Russia's Non-Transformative Constitutional Founding

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The founding of Russia's 1993 Constitution undermined its transformative potential – The use of pre-existing Soviet legality during Russia's 1993 founding period encouraged President Yeltsin to push through a constitution that would ensure presidential dominance over the legislative branch – This presidential centralism has hindered the realisation of the transformative potential of the other parts of the constitution – Any future turn to transformative constitutionalism in Russia will require weakening the power of the Russian presidency – Transformative constitutionalism depends as much on the actual process of constitutional foundation as the text of the constitution

Introduction

Since the end of World War II, constitutions have helped countries across Europe, Latin America, Africa, and Asia to overcome deeply-rooted traditions of centralised, authoritarian government.[1] This phenomenon – called 'transformative constitutionalism' – has been most successful in post-authoritarian Germany,

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[1]The concept was likely first used in relation to South African constitutionalism in K.E. Klare, 'Legal Culture and Transformative Constitutionalism', 14(1) *South African Journal on Human Rights* (1998) p. 146; *see* O. Vilhena et al. (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013); *see also* D. Bonilla (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013) (where the terms is used in numerous country chapters); *see also* A. von Bogdandy et al. (eds.), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press 2017); R. Gargarella et al. (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, 1st edn. (Routledge 2006) p. 1 at p. 107-152 (describing India, South Africa, and Colombia as courts that could help provide a voice for the poor in the consolidation of democracy). It has recently been applied to German constitutionalism: *see* M. Hailbronner, 'Transformative

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South Africa, and Colombia.[2] In these contexts, constitutional courts have stepped in to play a critical role in ensuring that constitutions become instruments in transforming a formerly authoritarian political order.[3] This reshaping of society requires constitutional courts to go further than in traditional liberal constitutional orders by 'conceptualizing the constitution as a comprehensive order for a more just and equal society and a tool to prompt state action to that purpose as much as restrain it'.[4] In this transformative role, constitutional law becomes a critical instrument in a post-authoritarian transition to a more just, democratic state.

Most scholarship has examined countries where transformative constitutionalism has proven successful.[5] Less research, however, has examined jurisdictions where it has failed. This article will fill that gap by examining the failure of transformative constitutionalism in Europe's largest and most populous state: Russia. On its face, Russia's 1993 Constitution is an ideal transformative constitution.[6] The initial chapter outlining the 'Fundamentals of the Constitutional System' declares that 'the individual and his rights and freedoms' have the 'highest value'[7] in a constitutional order grounded on 'ideological and political pluralism'.[8] Furthermore, the preamble affirms the commitment of the 'multi-national Russian people' to individual rights and freedoms and the 'inviolability of the democratic foundations of Russian statehood'. Finally, Chapter 2 lists dozens

Constitutionalism: Not Only in the Global South', 13 *American Journal of Comparative Law* (2017) p. 527.

[2]D. Moldonado (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013), p. 21; Hailbronner, *supra* n. 1, p. 527 (describing how the term applies in Germany's post-authoritarian transition).

[3]For representative examples among many: *see* e.g. U. Baxi, 'Preliminary Notes on Transformative Constitutionalism', in Vilhena et al. (eds.), *supra* n. 1, p. 19; N. Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court', 8 *Washington University Global Studies Law Review* (2009) p. 1 at p. 67 (discussing a 'a global shift to check representative institutions with increasingly broad principles of good governance'); H. Stacy, *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture*, 1st edn. (Stanford University Press 2009) (looking at Colombia, India, and South Africa courts as powerful guardians of judicially protected human rights).

[4]Hailbronner, *supra* n. 1, at p. 527.

[5]*See* e.g. M. Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism*, 1st edn. (Oxford University Press 2015); D. Bilchitz, 'Constitutions and Distributive Justice: Complementary or Contradictory?' in Bonilla (ed.), *supra* n. 1; *see generally supra* n. 2; *but see* P. Sonnevend, 'Preserving the Acquis of Transformative Constitutionalism in Times of Crisis: Lessons from the Hungarian Case', in von Bogdandy et al. (eds.), *supra* n. 1.

[6]*Constitution of the Russian Federation* (1993), available at ⟨constitution.kremlin.ru/⟩, last visited 5 November 2019.

