% in 1998[28] (Rose, 1999:21).[29]

2.4.4 Constitutional Court

Judicial control over legislature was introduced to the Soviet Union in 1989 during Gorbachev's era in the form of the Committee for Constitutional Supervision. It was not a real court and its findings had only limited weight, but it proved eager to emphasize human rights norms of the constitution. For instance, it ruled unpublished acts affecting citizens' rights and obligations invalid and found existing procedures on residence permits (*propiska*) unconstitutional (Justice Delayed, 1995). However, unpublished acts are still passed and the residence permit system has not been abolished.

The first Russian constitutional court started on 6 May 1991. The Supreme Soviet decided to establish a genuine court that was separated from the regular court system. The court could also take complaints from individuals. However, it had wide discretion in deciding whether it wished to review human rights complaints. The court

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[28] Only churches can boast quite a high rate of trust compared to other organizations. 50% of the respondents declared trust in churches in 1994. The rate is, however, declining being only 30% in 1998. A typical Russian phenomenon is that the rate of trust in the army is as high as in churches, 30% in 1998. The trust in the army has also been declining (Rose, 1999:21). According to Rose, the higher rates for the church and the army only indicate that these organizations are less mistrusted. Kääriäinen and Furman (2000a:16) explain that the trust in the church is ideological. Trust in the army can also be explained as ideological; it is the defender of the Russian Fatherland, which is still important to Russians.

[29] According to another survey made in 1999, trust rates in judges are slightly higher: 3% trust a lot, 31% do trust, 32% do not trust, and 24% absolutely do not trust. Trust in the police is lower: 3% trust very much, 25% trust, 37% do not trust, and 30% absolutely do not trust (Kääriäinen and Furman, 2000a:14).

concentrated on cases involving the separation of powers and giving the flood of appeals by individuals less attention (Justice Delayed, 1995).

The task of the first constitutional court was not easy. The constitution, which it had to interpret, was the Soviet Constitution of 1977 with a lot of amendments hardly responding any more to the needs of a country moving to democracy and the rule of law. The court was often criticized in the press and by legal specialists (Bowring, 1999:266–268) and was later condemned in legal textbooks for politicizing cases (Shul'zhenko, 1995:127). The involvement of the court in the power struggle between the legislature and the president was inevitable but proved to be destructive to the court itself.

The first heavily criticized decision was the one finding that presidential decrees banning the activities of the Communist Party were unconstitutional. The final crash came in 1993, when the decision on finding President Yeltsin's decree on establishing an extraordinary situation unconstitutional. The decision was open to criticism, since it was made on the basis of the President's televised address and not on the examination of any documentation. "Taking the side of the Supreme Soviet" was, however, legally well grounded since the Soviet Constitution of 1977 placed the Parliament above the executive. The President had no legal right to dismiss the Supreme Soviet. This issue is, however, still largely disputed among Russian lawyers.

Separating law and politics is one of the main principles of legal positivism. Legal decisions should be made only on a legal basis. Even in the United States, where constitutionalism rests implicitly on natural law, the Supreme Court is supposed to make its decisions totally on the basis of legally interpreting the constitution (Alexander, 1998:10). Otherwise the court would not be regarded as an impartial judicial body. Many decisions of the court, however, inevitably have political effects. The fate of the first Russian constitutional court illustrates that without a proper legal basis and in extraordinary situations creating constitutionalism inevitably brings the court in the nexus of a political struggle and damages the reputation of the court as an impartial and purely judicial body. Chief Justice Zorkin's[30] eagerness to give extrajudicial public statements in which he openly took the parliament's side in its power struggle with the President were too political not only in terms of Russian legal positivism but also more generally. Even if his opinions were based on a clear legal interpretation of the constitution, the way he expressed them did not increase the credibility in the independence of the legal body he represented.

The legitimacy of legal rules should be high, before a court is able to rule over political matters, and political leadership has to accept legal control. Otherwise, constitutional checks remain a technical tool in the hands of political leaders to legitimize their actions. An authoritarian state does not give a lot of chances to a constitutional court. Constitutionalism and democracy presuppose each other, even though constitutionalism

[30] Judge Zorkin was born in 1943, graduated from Moscow State University in 1964, and taught jurisprudence there until 1980. He then became Professor in the Department of Constitutional Law and Theory of the State at the Academy of the Interior Ministry of the USSR (Bowring, 1999:267, footnote 49). Nersesyanc (1999:319) mentions him among the critics of narrow legal positivism. This critical movement started to publish their opinions in round table discussions of the periodical Sovetskoe gosudarstvo i pravo in 1979.

does not have to be democratic. A court does not have to produce democratic decisions, but the decisions must be legal.

President Yeltsin solved his dispute with the Constitutional Court with the same kinds of methods as with the parliament. He did not dissolve the court, as he did with the parliament, but he suspended the court. After eliminating both the parliament and the constitutional court, Yeltsin had free hands to adopt the new constitution, which was also clearly needed to legitimize new power and to end the power struggle.

According to the constitution of 1993, the constitutional court can rule on the constitutionality of federal laws, presidential decrees, constitutions of republics and international treaties that are not yet in force. The court can examine cases on request. The President, the Council of the Federation, the State Duma, one fifth of the deputies of the Duma or of the members of the Council of the Federation, the Government, both Supreme Courts or the executive or the legislative organs of the subjects of the federation have the right for a request. The court can no longer start a case on its own initiative as it did when banning Yeltsin's decree on establishing an extraordinary situation. Regular courts can also request to examine the constitutionality of applying law in concrete cases.

According to the previous law on the constitutional court, an individual was allowed to make a petition to the court on the basis of a violation of his or her human rights. The right of an individual to petition to the constitutional court is unclear in the present constitution but, according to the present Law on Constitutional Court of 1994, the court only examines such cases brought to the court by individuals concerning the constitutionality of laws. It cannot examine the constitutionality of individual decisions of the authorities, say the president, based on those legal norms. Furthermore, citizens cannot challenge the constitutionality of presidential decrees and governmental decrees or lower legal norms. Often, cases brought to the court by individuals have concerned tax law or criminal law regulations. The new limitation was grounded with the fear of the court collapsing under the weight of the number of cases to review law application practices (Human..., 1993). In cases containing human rights violations, a citizen can turn to the ordinary courts based on the law on the court system of 27 April 1993. The possibility of turning to the procuracy also exists (see p. 33).

The changes made to the draft for a new law on the constitutional court gave President Yeltsin a pretext to delay the work of the court. It had to wait first for the new constitution, then the new law and then the fights concerning the appointment of the four new judges. The fact that Yeltsin did not dismiss the judges of the Constitutional Court shows that the court might have gained some legitimacy and that the President had to be more cautious towards a court compared to his rudeness towards the Congress. There are 19 judges in the constitutional court instead of 15 in the old one. The Law on the Constitutional Court rules that a judge cannot take part in the work of political parties or give statements to the press concerning questions that are or might be brought to the court.

The Constitutional Court has an important role in clarifying obscure rules of the constitution. It is a difficult task since a lot of provisions were left unclear because no political compromise was reached. The court then has to find a legal solution to continue the work of the drafters of the constitution. After the clash with the President,

the court seems to have returned to a cautious and narrow legal positivist interpretation.[31] In numerous decisions the court has clarified badly drafted technical rules. One good example is the 14-day rule for the Council of the Federation to consider federal laws (see p. 23). The new constitutional court has, however, tried to stay out of political struggles. The court clearly realizes that its rulings may have significant political affects. The result has been that the cases have been decided mostly in favor of the President. The most extreme case was the one finding the secret presidential decrees starting the Chechen war constitutional (see p. 46). The court has realized its role as the legitimizer of federal executive power. Also the cases, which have been brought by the subjects against the federation, have mostly been decided in favor of the federal power. However, cases concerning the provisions of constitutions of subjects of the federation have not been taken before the court after 1995 due to political reasons. Treaties between the federation and the subjects have never been taken before the Constitutional Court in spite of their obvious contradictions with the constitution (see p. 59). There are questions, which are politically too dangerous to be left to the mercy of a purely legal decision as the legal rules in question do not have enough legitimacy.

The court has had the same problem, which its predecessor already faced. Neither federal nor regional authorities obey the decisions (Shul'zhenko, 1999). One good example is the *propiska* practice. Big cities still demand a residence permit to settle in the city. This permit also costs something and requires a lot of time and effort with the city bureaucracy.[32] The new constitution clearly states that everybody can choose where they stay or reside (Article 27). In several instances the constitutional court has several times found the *propiska* practice unconstitutional (No. 3, P of 25 April 1995; No. 9-P of 4 April 1996; No. 2, P of 15 January 1998; No. 4-P of 2 February 1998). The mayor of Moscow made a decision concerning one of the rulings. He ordered city officials to begin examining the possibilities of finding alternative fiscal revenues and improve the social situation in the city (Decision of the Mayor of Moscow, 29 April 1996, 259-PM). The *propiska* practice still continues because Russian officials do not want to accept human rights principles, which are guaranteed in the Constitution, but are not appropriate for them.

Ignoring the decisions of the constitutional court is due to traditions, which know only insider control and has no actual limits of the power of the State organs. The reluctance in implementing the decisions of the Constitutional Court challenges the legitimacy of the court. It also reflects the peculiar asymmetrical federalism in Russia.

2.5 Summary

The separation of powers is the most significant change compared to the Soviet constitutions where the Communist Party could rule everything. The balance between

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[31] Ebzeev's (1998, p. 5–12) article on the interpretation of the constitution represents quite an established opinion according to which the interpretation stems from the will of the drafters and gives a lot of attention to the written form.

[32] The *propiska* practice is a method of collecting money and is an extremely bureaucratic procedure. This practice has given the police the opportunity of collecting money as "fines" from citizens who do not have the *propiska*. It also enables expelling Caucasians from big cities. They are either not given a *propiska* or are sent back when they do not have one.

the powers was a disputed question, which lead to a power struggle. After having won the struggle, the President introduced a highly presidential constitution. The President of Russia is considered to be the head of both the executive and the organ to check the balances between federal organs as well as between federal and regional organs. Furthermore the president is the main overseer of human rights.

The power given to the President in the constitution is vested on his power to issue decrees in the absence of laws connected with his right to refuse to sign a new law adopted by the parliament. In the Russian legal environment with great gaps in legislation, these presidential powers have played an even more significant role in practice. Yeltsin's power was only partly based on the constitution. His authoritarian Soviet party leader mentality allowed him to also exceed the constitution.

The Federal Assembly is weak and powerless because of the absence of strong political parties and civil society to control state power. The government is only a tool of the president. Parliamentarism is limited, since the president can dissolve the Duma when disagreeing with its lack of confidence in the government. The corruptness of Russian politics does not encourage democracy to develop. Why should people trust in non-trustworthy organizations?

The Constitutional Court has an important role in interpreting the unclear and inconvenient rules of the constitution. It has concentrated on the questions concerning the separation of powers and was soon drawn into the power struggle. After being defeated and losing its reputation, the renewed Constitutional court has endeavored to avoid interfering in politics and has concentrated more on clarifying technical regulations and being very cautious with the President.

Russia now has a modern democratic constitution which, however, was drafted under politically dangerous circumstances. The strong presidency is a result of a bloody power struggle, but also a method for introducing economic and political reforms. Without President Yeltsin's stubborn autocratic leadership, reforms would not have been able to be introduced so quickly. It can be disputed whether it was good or bad and whether the changes were too rapid or too slow. President Yeltsin's autocratic leadership and rule by decree caused much complaint by the citizens, who, however, had no difficulties in coming to the polls and choosing a new tsar, who had already been chosen by the old one.