[7]Ibid., Art. 2.

[8]Ibid., Art. 13.

of political and social rights, including the right to freedom of speech, movement, conscience as well as the right to life, housing, and a pension.

Despite these textual commitments, the Russian Constitution has not emerged as a tool of political change. In particular, the Russian Constitutional Court has done little to transform Russian society through the implementation of political or social rights. Instead, the Russian Constitutional Court has upheld legislation strengthening authoritarian governance.[9] The general view is that this failure is a product of historical path dependency, constitutional breakdown, or a slow process of transition.[10]

This article will argue that a neglected barrier to transformative constitutionalism in Russia can be traced to the Russian founding period (1991–1993). We argue that a critical opportunity was lost during this founding period to use Russia's new post-Soviet constitution to fundamentally transform pre-existing Russian constitutional *design*. This failure can be traced to the drafting of the new constitution under Soviet-era legality and institutions. In the wake of the collapse of the Soviet Communist Party, Soviet-era legality was drawn from the Leninist concept of 'democratic centralism', a largely undemocratic system of 'formal legislative centralism' in which a decorative legislature was manipulated by a powerful executive chairman. This system ultimately presented a 'status quo problem' as the legislative leadership used their monopoly on power to block reforms advanced by President Boris Yeltsin's presidential administration.[11] Facing a legal order that afforded these status quo interests a near monopoly on power, the Yeltsin-led reformers had two choices. They could capitulate to the status quo; or they could use force to unilaterally push through a constitution that concentrated power in the presidency to allow them to continue reforms.[12] The choice of

[9]A. Mazmyan, 'The Judicialization of Politics: The Post-Soviet Way', 13 *International Journal of Constitutional Law* (2015) p. 200 (describing how post-Soviet courts have generally acted in the interests of the dominant group in power); A. Trochev, *Judging Russia: Constitutional Court in Russian Politics 1990–2006* (Cambridge University Press 2008).

[10]E. Mazo, 'Path Dependency in Soviet and Russian Constitutionalism', in R. Albert and M. Guruswamy (eds.), *Founding Moments in Constitutionalism*, 1st edn. (Hart Publishing 2019); *see generally* O. Varol, 'Constitutional Stickiness', 49 *UC Davis Law Review* (2016) p. 899; J. Mahoney, 'Path Dependence in Historical Sociology', 29 *Theory and Society* (2000) p. 507 at p. 507-508.

[11]W. Partlett, 'Expanding Revision Clauses in Democratic Constitutions in Constitution-Making in Democratic Orders', in G. Negretto (ed.), *Redrafting Constitutions in Democratic Orders: Theoretical and Comparative Perspectives* (Cambridge University Press forthcoming) (discussing how one of the key status quo problems is that pre-existing constitutional legality and institutions can be used to block change).

[12]W. Partlett, 'Separation of Powers Without Checks and Balances', in T. Borisova and W. Simons (eds.), *The Legal Dimension in the Cold War Interactions: Some Notes from the Field* (Martinus Nijhoff 2012) p. 113.

the latter option ultimately led to presidential centralism that has re-created Soviet-era centralism and undermined the transformative potential of the 1993 constitution.[13]

First, this finding helps better understand the future prospects for transformative constitutionalism in Russia. It suggests that Russia's failure to realise the transformative nature of its constitutional text (so far) is more than just the inevitable dynamics of historical 'path dependence' which ultimately led to breakdown of the constitutional order.[14] Instead, existing Russian constitutional design – adopted at Russia's founding – continues to hinder the development of Russian transformative constitutionalism. Put simply, presidential centralism has undermined the transformative aspects of Russia's constitutional order.[15] This weak constitutionalism demonstrates that a checks-and-balances constitutional design is a necessary precondition for successful Russian transformative constitutionalism.

Second, this finding highlights a neglected link between the process of post-authoritarian constitutional founding and transformative constitutionalism. Recent scholarship has described how successful constitutional foundation has avoided not just the status quo problem of a founding based on pre-existing legality but also a full (and often violent) revolutionary founding. This 'post-sovereign' process has found a middle ground where post-authoritarian constitution-making proceeds on the basis of newly agreed-upon rules (often hammered out in a roundtable process).[16] Under these agreed-upon rules, different political interests are forced to compromise in the construction of checks-and-balances constitutional design.[17] This divided constitutional design may not guarantee the long-term success of transformative constitutionalism, but creates important preconditions for its realisation.