Introducing democratic values and organizations with an attack has not proved to be efficient. New democratic rules and constitutionalism are not familiar to Russian politicians and state officials. Often, they still seem to think in old Soviet terms relying on previous institutions and personal contacts. The roots of such mentality are not only Soviet, but also reaches back to tsarism and reflect the omnipotence of the unchallengable State power. The Weberian *Rechtstaat* is not completely understood because of such inheritance. Even if there has been a notable change in the organizations moving in a democratic direction, the informal rules and working habits have, however, not been able to change with equal speed. Institutions, which are inherited from the Soviet past, are not favorable for developing democracy. The changes have also escalated corruptness and the cynical seeking of one's own interests.

Civil society and real democracy grow from the bottom up. This process has not advanced enough in Russia. The major reason for this is that people have alienated themselves from politics and do not have any trust in political organizations, both due to their unfavorable traditions and constantly learning from increasing cynicism and corruptness. The result is a vicious circle. People do not try to change the situation because they think that they cannot influence it through politics.

Due to the absence of a civil society, courts and lawyers have an important role in establishing the rule of law and constitutionalism in Russia. Determinant reliance on the independence of the court system has already increased the importance of court cases in interpreting new rules. It is a remarkable achievement taking the previous role of the courts in the socialist system into consideration. The courts still face serious problems stemming from corruption and organized crime, which also makes it more difficult to gain the trust of the citizens. There is, however, no doubt that the courts and lawyers would not be able to gradually strengthen the rule of law in Russia.

3. Developing Federalism out of Democratic Centralism?

3.1 The Federal Structure

3.1.1 Origins of Russian Federalism

The Russian Socialist Federal Soviet Republic was already a formal federation within the Soviet Union. The Soviet Union consisted of republics, which according to the Soviet Constitution were Sovereign republics with all the formal symbols and signs of independence. The Soviet Constitution emphasized the voluntary nature of the union allowing the republics to withdraw from it. In practice, however, even increasing the possibility to withdraw would have been dangerous. As soon as the first winds of reforms started to blow, the forced basis of the union began to shake. In the Federal Treaty, which Gorbachev tried to make the republics sign, the possibility to withdraw was already abolished.

It was paradoxical that Russia was the final initiator of the Minsk Treaty, which terminated the Soviet Union, since the Soviet Union was the successor of the Russian Empire. Secession from the Soviet Union was, however, considered to be necessary in order to begin the economic and political reforms, for which the reformers and the President of Russia, Boris Yeltsin had actively propagated. Secession from the Soviet Union was explained to mean independence from the socialist system of the Soviet Union. At that time, there were complaints about other republics gaining more from the union than Russia.

President Yeltsin and the leadership of the Russian Republic have later been criticized for “sacrificing” the union to obtain the power to rule Russia. With the independence of the Baltic States President Yeltsin has been explained as having bought the support of the United States and Germany. He has been accused of diminishing the original Russia — the Russian Empire of the Tsars — because of a short-term political power struggle. In a text book of the history of the state administration for university students, the authors express their astonishment of “the wrong kind of patriotism” of the reformers, “who should have understood that their true fatherland Russia is actually the historical

Russian Empire" (Istoriya…, 1999). For centuries, Russian "patriotism" has exceeded the areas populated by ethnic Russians. There is even widespread opinion that the Russians, as a more developed people, have both the right and an obligation to rule "underdeveloped" Caucasian and Central Asian peoples. According to opinion surveys, a great majority of Russians did not approve of the Minsk Treaty and blamed the collapse of the Soviet Union for the economic difficulties of Russia (see p. 7).

Russian federalism stems from different origins than American federalism, which is usually regarded as the most advanced model. While American federalism rests on an agreement between former colonies, Russia developed as an empire enlarging its territory to protect and strengthen the center. The Bolsheviks promised to turn "the prison of the peoples" into a voluntary union and give autonomy to national minorities.[33] The same slogan was used again during the collapse of the Soviet Union.

In spite of the official concepts of federalism and autonomy, the Soviet Union developed into a centrally governed state with regions submitted to the center. The Communist Party and its politburo directed the so-called democratic centralism. It was probably the most centrally governed system in Russian history. The union was, however, too large to be centrally directed. The regions, especially the republics dominated by non-Russians, soon developed a kind of a "feudal" relationship to Moscow similar to the earlier Russian Empire. The orders from Moscow were obeyed and the plans fulfilled or at least were pretended to be. The local party leaders, who had to be approved by the Politburo, tried to keep good relations with the center and their own region under their own authoritarian control. The party leader was the representative of the regions to the faraway center, which did not play a significant role in ordinary peoples' lives.[34] A significant difference to American federalism was that there were no limitations of the authority of the government, which was the Sovereign to be obeyed. Although the center officially ruled the whole union, the regions were able to decentralize in practice. In most cases after the collapse of the union the new independent republics continued under the leadership of the same regional elite, the party bureaucrats and the *nomenclatura* (cf. p. 10).

3.1.2 The New Constitution and the Demands for Decentralization

President Yeltsin had to discover that centrifugal tendencies in the Russian Federation only escalated because of the collapse of the Soviet Union. Also in the Russian Federation there are people who were annexed to the Russian Empire against their will. The most extreme example are the Chechens, who have clearly pointed out that they — like other North Caucasian peoples — were annexed to Russia by force and would prefer to withdraw from the federation.

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[33] The self-determination of peoples was a political principle which, for Lenin, was only a weapon in changing the society into the trail of socialism. He explained socialism to automatically guarantee self-determination (Lenin, 1967).

[34] As examples of semi-autonomous policies, Hosking (1985:427–439) mentions Akhunov in Azerbaijan, Mzhavanadze in Georgia, Johannes Käbin in Estonia and Anton Snieckus in Lithuania, all of whom were more or less successful in protecting their own language and culture. For Shelest, in Ukraine, a similar policy cost him his position and V.V. Shcherbitsky, who was Brezhnev's man and followed more Muscovite policy, replaced him.

Not only the multiethnic but also the regions populated almost totally by ethnic Russians have demanded more power to the regions. Moscow-oriented specialists of federalism like to point out that the regional elites, which have always been complaining and demanding more power, are actually greatly dependent on Moscow (Stel'makh, 1997). The Soviet system was built in such a way that the decisions were made in Moscow and the delivery of the revenues of the budget was decided in Moscow. Even one of the richest regions Saha-Yakutia, which produces diamonds, is dependent on the delivery of food products during the winter period. Even if their own region has been more important for them than the union, the regional elites have, however, been used to obey or at least pretend to obey every order coming from Moscow. Excluding Chechnya, the same quite narrow circle of communist *nomenklatura* stayed in power in the regions, which explains a lot about the mentality of the regional elites.[35] The problem from the regions' point of view is that they were left alone without the support of the center, which was occupied with the hectic power struggle on the federal level. In this power struggle the regions tried to gain more power, while the fighting rivals of the center promised them more power in return for their support.

Traditionally, the Moscow elite has regarded itself as the leading *intelligentsia* and the best specialists of the country and has drawn a parallel between regionalism and backwardness. Therefore, even the Moscow elite regards that decentralization should be developed at the center and then "given to the peasants". It is indeed true that new ideas take time to reach the periphery. Regions are more conservative than the center, which in Russia means that communism still rules in the countryside. Decentralization is also regarded as a threat for the unity of Russia. This opinion is also found in history textbooks, which equate decentralization and the weakness of the country explaining that Russia has been the strongest (and most expansive!) when it has been centralized under a strong leader. However, during the few years before and after the collapse of the Soviet Union also the Russian republican leaders spoke for self-determination and decentralization. Such messages from Moscow found fertile soil in many regions, but the regional elites have gradually returned to the old trail after Moscow leaders started to govern the regions again.

There is much truth in the belief that there is a danger in decentralization from the point of view of the center. If such a huge country as Russia is going to be decentralized, the regions might develop their economic and political relations to other more natural directions than to Moscow and might be able to manage without Moscow. Even if economic dependency has been planned and developed for a long time, it can still be broken. The Russian Empire was anyhow an attempt to increase the security of the center by spreading its influence even further. Such politics does not have much to give to the faraway regions. In the most favorable cases, the faraway regions are left alone to get on independently if they, at the same time, officially submit themselves to the authority of the center. The starting point in discussing "federalism" at the center still seems to be that orders always come from above and that the regions are for the center not vice-versa. According to opinion surveys in 1993, both centralism and decentralism

[35] The leaders in Moscow have always been afraid of national movements, because they tend to be separatist. Therefore, the Chechen leadership was labeled as criminal and the opposition (read: former *nomenklatura*) was given political and economic support including arms. Moscow has assisted even the worst old communist leaders to crush nationalist movements in former Soviet republics.

in governing the regions were equally supported (Rose *et al*., 1993:45). Opinion polls cannot, however, illustrate how people actually understand these concepts.

There is a lot of economic potential in the regions and the federation, as a whole, would benefit from their economic growth. Without decentralization the regions are not going to develop. President Yeltsin agreed that decentralization is necessary and he negotiated with political leaders of the regions during the drafting process of the Constitution to gain their support in his power struggle with the legislative power (Stel'makh, 1997:10). However, it can be read in the Constitution that many of the disputed issues were not solved but diluted into unclear compromises. The main reason for leaving the most important question such as the division of powers between the federal and the regional level and the principles of fiscal federalism open was that President Yeltsin quickly needed a new constitution to legitimize his leadership and the reforms. Other issues were of minor importance.

On the other hand, President Yeltsin already started to establish firm presidential control on the regions from the beginning. The first step was to appoint the presidential representatives in the regions to serve as the "eye" of the President and to monitor and report to the Presidential Administration. In November 1991, the Congress gave the President the freedom to appoint the regional leaders for a year in advance. The next year, the President informed them that the next elections were going to be only in 1994 and that the leaders that were appointed by him had to continue until those elections. In this way the President managed to change many leaders of the regions. In the elections, however, regionalist candidates were more successful, which gave a new headache to the President who started to plan on how to replace them with his own men. The regionalist candidates were often also "conservative" old communists who were not interested in President Yeltsin's reforms.

The quasi-federal and extremely presidential constitution of 1993 was not received with enthusiasm in the regions. According to the region by region results of the referendum on the constitution published by the Central Election Committee, the constitution received more than 50% of the votes in 59 subjects of the federation. In Dagestan, only 20.9% voted in favor of the constitution (Grigoriev *et al*., 1994). The neighboring republic, Chechnya, refused to arrange the referendum at all. It was not even possible to participate in the referendum because Chechnya had previously — in September 1991 — proclaimed independence, and had arranged new parliamentary and presidential elections in October 1991. The national movement won the elections and the new President, Dzhohar Dudayev, immediately issued a Decree on State Sovereignty (1 November 1991). Also Tatarstan protested the referendum but made it possible for the citizens to participate in it, however, only 13.43% of those entitled to vote bothered to do so in the referendum. Connecting the resistance of economic reforms and the wish to return to the old system with low voting rates, undermines the fact that many of these regions are poor and remote areas where nationalist feelings and their own different culture alienate people from the federal center.[36] Voting reflects the relationship of the regional and federal leadership. Regional leaders are able both to affect the voting in their region and trade with votes with the federal center.

[36] This connection is drawn in a report by Grigoriev *et al*. (1994).

Tatarstan and Chechnya had also refused to sign the Federal Treaty in March 1992. There were three different treaties, the idea of which was to keep the regions in the federation until the new constitution was signed. The treaty, which was made between the federation and the republics, give the republics the ownership of their natural resources as well as sovereignty. Another treaty was signed with the territories and regions and a third with the autonomous regions and areas. Also, they gained the ownership of their natural resources but did not get sovereignty. With these treaties, autonomous regions received same rights as the regions and territories within which they are situated.

Especially the republics, which were proclaimed sovereign, insisted that the Federal Treaty should be incorporated into the constitution. The treaties are incorporated into the constitution, but are given a lower status than the constitution (part 2 of the Constitution). When rules contradict each other it is the rules of the constitution that count.

3.1.3 The Status of the Subject of the Federation

The Notion "Subject of the Federation"

According to the Article 65 of the Constitution of 1993, the Russian Federation consists of 89 so-called subjects of the federation. The concept "subject of the federation" dates back to Soviet times and was invented to cover all kinds of different regions of the federation. There are 21 republics (*respublika*), 6 territories (*krai*), 49 regions (*oblast'*), 2 cities of federal importance, namely Moscow and St. Petersburg, one autonomous region (*avtonomnaya oblast'*), and 10 autonomous areas (*avtonomnyi okrug*). The boarders of the areas of these different subjects of the federation are the same as in the former Soviet Russian Federation. The three different groups of regions were preserved as such, which they were in the Federal Treaty of 1992.

Russia inherited a complicated structure from the Soviet past, a structure that was originally created with the first Constitution of Soviet Russia in 1918 to solve the national question by giving national minorities self-determination in the form of territorial autonomy. Even if autonomy was of quasi-autonomous character, it guaranteed the indigenous peoples or national minorities of the area quotas to universities or jobs in the local administration. In this way, the Soviet power maintained otherwise forbidden nationalism in quasi-autonomous structures.

Equality with Two Different Statuses

All of the different regions have the status subject of the federation and the Constitution declares that they are all equal (Article 5.1). The Constitution further specifies that in relations with the federation all the subjects are equal (Article 5.4). This equality permits every subject two seats in the Council of the Federation (Article 95.2) in spite of the different sizes in area and population of each subject. For example, the area of the Republic of Adygeya is 7,600 sq. meters, which is 0.04% of the area of the whole federation, while the area of the Republic of Saha-Yakutia is 3,103,200 sq. meters, which is 18.7% of the total area of the federation. The City of Moscow has the largest population with about 9 million in the smallest area of the federation — 1,500 sq.

meters. While the population living in the area of the Evensk Autonomous Region with 7,657,600 sq. meters is about 20, 800 (Shul'zhenko, 1999).

The equal amount of seats in the Federal Council has the same solution that was made in the United States; where each State sends two senators to the Senate. In Germany, however, the number of the seats in the *Bundesrat* depends on the amount of inhabitants in the *Bundesland*. The equal number of seats was chosen in Russia, because it would have been too difficult to negotiate a more cumbersome system that depended upon the size of the population or the size of the area or a mixture of both.

Even if the constitution clearly declares in Article 5.1 that all the subjects of the federation are equal, it defines the status of the republics in a different way to the status of the other subjects in Article 5.2. This is one of the reasons why Russian constitutional lawyers call Russia an "asymmetrical" federation (Shul'zhenko, 1999; Lebedev, 1999). A republic has its own constitution (*Konstituciya*) and legislation while the other subjects have a charter (*ustav*) and their own legislation. The Constitution also uses the notion "State" as a bracketed synonym for a republic. This difference has lead to a disputed interpretation of the status of the subjects. The supporters of the disputed theory explain that republics are Sovereign States within the Sovereign State of Russia, while the other subjects of the federation are governmental formations either on territorial (territories, regions and the two cities) or national basis (autonomous region and autonomous areas) without sovereignty.

This quite widespread opinion is not based on the Constitution alone, but on the three different Federal Treaties of 1992, which were incorporated into the Constitution. The treaty between the republics and the federation gave the republics a higher status than the other subjects. The definition of a republic reflected the official Soviet doctrine of Sovereign Republics. The original Soviet doctrine was actually more confederal than federal. In practice, however, the Soviet Union soon started to function as a unified highly centralized state, where the regions were only centrally governed areas. The republics would have liked to return to the original confederal idea, which never materialized in the Soviet Union. The republics also wanted to preserve their higher status compared to the other subjects of the federation. The Federal Treaty was incorporated into the constitution of 1993 as a political compromise (The Constitution, Second Section: Concluding Provisions) (Lebedev, 1999).

Some law scholars praised the treaties for legitimizing decentralization (Polenina, 1993). As time has passed, the advocates of a more centrally governed federation have denied the legal force of the Federal Treaty. They argue that the treaty was signed before the constitution, which is now the basic legal document with the highest legal power in the whole area of the Federation (Article 15.1). Furthermore, they argue that in the course of time the treaty has proved to be unnecessary and old-fashioned and has been completely replaced by the new constitution (Lebedev, 1999). The political compromise was not properly secured on the legal level, which has made it possible for Moscow-based constitutional lawyers to explain in a typical formal legal positivist manner that it was "only a necessary political compromise" without any legal foundation.

The legal doctrine giving the republics a better status has encouraged territories, regions, autonomous regions and areas to demand a change in their status to republics.

According to the Constitution, the status of a subject can be changed by common consent with the federation and the subject by a federal constitutional law (Article 66.5). This means that, apart from the consent between the federation and the subject, such a change would require a three-quarter majority in the Federal Council and a two-third majority in the State Duma. There is even a disputed draft under preparation to specify the procedure to change the status of a subject (Kozlov *et al*., 1996). The dispute is about the length of the draft. This law would also allow uniting or separating subjects from one another, changing borders between them and almost all the possible changes within the federation. According to the critics, such a law would require the Constitution to be changed as well (Lebedev, 1999).

Autonomous areas are situated inside a region, territory or republic. The Constitution does not specify their status clearly enough. They exist in the territory of another region with which they are equal. The Constitution provides that their relationship is organized with a mutual treaty or by a federal law. The Constitutional Court ruled in a case (14 July 1997, No. 12 P), where the Hanti-Mansi and Yamalo-Nenetsk autonomous areas and the region of Tyumen did not have a contract, that the autonomous area is equal to the region. The region is not allowed to interfere in the administration of the autonomous area but the population of the autonomous areas is entitled to take part in the elections of the Tyumen region. Such an interpretation actually makes the autonomous area in principle "more equal" than the region. In practice, however, an autonomous area usually constitutes such a minor part of the population of the region that their representation in the legislative organ of the region does not have any real significance.[37]

Federal and Regional Laws Conflicting with Each Another

Other sources of "asymmetry" are the constitutions and charters of the subjects of the federation. According to the Federal Constitution they should not contradict it. Also the legislation of the federation takes precedence over that of the subjects. It is a well-known fact that almost all the constitutions and charters of the subjects of the federation contradict more or less with the federal constitution (Lebedev, 1999, p. 99).

The federal constitutional court is the judicial organ that decides whether the constitutions or legislation of the subjects of the federation contradict the federal constitution. There have been only a few of these cases before the present constitutional court (1994–). After 1995, there have no longer been any cases. The earlier constitutional court (1991–1993) had to decide on more of these cases, which were usually initiated by the deputies of the Parliament.[38]Quite often the constitutional court found that the constitution of the subject contradicted the federal constitution.

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[37] The disputed question in the Tyumen region concerns oil and gas incomes. Oil is produced in the Hanti-Mansi autonomous area and gas in the Yamalo-Nenets autonomous area. The Tyumen region would also like to decide how the oil and gas incomes are used. The Tyumen region was originally created in 1944 around the autonomous areas to control their oil and gas resources. The autonomous areas were already created in 1930 (Dobrynin, 1998, p. 46).

[38] Nowadays, individual deputies cannot bring a case before the Constitutional Court. It has to be one-fifth of the deputies of the Duma or members of the Federal Council who have the right for a request (see p. 36).

However, the subjects of the federation have often ignored the decisions of the federal constitutional court. This has been the case for example, in Tatarstan and Udmurtia, not to mention Chechnya. The subjects of the federation have also elevated their status to resemble that of a State by adopting their own constitutional court where the constitutionality of the legislature and executive power can be challenged. The federal organs have been reluctant to further challenge the constitutionality of the constitutions and charters of the subjects since such cases might be politically dangerous (Lebedev, 1999, p. 100).

The Presidential Administration has, however, tried to use executive power and the power to give decrees to implement federal laws in the regions. In June 1996, Yeltsin issued a Decree (No. 810) "On Order and Responsibility in Governmental Positions". This decree made the head of the subject of the federation responsible to the federation for failing to implement federal legislation. Lebedev (1999) comments on this decree by stating that it was necessary due to the constant negligence by the subjects of the federation and because there was no obligation imposed on the subjects in the Constitution.

Chechnya — Constitutionalism Sacrificed for the Sake of Federal Unity

The most extreme case in which the Constitutional Court decided to put the unity of the federation before the rule of law concerns the constitutionality of the presidential decrees on restoring order in Chechnya using armed forces (2 November 1993, No. 1833; 9 December 1994, No. 2166).[39] The Court found (31 June 1995, No. 10-II) the decrees consistent with the Constitution even if they were confidential, which clearly contradicts the Constitution (Article 15.3) and even if the decrees allowed violation of basic human rights that are guaranteed in the Constitution and in the international human rights treaties that Russia has ratified. The Court actually found the decrees justified on political grounds in order to secure the unity of the federation.

However, the decision was not unanimous — 8 out of 19 judges gave a dissenting opinion. Justice Vitruk claimed that the confidentiality of the decrees already made them unconstitutional. His opinion emphasizes formal legal positivism. The strongest opinion was given by Justice Zorkin (cf. p. 35), who saw that in accepting to resort to arms on the grounds of the unity of the federation paves the way for also using extreme methods in the future. His opinion reflects a conception of law according to which there are principles of justice above the legal positivist hierarchy of norms. Justice Luzin pointed out that when the President, who is supposed to be the guarantor of human rights, uses armed forces against the people the constitution loses its meaning of serving individuals. Furthermore, he points out that it is not the president without any control to solve the conflict by armed force with a secret decree. According to Justice Luzin, even if something needed to be done with the situation in Chechnya, the measures should have been legal. The warning of the dissenting Justices has proved to hit the nail on the head. The decision by the Constitutional Court denied Chechens the right for legal protection and accepted that law can be overruled for higher political purposes.

[39] These are confidential presidential decrees and not available. The author of this report has not been able to access them anywhere.

The situation strikingly resembles that in the Weimar Republic, where the *Staatsgerichtshof* made a similar decision (25 October 1932) and issued the Decree on the State of Emergency (14 June 1932), which Papen had squeezed out of President Hindenburg; consistent with the Article 48 of the Weimar Constitution. Leaning on this decree, Papen removed the Prussian Government from office and became commissioner for Prussia (20 June 1932). The excuse was found in "the communist rebellion" of Altona, one of the suburbs of Hamburg. The decision to accept the *coup d'etat* of the Nazis was based on Article 48 of the Constitution that clearly authorized the President to ensure that the duties of a *Land* are performed even with the help of armed force. Compared to the Russian attack on Chechnya, the formal authority of the president was much clearer in Germany. Another question was that the reason for the state of emergency was not adequate. The decision of the *Staatsgerichtshof* was, however, formally correct. In the decision of the Russian Constitutional Court, the rule of law did not materialize even in the formal legal positivist meaning. The decision simply legalized political purposes.