The Russian example demonstrates how a founding period grounded on continuity with pre-existing legality can similarly undermine transformative constitutionalism. The full adherence to pre-existing legal continuity creates *two* status quo dangers. One is the well-known problem that the reformers will

[13]Mazmyan, *supra* n. 9, p. 200 at p. 206-207 (describing how political competition is a key variable in determining the independence of courts in the post-Soviet region).

[14]Mazo, *supra* n. 10; *see generally* Varol, *supra* n. 10; Mahoney, *supra* n. 10.

[15]A. Fogelklou, 'Constitutionalism and the Presidency in the Russian Federation', 18 *International Sociology* (2003) p. 181 at p. 194.

[16]A. Arato, *Post-Sovereign Constitution-Making: Learning and Legitimacy* (Oxford University Press 2016); W. Partlett, 'The Legality of Liberal Revolution', 38 *Review of Central and East European Law* (2013) p. 217.

[17]A. Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (Cambridge University Press 2017) p. 418 (Arato describes this as 'the normative logic of insurance that follows from the plurality of necessarily uncertain actors' involved in the constitution-making process).

ultimately be blocked by pre-existing legality; in this scenario, there is no possibility of transformative constitutionalism. The Russian experience suggests a second, and largely neglected, problem. Faced with an unyielding legal system that affords status quo interests a monopoly on legal power, reformers have no ability to compromise and instead must pursue a full – and violent – revolutionary break. In this revolutionary scenario, the reformers are likely themselves to adopt a constitution that concentrates power in their own hands. Although this constitution might successfully allow for short-term reform, its centralised constitutional design will hinder its long-term transformative potential.

This finding provides a critical operative lesson: transformative constitutionalism requires more than an ideal document that textually declares a break with the past and which includes a number of individual, social, and cultural rights. Instead, reformers must carefully seek to design the *process* of constitutional foundation itself so that it encourages compromise between opposing interests. This negotiated process is critical both in instilling democratic norms of compromise during the founding period as well as increasing the chances that the new constitution places structural checks and balances on the concentration of power. If reformers do not do so, they risk undermining the process of transformative constitutionalism at the very beginning. This demonstrates that a post-authoritarian version of transformative constitutionalism starts not with a transformative constitutional text but *earlier*, with the actual process of constitutional foundation.

To make these two arguments, this article will be divided into four parts. The first part will describe the two key arguments made in this article. The second part will describe the institutional dimensions of the Soviet legacy that created a status quo problem during Russia's period of constitutional foundation. The third part will describe the process of constitutional foundation in 1992 and 1993, in which continuity with Soviet-era legality ultimately led to the creation of post-Soviet presidential centralism. The fourth part will draw broader conclusions from this analysis.

Transformative constitutional foundation

This article will make two key arguments. First, it will provide a neglected reason why Russia has failed to adopt a post-authoritarian version of transformative constitutionalism. By transformative constitutionalism, we mean a form of 'activist constitutionalism' in which a constitutional court implements the constitution in a way that transforms society.[18] In this form of constitutionalism, the court plays a role that far exceeds the one played by courts in traditional

[18] *See* Hailbronner, *supra* n. 5.

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liberal constitutional orders. In particular, in what one scholar has called 'Constitutionalism 2.0', courts frequently implement social and cultural rights as well as apply the constitution in a wider range of cases.[19] In the Russian context, this form of constitutionalism would involve the Russian Constitutional Court in realising the constitutional provisions declaring a break with the Soviet past and introducing a wide range of civil, social, and cultural rights.[20]