Chechen separatism has indeed been a difficult question, which actually can not be solved by legal methods only. Chechnya-Ichkerya gave her Declaration of Independence as early as 6 September 1991, grounding it on the principle of self-determination of peoples and regarding the Chechens as a colonialized people. Such wordings were not rare in Russia at that time. Colonialism was how Lenin described the tsarist enlargement policy and rule, and colonialism was how the regions in Russia explained the relations with the center during the collapse of the Soviet Union. Even if Chechnya, according to contemporary international law, would have a legal right to independence, as the author of this report holds, gaining independence always depends on politics. Independence *de lege* cannot be reached without the recognition of other independent states, which Chechnya will not get without the consent of Russia (Nysten-Haarala, 1994; 1999).

The textbooks of constitutional law argue that the Chechen Republic is one of the subjects of the federation simply because it is included in the list of the subjects of Article 65 of the constitution (Konstituciya…, 1994). According to the constitution there is no escape from the federation. A constitutional law (Article 66.5) can change the status of a subject of the federation, but there is no provision for withdrawal. However, Chechnya consented to be excluded from Article 66, which is against the principle of self-determination of peoples and the voluntary basis, which the federal constitution officially rests on. Chechnya did not participate in the referendum on the constitution declaring that she is not subordinated to the federal constitution. Chechnya also did not send representatives to the Council of the Federation, which federal constitutional lawyers regard as a breach of the constitution (Lebedev, 1999, p. 121).

Chechnya has also been *de facto* independent since her Declaration of Independence. Dzhohar Dudayev refused to act as "a vassal" of the federation. In the Russian federation he could have maintained control over Chechnya with a lot of informal autonomy, but on the condition that he would have leaned towards being a vassal under the President of the Federation. President Dudayev and the national movement, however, required full independence. The federal power in the area has only been temporary and then effectuated with extreme violence. However, the 1994–1996 war ruined Chechnya so badly that the former commander-in-chief of the Chechen forces, Aslan Mashadov, who was elected President of Chechnya in 1996 after the war as a war

hero and a peace negotiator, was not able to restore governmental power and protect the population from armed terrorists.[40] Terrorism is a direct result of the cruel war against the Chechens.

In the autumn 1999, the leaders of the federation decided to solve the Chechen problem once and for all with the most extreme methods. Exactly as in the Weimar Republic, mysterious bombs exploded in the capital. Even if those, who were responsible for the attacks were not found, the Chechens were declared guilty in the mass media. The government supported the propaganda. Such allegations were considered to be a sufficient reason to attack Chechnya with armed forces.

The war, which is a logical result of the decision of the Constitutional Court finding the earlier Chechen War constitutional, has even been popular in Russia. It was well prepared and journalists have not been allowed to enter the area except for propaganda purposes. Fighting against terrorism has been the official explanation from the beginning, and the legal basis of the operation is the Law on Fighting Terrorism.[41] It is, however, quite clear that no law in a rule of law country can legitimize a full scale civil war to catch a few terrorists. Russian legal mentality, which can accept innocent victims in the more important task of punishing criminals, seems to accept even huge violations of human rights.[42] In 1996, the Russian population or actually the intellectuals were against the war in Chechnya. President Putin has, however, been able to use the fear of the population for personal safety and connect it with the need to be a great nation.[43] At the moment there are no legal limits in the power of the federal executive when it can only be justified with the unity of the federation.

The war is cruel punishment for those who insist in leaving the federation and Russian predominance and a good weapon to threaten those who might want to "steal" too much power from the State, which is considered to be the federal center. The war has caused a lot of damage to the attempts of developing sustainable and genuine federalism in Russia. The Peace Treaty between the belligerent parties[44] defined Chechnya as a sovereign State within the Russian Federation. There were also plans to develop self-determination of the Chechen people and perhaps even arrange a referendum on

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[40] For more information about the situation in Chechnya between the two wars, see Altamirova's (1999) article.

[41] Statement by the President of Russian Federation, Boris N. Yeltsin, regarding the situation in the Northern Caucasus, 3 December 1999, press release. Since the Federal Law on Fighting against Terrorism is applied to the situation in Chechnya, no interviews or statements of the representatives of the Chechen party can be published, because it is considered to be promoting terrorism and breaking the afore-mentioned law.

[42] Cf. The survey presented by Mikhailovskaya (1995) mentioned on page 31.

[43] President Putin explained in an interview of Kommersant (10 March 2000) that the war was "his mission" and that "the enemy has to be hit before he hits and do it so well that the enemy does not rise up again". The fact that a person with such KGB mentality can be elected as the President of Russia because of his good leadership capabilities, indicates that the fear of personal safety connected with the need to be a great nation is a powerful weapon to replace the principle of the rule of law for the unity of Russia.

[44] Published in Izvestiya 13 July 1997. In the Nazran Protocol of 10 July 1996 for cease-fire, signed by Aleksandr Lebed and Aslan Maskhadov, both parties acknowledge the other as belligerent parties.

independence after a five-year period.[45] The new war blocked any development of Chechen self-determination. Chechnya was taken under direct presidential control, which has no legal basis at all.[46] The actions of the army in Chechnya are also likely to escalate terrorism in the future. There are Muslim terrorist organizations in other countries, which will take care of cultivating hatred, which the Russian army has seeded among the growing generation of Chechens.

3.1.4 Division of Powers between the Federation and Its Subjects

Contradicting Legal Sources

One of the most confusing parts of the constitution is the division of legislative, executive and judicial powers between the federation and its subjects, which is regulated in Articles 71–73. Article 71 lists the powers of the federation, while Article 72 lists the joint powers, which the federation and the subjects use together. The constitution does not define how the joint powers are used. It has later been specified with federal laws often overriding the power of the subjects of the federation. Article 73 states that everything that is not included either in the powers of the federation or in the joint powers belong to the powers of the subjects of the federation alone.

The division of powers between the federation and its subjects is also regulated by the so-called federal treaties, which are allowed in the Article 11.3 of the Constitution. These treaties, which are nowadays a rule and not an exception, are the main source of "asymmetry" of Russian federalism. Russian federalism is being developed under political pressures. There are two contradicting tendencies, with no common plan or commonly accepted idea on how to reach a consensus on sustainable federalism. On the one hand, new federal laws tend to strengthen the powers of the federation over the subjects and, on the other hand, federal treaties between a subject and the federation allow the subjects more powers than federal laws or even the federal constitution permits.

Division of Legislative Powers According to the Federal Constitution

Lobbying through the Council of the Federation. There is legislative power on the level of the federation as well as on the level of the subjects. Each of the subjects has its own system of legal norms that is based on its own constitution or charter, which according to the federal constitution should not contradict it. The subjects of the federation have the right to initiate the drafting of a bill for federal legislation in both chambers of the Federal Assembly. They also have the right to challenge the constitutionality of federal laws in the Federal Constitutional Court or to turn to the President of the Federation

[45] Tadevosyan (1997) refers to those plans and sees that a confereral or association treaty would not satisfy the Chechen party and that, therefore, even independence after a transitory period should be considered.

[46] Direct presidential control means that there is a representative of the President of the Federation in Chechnya responsible for the republic. Russian legal specialists have discussed how the legal basis should be arranged. The possibilities are a federal law on Chechnya or a presidential decree on the emergency situation in Chechnya or the nomination of a representative of the president in Chechnya under the existing legislation. In any case, according to Russian sources the direct federal control of Chechnya is going to last years, perhaps a decade (Kommersant, 11 April 2000).

when federal and regional laws contradict one another. The subjects of the federation can also initiate a change into the federal constitution.

Since the Supreme Soviet received so much support from the regions in the battle between the President and the Parliament, President Yeltsin offered more power to the regions and promised to take their interests into consideration in the drafting process of the Federal Constitution. The regions managed to lobby the Council of the Federation to become the power center of the local leaders. Actually, their lobbying concentrated on this very issue (Stel'makh, 1997). The Constitution rules that the two representatives of each region in the "upper chamber" represent the legislative and the executive power of the subject (Article 95). This arrangement means that the federal elite occupies the Council of the Federation. In this way, the representatives of the regions can control the legislative process on the federal level (cf. p. 21).

The regional influence on the legislative process was, however, later weakened when a new law was passed on 5 December 1995 ordering that the representatives of the subject in the Federal Council have to be the heads of the executive and legislative organs. It is not likely that the heads of the subjects would have time to work effectively on both the federal and the regional levels. This new law makes the Federal Council more of a ceremonial body, which does not have the possibility to affect effectively on the legislative process. Especially the 14-day rule would require that members could concentrate only on parliamentary work. On the other hand, the Council of the Federation is now an organization where the regional leaders can exchange their opinions on a regular basis. In a country with traditions of leader-oriented rule it is a logical solution. The change also elevated the status of the governors. President Putin's attempts to move the governors from the Council of the Federation have caused a lot of resistance. The governors see that losing their parliamentary immunity would submit them too effectively under the federal president. Decentralization in Russia does not necessarily bring more democracy to the regional level. In practice, decentralization diminishes authoritarian rule of the federal center but strengthens authoritarian rule of the governors instead.

The problem of regional lobbying is the lack of coordination. In passing laws there is no real coordination between the two chambers. They even physically exist in different places, because the Constitution wanted to ensure the independence of both chambers, but did not take coordination enough into account (Parlamentskoe…, 1999). Yeltsin wanted to make sure that the chambers would not be able to unite their forces against the President. Yet, the Council of the Federation is the federal organ, which can in principle coordinate regional interests. It seems, however, that the interests of the regions seldom meet and that the President of the Federation can therefore quite easily use the old Roman principle of *divide et impera* in leading the federation.

Regional Parliaments. Every subject of the federation has its own legislative organ that functions by being regulated by their own Constitution or charter (*ustav*). According to the federal constitution (Articles 10; 77.2; 95.2), each subject of the federation has chosen the model for their parliament independently from the center.

Since the issue was disputed it has taken a long time before the federal law, coordinating and unifying the structures of the legislative bodies of the subjects, was passed. It has been debated how far a federal law can go to regulate the structure of the governmental bodies of the subjects. Finally, the Law on the General Principles of the Organization of Legislative and Executive Power of the Subjects of the Federation was

issued on 6 October 1999. The rules regulating the structure of the legislative body are quite flexible. It is only necessary that the principle of the separation of powers be followed. There are still such regional legislative bodies, which follow the Soviet principle of executive power subjected under the parliament. The Constitutional Court, however, formulated a principle in 1996 according to which the organization of the legislative and executive power on the level of the subject of the federation should reflect the one on the federal level to the extent that is needed to ensure a unified system.[47] Otherwise the parliament may consist of either one or two chambers and the number of deputies has to be decided in the regional constitution. Regional parliamentary elections are regulated and detailed in the law.

Branches of Federal legislation or coordination. Legislative power on certain branches of jurisdiction belongs completely to the Federation. Financial, currency and customs legislation can be passed only on the federal level, which means that economic policy is almost totally in the control of the federation. The Constitution declares that the legal basis of "the single market" of Russia is regulated by federal legislation. According to the Constitution, international economic relations are regulated on the federal level. This is often interpreted in legal literature that the federation coordinates these relations. Such an interpretation takes the Federal Treaty into consideration. Russian lawyers complain that legal rules are obscure and inadequate in this respect (Pustogarov, 1994).

The idea is to keep a common market in Russia under the same regulations and legal framework. Separate markets could, in practice, add pressure also to separate statehood. When economic policy and foreign trade issues belong completely to the federation, the regions lack real possibilities to develop direct economic relations with cross-border areas. This is the case especially in Russia, where the federation controls international economic relations with strict and often contradictory or even absurd norms. Such policy blocks the economic development of the regions. Their entry into the world market could give the Russian economy a boost. The old centralist mentality is a serious constraint to the development of the regions. It can be claimed that the institutions are still built on a centralist foundation. The idea of a Moscow-centered economic entity with fulfilling plans has not disappeared either from the center or from the regions.[48]

In the United States, there was also a debate over foreign trade when the foundations of the federation were established. The result was that foreign policy and a lot of economic policy is concentrated on the federal level. There is, however, competition between the states on who is able to give better opportunities for business. In Russia, it should also be understood that the question is not so much about whether it is the federation or the subjects that guide economic policy, but that it is the economic activity, business, which should be thought about.

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[47] Ruling of the Constitutional Court No. 2-P of 18 January 1996. The case concerned the charter of the Republic of Altai.

[48] Alexander Kirilichev's statement to the Financial Times (27 April 2000) is a typical example. He is the president of the Primorsk Shipping Corporation, who stood against Yevgeny Nadratenko in the governor's elections in Vladivostok. He stated: "I prefer to believe in the dictatorship of law as advocated by the new president Putin. Without a change in the system of power Russia does not have a future. Putin's program will create a new legal base for the country and we will be able to change people who do not fulfill federal laws."

However, according to federal treaties a region may have powers to conclude treaties with foreign countries in spite of the regulations of the constitution (see p. 59). For example, Tatarstan, Saha and Bashkortostan do conclude treaties with other States. The complicated legal situation, however, makes foreign countries more or less reluctant to conclude treaties with the regions. Treaties, which have been concluded, are more ceremonial in that they express mutual interests. Most constitutional lawyers, who represent the interests of the federation, consider that federal treaties on the division of power are on a lower level in the hierarchy of norms than the constitution or even the federal laws (Lebedev, 1999). In legal terms this means that such treaties of the subjects with foreign states might be declared as unconstitutional.

This question reflects the power political nature of the dispute. In Russia, the federation is still largely involved in foreign trade. It can be claimed that centralized exports are reviving the state monopoly of foreign trade (Kirkow, 1996). This fact is clearly visible in the federal budget. In the 1997 budget, 1.6% of the revenues came from foreign economic operations and 3.8% of the revenues were collected by taxing foreign trade (Byudzhetnaya…, 1999). The subjects of the federation do not have such incomes. Liberalization would inevitably abolish export duties and reduce export tariffs. In a free market economy, it is anyhow the enterprises that conduct foreign trade. The question is about whether the state gives them an adequate legal framework for foreign trade, be it the federation or its subjects.

Quite a few branches of jurisdiction are only regulated on the federal level. Legislation in both criminal and civil (private) law including the corresponding procedural laws is completely federal. Also, intellectual property law and private international law (conflict of laws) are regulated only on the federal level. Employment, family and tenancy laws are not included in the civil law in Russia but are regulated both on the federal and the regional levels. In the United States, each State has its own legal structure including private international law. Economic development has, however, harmonized the different legal systems especially in trade law. In Russia, the need for preserving the common market is used for explaining why the subjects of the federation are not given legislative power. While the development in the United States has occurred from bottom up, the drafters of the Russian federal constitution decided that there is no time to wait for an evolutionary development, but that it is better to keep the legal systems of the subjects as harmonized and unified as possible.

Joint powers between the federation and its subjects. Tax and administrative laws are branches of joint powers as well as environmental law, regulation of health care and education. The tax system would need coordination, since there are taxes on all the three possible levels; federal, regional and municipal. The General Part of the Federal Tax Code of 31 July 1998 representing new federal tax legislation, however, regulates merely general principles of taxation concerning the relationship between the taxpayer and the tax collector. The General Part of the Tax Code, however, gives an exhaustive list of the possible sources of taxation, which means that it is not lawful to invent new sources of taxation on any level. These provisions, however, are going to enter into force only with the second part of the Tax Code.

There are also contradicting environmental regulations on both federal and regional levels. The responsibility for pollution is a disputed issue, which neither the federation nor the regions would like to take over. The regulation and organization of expensive

health care is a burden in the present economic situation. Local demands for financing a hospital from the federal budget can be answered that such social political questions belong more naturally to the sphere of local self-government (see p. 64).

Fiscal federalism, which is an important part of the German Constitution or any real federal constitution, is completely absent in the Russian Constitution. Again, the reason was the need to quickly produce a new Constitution to legalize the political bodies. The principles of fiscal federalism were so open at that time that it was impossible to agree about them. Later, such principles have been introduced with federal laws (see p. 64). The system of dual subordination has remained in Russia. Tax authorities have continued to share revenues upward from the local to the regional and then to the federal budget. This takes place on a non-transparent, bargained *ad hoc* basis and creates open-ended commitments for the Russian government. 71% of the budgetary expenditure is spent on the regional level, but about half of the total sum consists of central subsidies mainly for housing, agriculture and transport. High dependence on central subsidies, which are divided arbitrarily, has lead to a low efficiency of local tax collection and weak responsiveness by regional governments to local demand (Kirkow, 1996).

The power to regulate the use of land and natural resources as well as the property rights question was a disputed issue after the collapse of the Soviet Union. The possibility of reprivatization has, however, not been seriously discussed in Russia. The strongest rivals in the struggle for natural resources have been the federation and its subjects. The question is not so much about ownership but about who has the right to economic benefit. For an outsider, the situation can be quite confusing. For the economic development of a transitional country, it is vitally important to know on whose disposal the natural resources are and who is able to dominate them. Do the fish in a river belong to the federation, or to the subject of the federation, to the local community or might they actually belong to the indigenous people living in the area? For example, in the Kola peninsula the federal government has sold fishing rights to foreign tourists and prohibited the Sami, whose traditional source of livelihood is fishery, from fishing in the same river. According to the Federal Constitution (Article 67.1) inland waters, as well as territorial seas, and air space belong to the territory of Russia. The above mentioned Article separates those areas from the territory of the subjects of the federation.

When the Constitution was being drafted, the dispute over natural resources was lively. So, the Constitution left this dispute unsolved and regulated that the power to regulate the use of natural resources is to be used jointly both on the federal and the regional levels (Article 72.1 c, d). Deciding over the status of air space, territorial seas and the continental shelf are reserved for the Federation (Article 71 m). The Constitution states that land and other natural resources are under the special protection of the federation (Article 9.1) and further that they can be in private possession, state or municipally owned or within some other system of ownership (Article 9.2). Alternative property rights systems were kept open.

Constitutions of the republics may, however, have regulations contradicting the Federal Constitution. The Constitution of the Permsk Region regulates that air space, waters and minerals belong to the Permsk Region. The Constitution of the Republic of Saha-Yakutia adds also the continental shelf into the territory of the republic (Lebedev, 1999,

p. 112). The Constitution of Tatarstan goes even further since it regards Tatarstan as a Sovereign State, which has been associated with the Russian Federation. The Speaker of the Tatarstan Parliament, Muhametshin, explained that the wording of the Constitution and the treaty between Tatarstan and Russia means that the federation is a union of sovereign states, which have delegated each other powers. He sees the possibility of building a new type of federalism there (Muhametshin, 1994). Such a genuine federalist point of view is, however, strange to soviet centralist mentality, which the bureaucrats and specialists serving the federal executive power represent.

The idea of divided sovereignty, which can be found in the Federal Treaty between the republics and the federation, is of Soviet origin. It did not have any practical value then. Now, sovereignty seems to be understood in a new way, which reflects more the practice of Soviet times with the idea of a unified state. There can be only one sovereignty, which cannot be divided (Kondrashev, 2000:10–15). The discussion about sovereignty and the dangers of confederalism seems to be an either/or dispute, which cannot descend on the level of division of powers between the center and the regions and developing genuine federalism.

Tendencies to strengthen the federal power within joint powers. There is a strong tendency to strengthen federal powers within the joint legislative powers by promulgating new federal laws. The constitution does not define at all, what joint legislation actually means and how far the federation can go in determining the framework on the federal level. Sometimes the federal law goes so far that it actually usurps the whole legislative regulation to the federal level. This has happened with both the Federal Law on Minerals of 1995 and the Federal Forest Code of 1997.

In the Federal Constitution, legislative powers on minerals are regulated to occur jointly between the federation and its subjects (Article 72.1 c). The Federal Law on Minerals (‘*o nedrah*’), however, usurped them to the property of the federation (1995, No. 10). Lebedev (1999, p. 111) explains in his study of the status of the subjects of the federation that it is clear and commonly accepted that such kinds of property should be in common ownership of the whole nation even if it is not mentioned in Article 67.1. Lebedev’s opinion reflects the traditional Soviet centralist mentality. The Article states that the territory of Russia includes the territory of the subjects, inland waters, territorial sea, and air space. The Constitution separates waters and air space from the territory of the subjects. Inland waters are, however, under joint powers of regulation (Article 72.1 c) along with land, minerals and other natural resources.

The Federal Forest Code of 1997 regulated that the forests form a so-called federal forest fund (*lesnyi fond*), which is included in the property of the federation.[49] Before the Federal Forest Code, several codes had been passed on the regional level regulating the use of forests, which included forests in the property of the subject of the federation. Some of them even allowed private ownership. The former federal law of 1993 on the Principles of Forest Legislation regulated that forest resources were in joint ownership

[49] The structure of the Russian forest sector is presented in IIASA’s Forestry Project reports. See, e.g., Efremov *et al*. (1999), which also presents the structure of forest sector in Khabarovsk krai. The structure of the Karelian forest sector is presented in Piipponen (1999).

of the Russian Federation and its subject. The Federal Council actually delayed the legislative process, but finally had to give up.

The Republic of Karelia and The Khabarovsk Territory took the issue before the Constitutional Court claiming that the Federal Code contradicts the Constitution, which includes both natural resources generally (Article 72.1 c) and the administration and legislation of forests (Article 72.1 j) into the joint jurisdiction. They regarded the code as unconstitutional also because the Code made forests completely federally state-owned even if the Constitution regulates that land property can also be in private or municipal ownership. The Constitutional Court, however, held that the Federal Forest Code does not contradict the Constitution (No. 1-P of 9 January 1998). Joint jurisdiction in this case means that even if the forests are included in the "federal forest fund" the use and profit of this property can be regulated on a contractual basis between the federation and the subject. This means, in practice, that the subject of the federation, e.g., the Karelian Republic, is entitled to a share of the income from harvesting the forests on its territory. According to the Forest Code (Article 106), the share of the subject is 60%, while the federation receives 40% of the income from harvesting. A different share can be agreed upon between the federation and the subject. It is actually the subject of the federation, which decides about the use of the federal forest fund, not the owner itself. The subject decides on renting or leasing plots of forestland for harvesting purposes. In these decisions they should implement federal forest policy. Such an arrangement is one of the odd compromises of Russian federal structure. However, transfer of ownership is not allowed by means of an agreement between the federal state and a subject. The Forest Code rules that only parts of the forest fund may be transferred to the possession of a subject, by virtue of a federal law.

In the case that Karelia and Khabarovsk took before the Constitutional Court, the court held that the forests also belong to the whole Russian nation, and form a special kind of property, about which there is specific legislation. Forests were not regarded as ordinary land property. Even after the privatization of forest enterprises, the administrative structure of the forest sector has remained mainly in the same form, which was established in the 1930s (cf. footnote 49). Forest legislation has changed and now includes, for example, different alternatives of ownership but only on a regional level. The decision of the Constitutional Court indicates that acts issued by some of the subjects regulating the private ownership of forests are unconstitutional even though the Constitution clearly declares (Article 9.2) that land can be in private ownership.

The Federal Land Code has been under preparation for a long time, mainly due to the dispute on what forms of property rights can be accepted. Many subjects of the federation already have their own property law legislation, which will probably turn out to contradict the forthcoming federal code. Some subjects of the federation allow private ownership of land while others do not. In such cases, the subjects of the federation might decide not to change their property law legislation to correspond to the federal code.

The ongoing struggle over legislative authority between the federation and the subjects makes the legal framework blurred and shaky. As long as the federal structure remains disputed, economic activity does not have a secure basis. Investments on a long-term basis are especially risky. Centralized decision power may be advocated both with more clearance and with legal traditions, but it will prevent the development of genuine

federalism. Since decentralization is common practice, it should be accepted also on the legal level and developed to an acceptable balance. Federalism is, of course, a continuous process not an eternal structure laid down on a written document. However, a continuous dispute between the federal center and the regions does not make Russian federalism either democratic or effective. What the Americans call a 'due process of law' is missing. There is no real undisputed legal basis where to look for legal solutions and no rule of law to lean on.

Division of Executive Powers between the Federation and its Subjects

The struggle on the federal model has been hectic on the sphere of executive power. Every subject of the federation has its own government and usually a huge local administration with a lot of ministries and committees. The head of the subject is usually called a president in the republics and a governor in the other subjects. In most cases the executive power is presidential just like on the federal level. However, the executive power is far from a unified structure.

The President of the Federation, as head of the executive power, has tried to unify the executive power, solve the problem of "asymmetry" and take the executive power of the federal subjects under his control with presidential decrees. In October 1994, President Yeltsin issued a Decree "On the Measures to Strengthen the Unified System of Executive Power in the Russian Federation (No. 1969), according to which the appointment of the heads of subjects other than republics is submitted to the President of the Federation. The President is also entitled to dismiss them. The Constitutional Court found the decree consistent with the Constitution (31 April 1966, No. 11-P) accepting the explanation of the presidential administration that these measures were only temporarily functioning in the absence of a proper federal law. The Court also held that the decree does not deprive the subjects of the federation the right to independently arrange elections for the governors. President Yeltsin's original purpose was to change regionalist governors into his own men. The Congress gave Yeltsin the right to appoint governors in 1991 and he was able to keep them in power until the election of 1994, in which the regionalist candidates were more successful.

The other means to control the executive of the subjects is the system of representatives of the President. They are federal civil servants under the Presidential Administration. President Yeltsin started the institution when he obtained the power from Congress to nominate governors in 1991. In the beginning, he presented them as observers with no power to control the governors. In many regions, the relation between the representative of the president and the governor were not good at all (Lysenko and Lysenko, 1998, p. 14). President Putin has tried to intensify the control of the federal president by issuing a decree on establishing new "superregions" above the subjects of the federation for his representatives to control the implementation of federal legislation and report to the president about the situation in the area (No. 849 of 13 May 2000).[50]

[50] There is a more centralist reform of administration prepared under President Putin. He has informed the governors that the membership in the Council of the Federation may be cancelled. Like his predecessor, President Putin has also tried to affect the elections of the governors.

There was a draft law in 1995, which would have given the center the power to order the structure and the powers of the executive of the subjects. The Council of the Federation, however, did not accept the draft. A new law, which subordinates the executive of the subjects under the control of the Presidential Administration, came into force in September 1999. This law, however, gives the subjects the power to decide about their own state structure. This is already guaranteed in the Constitution (Article 77). The powers of the head of the subject do not have to be similar with the powers of the federal president, but the separation of powers is required. There are still several subjects of the federation where the executive has been subjected to be under the parliament according to Soviet principles. The Constitutional Court has emphasized the need for a unified system in its ruling from 1996 concerning the Altai region (cf. p. 51).

Participation in local elections has been so low that it is difficult to tell, how much the people support regionalism. Opinion surveys show that centralism and decentralization are supported equally (see p. 41). It may also be that the regional level is considered to be so unimportant that people do not bother to vote (Stel'makh, 1997). Low participation in all the elections also reflects the low interest of the people towards politics. Since regional difficulties are nearer to the people, regional misconduct and corruption may also alienate people from politics more on the regional level and even increase the popularity of centralism. In Russia, regional leaders traditionally tend to govern their regions like feudal vassals. Since their management skills usually stem back to communism, decentralization has not lead to increased democracy, but are a reflection of the authoritarian rule of the center with corruption and "friendship" relations. The misconduct of power and corruption on the regional level has made it easier for the federal center to get support from the population for intensified centralism. It is a general phenomenon everywhere that people tend to react more to corruption the nearer the decision-maker is to them. This is also why it is important to start building a civil society from below.

Regionalist leaders have tried to get more power from the center, while the center has been weak. However, as soon as the center started to strengthen again, it has tried to "put the regions back in order". At least the center has had difficulties in regaining the powers, which had already been given to the regions. The centralist mentality regards the situation as such that the center gives power to the regions and the regions try to rob it. According to Kondrashev (2000:11), who sees that there can be only sovereignty, it is only the sovereign itself (read: the federal center), which can limit its sovereignty. While the point of view of the regionalists is that the federation consists of its regions, which delegate powers to the center (Muhametshin, 1994). However, with the help of federal legislation and with the consent of the Constitutional Court, the central power is gradually strengthening its sphere usurping away what the regions were able to negotiate in exchange of support for the President of the Federation.[51]

The regionalist leaders have not been successful in coordinating and lobbying regional interests. Nowadays, the Council of the Federation is an organ where the regional

[51] After the elections of the State Duma of 1999, the center will be able to strengthen itself even more on condition that the deputies of the Unity Party will stay under control of President Putin. The President has been able to strengthen the center also by issuing decrees on administrative changes. It will remain to be seen whether these changes only increase bureaucracy and how long they will last.

leaders can meet regularly, and where their interests can sometimes meet in spite of the constant *divide et impera* policy of the federal center. There have also been attempts to establish unofficial organizations of some regions. One example is the association of the regions producing oil and gas, which was founded in 1994. The aims of the association are to take part in the state energy policy and coordinate the activity of the regions. This means that the regions try to lobby together to affect the price of oil and gas in the inner markets of Russia. Such lobbying is, however, not consistent with the federal competition law prohibiting monopolies.

There was also an attempt to stop the Chechen War (1994–96) by establishing a lobbying group of the heads of those republics with large ethnic minorities. President Yeltsin, however, responded by gathering another group of Great Russian regional leaders to fight against the group lobbying against the war. The different interests of the Great Russian regions were used against the interests of the regions with ethnic minorities. The Chechen war did not raise a unified front of the regions against the center to defend the separatist republic. Actually, the Great Russian regions managed to lobby for their own interests against the earlier budgetary politics favoring poor Caucasian regions in order to keep them peaceful (Stel'makh, 1997). In a federation with no firm and transparent rules of fiscal federalism, regionalist leaders can not afford to resist the federal president, who can take budgetary measures to force the regions to obey the center.

It should, however, be borne in mind that the regional leaders traditionally have some freedom in governing their own regions. Even if the federal President tries to affect the nomination of candidates of the regional elections to ensure obedient regional leadership and even if he has a lot of executive power to make an affect on the regional level, he cannot control the huge federation completely. The centralization tendencies are now strong, but they are probably going to weaken in the future because of their own impossibility. Decentralization tendencies advance more silently, but may be able to succeed in the long run. Authoritarian rule on both the federal and regional levels is, however, likely to continue because of the absence of a civil society and effective control of state power from the grass root level.

Judicial Power of the Federation

Judicial power exercised by independent courts is almost completely federal (Article 71.1, n). All of the court instances are governed by federal legislation and financed from the federal budget. The subjects have, however, the right to establish courts of the first instance (*mirovye sudi*), which are also regulated in regional legislation. These courts are so new that it is difficult to say what their role is going to be in the future. There is a reason to fear that because of the different sources of financing the activity, regional courts may become the bone of political contention (Malyi, 1999). The Procurator's Office is also a large federal organization controlling the court system and implementing legal rules on both federal and regional levels. In many regions, however, procurators are also under regional control or there is a regional procuracy competing with the federal system existing (see p. 33).

Even if there are no competing courts on the regional level, most of the republics have their own constitutional court where constitutionality of regional laws can be challenged as well as the decisions of regional executive power. Such courts are independent and

do not belong to the federal system of courts. There is no right to appeal to the federal constitutional court. They are also quite different in the different subjects. Some of them are only administrative quasi courts. In Irkutsk, for instance, the constitutional tribunal can only give recommendation in disputes between state organs. The members are chosen in many different ways. In Adygeya, Dagestan and Saha, the judges are elected. In Tatarstan, the Parliament has to accept the appointment of the judges taken by the court itself. In Tuva, the Parliament appoints the judges on the nomination of the court and after acceptance of the President (Malyi, 1999).

Many subjects of the federation have also established a regional ombudsman system. According to the Federal Constitution, the protection of human rights and the rights of national minorities both belong to the federal powers (Article 71) and to joint powers of the federation and the subject. Establishing such organs as constitutional courts and ombudsman adds more signs of statehood to the status of the subjects of the federation. However, their efficiency is often low and their role often seems to be more ceremonial than actually taking care of constitutionality and human rights in the region.

Federal Treaties — The Other Legal Source of Federalism

The Federal Constitution did not solve the dispute concerning the division of power between the federation and its subject. Articles 71–73 are unclear and leave a lot to be specified with future federal legislation. Such important questions are the specification of joint powers and fiscal federalism. Even if the regions got the control of federal legislation through the Council of the Federation, they have not been able to effectively prevent the strengthening of federal power through controlling the legislative process on the federal level. Unclear rules of the Constitution also give the Constitutional Court a lot of power to interpret it. The Court has quite clearly favored central power in the cases where usually the subjects of the federation have challenged it. It has also not paid attention to the Federal Treaty, which legalized decentralization and which the subjects of the federation wanted to be incorporated in the Constitution.

There is, however, another additional way for the regions to gain more power from the federation. According to the Constitution, it is possible to conclude treaties between the organs of executive power of the subject and the federal executive power on transferring powers to the other party, on the condition that such treaties do not contradict the Constitution (Article 11.3).

The first of such a treaty was signed between the Presidents of the Federation and the Republic of Tatarstan at the beginning of 1994 (*Ross gaz*, 14 February 1994). Tatarstan refused to sign the Federal Treaty in 1992 and did not participate in the Referendum on the Constitution of 1993 although allowed the citizens to go to the ballots. Like Chechnya, Tatarstan referred to President Yeltsin's famous utterance in Kazan, in which he urged the regions to take as much power themselves as they could manage. Since Chechnya was even more separatist and would have agreed to negotiate only on independence, the president wanted to show that he was able to decentralize power to the regions as long as the region stays within the federation. In this political environment, the president of Tatarstan was able to make a treaty, which actually acknowledges the sovereignty of the republic. Tatarstan even received powers for direct foreign relations. The treaty is an association treaty with the federation and Tatarstan. The Constitution of Tatarstan is often described as being more confederal than federal

(Pustogarov, 1994). It regards the republic as a sovereign state, which has been associated with the Russian Federation.

Those who were in power in Tatarstan at that time belonged to the former Communist *nomenklatura*. They were probably only interested in keeping the republic in their own control. There was, however, a strong nationalist opposition, which claimed Tatarstan independence or at least a lot more power. President Shaimijev felt that he was forced to listen to the nationalists. Later, however, the nationalist movement split and weakened. The *nomenklatura* managed to maintain control and slow down privatization in Tatarstan (McAuley, 1997).

The Treaty between Tatarstan and the federation quite clearly contradicts the Federal Constitution since many of the powers given to Tatarstan would, according to the constitution, belong to the powers of the federation. This fact has openly been admitted and accepted by federal constitutional lawyers as a political necessity (Lebedev, 1999). Quite a few specialists do not consider the situation to be ideal, but see the treaties as an acceptable and practical means to develop Russian asymmetric federalism (Tadevosyan, 1997). For some scholars, federal treaties reflect the break down of the Soviet centralist principles and represent decentralization, which can also develop from below, not only from above (Polenina, 1993). Some critics of the treaties emphasize their temporary nature, since the President had explained that the treaties were made in the absence of federal legislation (Eliseev, 1999). Karapetyan (1996), who sees equality of the subjects of the federation as the only acceptable foundation for a federation, expressed the most severe criticism.

The treaty method is not as safe as taking the same powers into the constitution but politically it was the only possibility of introducing a more decentralized federalism through the back door. This is felt as pressure at the federal level. Constitutional lawyers ironically comment that it will soon be the subjects who demand that the federal constitution should not contradict their own constitutions (Lebedev, 1999). Such a step would actually make Russia a more genuine federation, since it would mean an acceptance of the idea that it is the subjects forming the federation and that the federation exists for the subjects not *vice versa*.

Several other regions followed Tatarstan's example. President Yeltsin made these treaties to gain more support before the presidential elections. In 1995, 4 treaties were made and 11 in 1996. By the beginning of 1999, 46 treaties already existed on the division of power between the federation and a subject. These treaties were made either between the Presidents or the Prime Ministers. Federal treaties became more a rule than an exception. These treaties were initially made with republics, but from 1996 to 1998 there was a wave of treaties with subjects other than republics (Lebedev, 1999).

These treaties contradict the federal constitution also because they are often partly confidential. The treaties contain a basic agreement with special agreements connected to it. Special agreements are more detailed and usually focus on a specific problem of the subject of the federation. It is these special agreements, which are often confidential. Other subjects of the federation are not supposed to know what benefits were gained by the agreements.

Many of these treaties do not clarify the division of powers between the federation and the subject. From the point of view of the federation, the aim of the treaties seems to have been to keep the subjects of the federation content and ensure that the subjects of the federation do not have separatist objectives. The practice of secret treaties totally undermines the whole idea of federalism and shows how weak and undemocratic the foundation of the federation actually is. The inequality these treaties create can cause more contradictions between the subjects of federation. This may even be the aim of the center relying on the principle of *divide et impera*. When regions envy each other, they are less likely to unite their forces to put pressure on the federal center.

When most of the subjects of the federation had already concluded treaties with the federation on the division of powers, a federal law clarifying the practice and the contents of such treaties was finally passed. The law "On the Principles of Dividing Power between the Russian Federal Government and the Subjects of the Federation" came into force in July 1999 and, if implemented correctly, should also end the practice of secret treaties. None of these treaties, which are part of the policy of taming the dissatisfied regions, have been taken before the Constitutional Court. In the case concerning the constitutionality of the Federal Forest Code, the court did not deal with the contradictions between the treaties on the division of powers and the constitution. The whole practice is a political necessity, and clearly contradicts not only the Constitution, but also the principles of democracy. The Constitutional Court would be in a difficult situation, if the constitutionality of one of these treaties were taken before it. A decision, which would be in line with the earlier rulings of the constitutional court that emphasized the superiority of the constitution, would be politically dangerous.

From the point of view of the regions, decentralization is not based on a legally secure foundation. It is always possible that if the federation gains so much power over the subjects that splitting into parts would no longer be a great threat, the constitutionality of these treaties might be challenged. Then the law could be used as a weapon in power politics. The unconstitutional and undemocratic way to make the federation more "asymmetric" to prevent it from splitting or shifting into a confederal basis, shows that the center may regard the situation as temporary and has only decided to use the old strategy of *divide et impera*. It is, however, also a development towards shifting the decentralized practice from an informal level to one of formal legal rules. The uneven and asymmetric development does not look good in the eyes of a lawyer, who would prefer a clear system. It is, however, a development towards accepting the existing system. It has moved the gap between decentralized practice and centralist legal rules to the level of official legal rules.

3.1.5 Summary — Is There Any Future for Russian Constitutional Federalism?

Developing sustainable federalism is one of the most important challenges among the other political, economic and social problems of the new transforming federation. There are at least two competing models of Russian federalism. The first is a centrally governed pretended federalism with some decentralization to silence the regions. It is based on the idea that only the federation is a state and the subjects are parts governed from above. The federal center and its legal specialists support this model. The second model is based on the idea that the subjects of the federation are states, which together

can form a federation to gain more economic and political power. The more genuinely federal model stems from the early decentralizing ideas of the Soviet Union, according to which Russia could have been developed into a confederation of Sovereign States. The latter model is supported more or less by the regional elites and is more or less functioning in practice. Between these two models, a compromise model might be found. Apart from federalism and confederalism, there is also separatism, fighting against which is used for strengthening the center.

The centralist constitutional lawyers, however, seem to think that a confederation would be as destructive to the unity of Russia as actually splitting up. Confederation is regarded as a long step ahead towards finally splitting up. Calling the regionalist model confederal actually reflects this fear of the centralists. To prevent such a destiny they have established legal solutions for developing Russian federalism under the existing Constitution. One suggestion is that the federal treaties should be replaced with a new Federal Treaty between the federation and all its subjects (Lebedev, 1999). In this way, asymmetry would be replaced with an equal status. If the treaty would be consistent with the present Constitution, Russia would stay on quite a centralist type course of federalism. It would, of course, be a clearer model but also less democratic since democracy requires decentralization and not strict and clear central control. It is, however, not presumable that the subjects of the federation would accept such a treaty and return to the center powers, which some of them have gained by virtue of separate treaties with the federation.

If, however, federalism is going to be developed to a more decentralized direction, the Constitution has to be changed. Changing the Constitution is complicated, because it would require a three-quarter majority of the Federal Council and a two-third majority of the State Duma of the Federal Assembly (Article 134). Furthermore, changes in Chapters 1, 2 and 9 which define the constitutional structure of the federation, cannot be made unless a three-fifth majority of all the members of both chambers supports the proposition and a Constitutional Assembly is appointed. The Constitutional Assembly can either accept the amendment or revision or draft a new constitution and accept it with a two-third majority of all its members. It can also submit the draft to a referendum, in which case the constitution is considered to be adopted if over half of the voters support it (Article 135). Changing the constitution towards a more federal and decentralized basis would require a more complicated procedure. There are, however, gaps in the constitution, which have allowed the President to intensify and centralize administration through decrees and administrative decisions.

As long as no mutual political consensus has been reached, there are no legal methods to develop Russian federalism. The centralists seem to prefer a legally vague situation, which is based on administrative treaties and increases the asymmetry of the federation at the cost of clarity and constitutionality. They hope that the situation is only temporary and that sooner or later the federation is going to be unified and the legal foundation purified from obscurities. This seems to be the strategy of the federal presidential administration. The regionalists, on the other hand, regard the administrative treaties as their only available possibility to increase pressure on the federal center, which tries to strengthen its own powers relying on the constitution and its centralist interpretations. As the regionalists have now been able to make the practice appear also on the legal level, it is highly unlikely that they will forfeit their power. They can always use passive

resistance and wait until the bureaucracy at the federal center gets tired. In practice, pure centralism is impossible in such a huge and inefficient federation.

The Chechen War (1994–96) was destructive to the development of federalism. It showed that the center is apt to use violence against a disobedient region. Disobedient subjects are forced to sign "a social contract", which happens to be the constitution prepared by federalist lawyers and reflecting mostly centralist ideas. The support of the Great Russian regions offered Yeltsin the weapons to punish separatist ethnical movements, and blame the Chechens for all kinds of misery. Since also the Constitutional Court accepted violations of human rights in protecting the unity of the federation, it is quite clear that it is now acceptable that the federal center does not have any limits to its power, when it considers that the unity of the federation is at stake.

The war has been able to channel the frustration of not only the political leaders of the country and the military but also the disappointment of the people on the misery caused by unsuccessful economic reforms, corrupted politics and increased insecurity because of organized crime. Especially the citizens' feelings of insecurity were cynically connected with Great Russian patriotism and channeled against an ethnic group inside the federation. History shows that such frustrations can easily be projected on an ethnic group but with serious consequences. Finding a common enemy is an easier way to unite people than finding a democratic consensus. Finding consensus in such a multicultural and multinational country as Russia is extremely difficult even in normal circumstances, without Soviet and tsarist traditions. From the point of view of historical development, the balance seems to be blurred but such a situation is more "ordinary" in Russian history. Strict centralist rules have always been circumvented or ignored until they finally wither away.

Transition increases the difficulties in keeping the asymmetric, inefficient and bureaucratic federation in existence. A state, which should exist to protect its citizens, finds it more justified to protect its own existence at the cost of the citizens. Such politics is a return to Tsarist Russia, with constant wars in peripheral areas. Unfortunately, Russia has not been able to find a new democratic ideological basis for its existence but has turned to the old imperialist ideology. Such a development does not indicate a triumph of voluntary, efficient and democratic federalism in the near future. Those regions, which have been able to gain an exceptionally independent status, may be the next targets of the unifiers. Recent demagogy indicates that Russia may try to "take the lost empire back". Great Russian expansion has fertile soil to grow, since the Russians seem to be sure to blame the collapse of the Soviet Union for their economic problems. A Great Russian centralized State is regarded as a normal and eligible situation in Russia. Anything deviating from the traditional model is abnormal and unfavorable to the mentality of Russian centralist bureaucracy, which can effectively hinder democratic federalism from developing.

Compared to American federalism, Russian federalism is something deeply contrary to American ideology. Limited authority of the government, based on a due process of law, is quite contrary to Russian authoritarian struggle and demand for unqualified submission to a Sovereign which, however, is circumvented in practice. Authoritarianism, lack of transparency and arbitrary unequal treatment of the regions stem from the "feudal" system of the Russian Empire, where remote provinces were given to vassals. The Russian asymmetric development, however, shows creativity.

Unfortunately, the development is not in anyone's control, because it is not based on a mutual convention. The situation and the relations inside the federation are so different than in the United States that Russia should be able to find its own democratic and decentralized model of federalism. The centralist aspirations of the presidential administration are doomed to fail in the long run and the splitting into parts is not out of the question either.

4. Local Self-Governance

Municipal self-governance was introduced to Russia by the Constitution of 1993. The Constitution only contains 4 Articles concerning municipal self-governance (Articles 130–134), but afterwards two laws were passed — one on Self-Governance (1996) and the other on the Financial Basis of Self-Governance (1997).

The model for municipal self-governance in Russia is the European Charter of Self-Governance, the implementation of which was one condition for the membership of the Russian Federation in the Council of Europe. Municipal self-governance is, however, something totally new in Russia. During the Soviet era, the state took care of all the administration, also at the local level. Russian textbooks of municipal law mention the *zemstvo* institute before the Revolution as a historical predecessor. The *Zemstvo* institute did not, however, fulfill the requirements of modern democracy (Ovchinnikov, 1999). It was more an organization of arranging local leadership for the villages.

According to the Law on Municipal Self-Governance (1996), the local population elects representatives to the local council, which is responsible for local affairs like public transportation, health care, education, planning and deciding on building and using land. The division of municipalities and the number of representatives of each unit are decided by legislation of the subject of the federation.

The law of 10 September 1997 arranges the financial basis of self-governance. According to this law the income of the local budget consists of local taxes and payments, shares of both federal taxes and taxes of the subject of the federation. On this financial basis, the local council decides on its budget independently from the state. It also accepts a municipal ordinance independently. The local level is, however, totally dependent on subsidies from the federal level, the distribution of which is arbitrary and not transparent (cf. p. 53).

The first part of the Federal Tax Code lists all the possible local taxes. The exhaustive list of the first part of the Tax Code is, however, not yet in force. It will enter into force together with the second part of the Tax Code, which has yet to come. Local authorities have been creative in inventing new local taxes, which are not all legal. The authority to complain to is the procuracy, which has the duty to supervise that the law is followed on the municipal sector. The Constitutional Court cannot decide such questions upon a request from an individual (see p. 36).

The income of privatized municipal property goes completely to the municipal budget. Also 10% of the income of privatized state property on the territory of the municipality is paid to the local budget. The most important income is 50% of the property tax from enterprises and 50% of the income tax from physical persons. The municipality also

receives at least 10% of the value-added tax on minerals and metals that have been excavated in the municipality. The municipality is also entitled to at least 5 % of the tax on alcohol and 10 % of the excise tax. All these percentages are the minimum, which the law allows the municipalities. The shares that the municipalities received from the budgets of the subjects of the federation in 1996 were considerably higher than the minimum, which the law of 1997 requires (Feigin, 1998:47). This is logical, since most of the costs of health care and social services rest on the municipal level. The new law actually gave the subjects of the federation the power to diminish the shares given to the municipalities (Feigin, 1998:47). Besides these percentages of tax income, the municipality is also entitled to income from renting its property, fines, and so on.

The problem for organizing self-governance, which has not existed before, is that its regular sources of income are unsure. The problem is not only the arbitrary delivery of state shares from the federal budget but also from the budgets of the subjects of the federation. In the present "virtual economy", the enterprises do pay taxes but mostly on the barter basis. In practice, this means that the local self-governmental bodies have to be satisfied with such municipal technology that can be offered by the local enterprises in exchange for taxes. The lack of cash limits the possibilities to plan and development the infrastructure of municipalities. The social infrastructure was transferred to the municipalities with the income from privatizing municipal or state enterprises. The income of privatization has, however, not been very high. The income tax of physical persons is very low in Russia. Taxes were minimal in the Soviet Union, and in its successor's virtual economy, it is impossible to pay higher wages to increase the share of taxes. Even the existing low wages are seldom paid on time. Sometimes the salaries are simply cut, because the amount of unpaid salaries has grown to be too large. Gradually the municipal sector should, however, be able to take over the social tasks, which enterprises earlier offered to its workers, family members and pensioners.

In many big cities, municipal enterprises and banks as well as municipal stockholdings in companies can constitute a good asset for the municipal economy. Many municipalities have indeed noticed the possibilities of security trading (Uvarov, 1998, II, 41). Restrictions and obscurities in the regulation of sale of real estate are a hindrance for the municipalities. Federal Land Law has been prepared for a long time. In the meanwhile many subjects of the federation have passed own laws, which contradict with the present and presumably also with the future federal legislation. In such an environment municipalities take a risk in operating in the land market (Uvarov, 1998, II, 41).

Apart from the lack of money another significant hindrance for developing municipal self-governance is the Russian centralist mentality. There is a lot of high quality theoretical discussion in Russian periodicals of jurisprudence. Specialists of municipal law seem to understand the idea of municipal self-governance.[52] There are, however, also a lot of voices against local self-governance, criticizing it as being unsuitable for Russia. Many critics do not see any reason to change the earlier practice, where local administration belonged to the state administration. These legal specialists, as well as a lot of politicians, are afraid of competing power for state power (e.g., Krasnov, 1990, p. 10; Eliseev, 1999:12). The President, on the other hand, has supported local self-

[52] See, for example, roundtable discussions in *Gosudarstvo…*, (1993; 1997).

governance to weaken the regional governments and the power of the governors (Lysenko and Lysenko, 1998:14).

The local leaders, on the other hand, are often the same communist bosses, which were appointed by the Communist Party during Soviet times. There are only a few newcomers to take care of local questions. In practice, this means that the same old methods are used and the same old relations count. The level of legal knowledge is also quite poor at the local level.[53] In introducing decentralism local self-governance is crucial. This is exactly where civil society would start to affect political power. Alienation of the people from political power and their deep distrust in political institutions tends to keep politics in the hands of those who are used to govern on Soviet terms.

5. Summary and Discussion

Russian inheritance of legal positivism in a distorted communist version and a concept of unlimited state authority controlled by the infallible Communist Party is not a favorable starting point for developing democracy and the rule of law. The people, who should be able to transform society into a new democratic and constitutional trail are mostly the same former communists, who were used to obey the party rules and think on centralist soviet terms. If we suppose that people are not totally imprisoned by their previous attitudes and mentality, but are able to learn new things, the unfavorable starting point could be regarded only as a temporary hindrance for development. The hindrance is, however, even stronger because the dominant institutional setup forces people to adapt only with the institutions. Those acting ahead of the times will definitely suffer.

Technically the preconditions for modern constitutionalism exist in Russia, because there is a written constitution and a formally independent judicial body supervising it. The separation of powers led to a severe power struggle that ended with the President's victory. The separation of powers was not understood as providing limits to state power, but it caused a constant power struggle of who has the ultimate power of the Sovereign. As a result, the highly presidential system with a weak parliament and a party structure has proved to support autocratic leadership. For the introduction of reforms a strong leadership might, however, have been more favorable than an open democracy that would soon have blocked all the reforms, which are economically heavy on the people. However, autocratic rule has not solved economic problems either.

In Russia, the minimum requirements for constitutionalism to function have not yet materialized. Rules are not transparent. Even a civil war can be started with secret presidential decrees. In the absence of new laws, the country has largely been ruled by

[53] There are also local cultural differences. In cultures other than Russian, there are pressures to decide local matters according to their own old traditions. Such double standards existed through the Soviet period. For example in North Caucasus, village elders were — in practice — much more influential in peoples' lives than local "communist" bosses, who represented the foreign state power. Traditions from below are therefore opposing local self-governance, which is understood at the local level as a model given from above. See, e.g., Shahmanaev's (1999) article describing difficulties in introducing local self-governance in Dagestan.

presidential decrees on a temporary basis. Sometimes even laws enacted by the parliament have been superseded by presidential decrees. Decentralization is not regarded as an important objective. Actually there is a tendency to strengthen the power of the federal executive — tendency that has not been turned down in the interpretations of the constitution by the constitutional court. Decentralization, which does not find enough support from the constitution, is developed through the back door with the help of treaties between federal and regional state authorities. These treaties, unfortunately, rest on a vague legal foundation since they often contradict the constitution and contain secret provisions. Therefore federalism is not developed openly. The presidential administration seems to have a centralist rule as an objective. The superiority of centralism is argued with clearness, order and the unity of the federation. The presidential administration is full of bureaucrats for whom authoritarian centralist rule seems to be a good option even if the President changes his officials quite often. Constant strengthening of this agency gives more weight to centralist mentality.

The constitution has served well as a formal legitimizer of the federal executive power. After being defeated in the power struggle between the legislature and the executive the Constitutional Court has offered legal support for the president. It has interpreted the powers of the president quite widely and often found some exceptions such as the temporary nature of the presidential decree. Its decisions have had a significant role in closing the gaps in the constitution and trying to clarify obscurities. However, the state authorities neither on the regional nor on the federal level have not always obeyed the decisions of the court. In the extraordinary environment in Russia, the Constitutional Court is inevitably drawn into the political battle, which it should settle in legal terms preserving its reputation as a purely legal body. The absence of a commonly accepted convention, a social contract of society, makes the role of legal checks difficult. Politically, the most dangerous issues such as federal treaties on the division of power have not been brought before the Constitutional Court.

Federalism can definitely be called virtual in Russia. It is not democratic and transparent federalism but contains an inner conflict. Centralist mentality regards federalism as an authoritarian system where the federal center should have the last word to say and the president ultimate authority. However, the existence of competing power centers is a practice that has to be tolerated. Setting limits for state power may develop in this process.

“Constitutionalism”, allowing serious violations of human rights in the name of the unity of the federation, can be only called a pretended or a fallacy of constitutionalism. Even reaching the *Rechtsttaat* in the classical Weberian meaning of strictly following legal norms that are set for those who represent state power, seems to be too difficult for Russian leadership and state officials. The rule of law is not as President Putin regards “dictatory of law” — obedience to the non-erroneous Sovereign. The rule of law does not function from above but requires democracy and a well-established civil society to control it.

It seems that Russia has not been able to simultaneously develop democracy, the rule of law and a market economy to a satisfactory level. This situation has lead to dubious attempts to restore order with bloodshed. There are alarming similarities with the failed democracy of the Weimar Republic and Russia today. As Carl Schmitt predicted, people wanted order and Adolf Hitler answered their needs with sad consequences. Hans

Kelsen, the other influential lawyer in the Weimar Republic, considered that every society has to be based on positive law and that democracy can be built only on a proper legal foundation. According to Tolonen (1996), Kelsen's approach functions only in a normal situation, while Carl Schmitt was right in claiming that the rule of law cannot be developed through positive law in an unstable situation (*Ausnahmezustand*) without first restoring order.

"Restoring order" has already caused a lot of damage for developing the rule of law in Russia. Human rights are deprived. Fighting against crime demands a lot of innocent victims in Chechnya, but does not include investigating illegal business and corruption in the Kremlin itself. Rebellious governors are more likely to be punished for their corruptness. The development is going to lead to more punitive and arbitrary law, like in the Soviet Union. Restoring order to the regions means increasing centralism. The total abolishment of democracy and the rule of law in the name of restoring order may, in Russian circumstances, not lead to a well functioning market economy either. Corruption takes care of that.

As an instrument, law has been used a lot in transforming Russia into a rule of law country. The flood of contradicting legislation has, however, lead to an inflation of the law. Unclear rules only confuse people who do not even know what laws are in force and what they regulate. Circumventing law and unofficial rules becomes more important in such an environment. Predictability is the most important feature of a functioning law. In a Weberian traditional *Rechtsstaat*, predictability is reached with exact rules that are applied strictly in the same way in all similar situations. In the Russian environment such predictability unfortunately does not exist.

Legitimacy does not stem from the state, as Russian legal positivist mentality supposes. Legitimacy is gained with the voluntary acceptance of the people and with the respect they show to law. True rule of law, therefore, has to be connected with democracy. Developing a market economy may be more effective in the absence of democracy but not developing the rule of law. On one hand, reforms are possible only when there is order and an adequate legal framework. On the other, only when there is the rule of law can the framework be transparent and respected by the people. In Russian circumstances, the absence of trust and abundant corruption hinders any kind of reform. Dictatorship of the present corrupted elite might push economic reforms ahead but cannot produce a stable economy. The only solution in Russia is to try "to rebuild the ship at sea" (cf. Elster *et al*., 1998). Restoring order in the Russian meaning of the word only means a return to the centralist, harsh and arbitrary state power with a corrupted elite leading the country.

Civil society does not develop easily and rapidly. In the absence of a civil society, lawyers and courts have an important role in establishing the rule of law. Even if opinion surveys do not show high trust in courts, they have been able to raise their significance with the help of their newly gained independence. Specialists are able to show that something can be done to restore trust and a well functioning rule of law. In this way, a civil society might be able have better soil to grow.

However, the rule of law and democracy are difficult to develop when the economy is a disaster. The economic failure in Russia is therefore the crucial key for the misery and the vicious circle also hindering democracy and the rule of law to develop. Therefore, a

clear vision for economic development is desperately needed, not an illusion on the greatness of Russia. A functioning economy does not develop from above either. The state should offer a predictable framework for the economy to grow from below. Successful regions with successful companies would gradually diminish the need for superpower mentality. Perhaps Russia is too big to be effectively developed from the center above. Unity should not be preserved only for itself, if it does not produce any real advantages.

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