Views of comparative law scholars on the transformative potential of Russia's constitution have changed significantly over time. In the 1990s, scholars and commentators acknowledged flaws within the process of founding the constitution and its concentration of power in the President but ultimately described the new Russian constitution as a transformative break with the Soviet past. For instance, one scholar described the process of drafting the constitution to be 'peculiar' but the final product to be a 'complete departure from the Communist dictatorship and a passage to democratic government'.[21] Some worried about the provisions concentrating power in the President. For instance, in a short article, Stephen Holmes argued that the document created a 'super-presidential' regime that ultimately placed too much power in the hands of the President.[22] But, as time went on, many scholars began to argue that the Russian constitution was not as strongly presidential as initially thought. For instance, one described how Russian presidential power could be limited under the current constitutional arrangements.[23] Another described how concerns about centralised power are not as worrying because of the legislature's ability to block action.[24]

In particular, many comparative scholars pointed to the obligation of the state in implementing a long list of individual, social, and cultural rights. One scholar described it as the product of 'one of the most extensive transfers of legal ideas in the modern history of law'.[25] In its design, others compared Russia's presidential

[19]*See* A. Somek, *The Cosmopolitan Constitution*, 1st edn. (Oxford University Press 2014).

[20]Extra-constitutionally, however, the Soviet legacy was not completely repudiated. Most notably, the Russian Foreign Ministry described Russia as a 'continuing state of the USSR'. *See* R. Mullerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia', 42 *International and Comparative Law Quarterly* (1993) p. 473 at p. 476-480.

[21]G. Danilenko, 'The New Russian Constitution and International Law', 88 *American Journal of International Law* (1994) p. 451 at p. 451.

[22]S. Holmes, 'Superpresidentialism and its Problems', 3 *East European Constitutional Review* (1994) p. 123.

[23]L.K. Metcalf, 'Presidential Power in the Russian Constitution', 6 *Journal of Transnational Law and Policy* (1996) p. 125 at p. 139.

[24]E. Mazo, 'Constitutional Roulette: The Russian Parliament's Battle with the President Over Appointing a Prime Minister', 41 *Stanford Journal of International Law* (2005) p. 123.

[25]R. Sharlet, 'Legal Transplants and Political Mutations: The Reception of Constitutional Law in Russia and the Newly Independent States', 7 *East European Constitutional Review* (1998) p. 59.

system of government to the American and French constitutions, arguing it was like 'Europe's Airbus' because it was 'assembled from parts manufactured in a number of countries'.[26] Rett Ludwikowski argued that the Russian Constitution was the product of a 'constitutional melting pot ... which combined both French and American features'.[27] Many political science scholars viewed Russia's constitutional structure as similar to France's semi-presidential structure.[28] Another saw it as 'so strongly presidential that it can be discussed in the same general terms as the American or other "strong" presidential arrangements'.[29]

Scholars therefore predicted that the Russian Constitution would eventually play a key role in 'the establishment of a constitutional society in Russia'.[30] Richard Sakwa argued that Russia's adoption of a constitution in 1993 put an end to a period of 'phoney democracy'[31] and was a critical first step away from its authoritarian and communist past towards a document promising 'economic liberalism and the democratic separation of powers'.[32] Constitutional law scholars also saw the constitution as marking a break with the Soviet past. Yale Law School's Bruce Ackerman described Russia's 1993 Constitution as the marker of a 'new beginning' for Russia that has helped the country to 'stay on the democratic course'.[33] Underlying this logic was that these new constitutions contained long lists of rights. For instance, Russell Weaver and John Knechtle – who advised both Kyrgyzstan and Belarus on their new constitutions – describe how these constitutions 'provide more protection for civil and political rights than were provided under the Soviet system'.[34]

[26]Ibid., p. 64.

[27]R. Ludwikowski, '"Mixed" Constitutions: Product of an East-Central European Constitutional Melting Pot', 16 *Boston University International Law Journal* (1998) p. 1.

[28]T.J. Colton and C. Skach, 'A Fresh Look at Semi-Presidentialism: The Russian Predicament', 16 *Journal of Democracy* (2005) p. 113.

[29]T.M. Nichols, 'The Logic of Russian Presidentialism: Institutions and Democracy in Post-Communism', in E.L. O'Malley et al. (eds.), *The Carl Beck Papers in Russian and East European Studies* (University of Pittsburgh, 1998) p. 1 at p. 11.

[30]D. Atchison, 'Notes on Constitutionalism for a 21st-Century Russian President', 6 *Cardozo Journal of International and Comparative Law* (1998) p. 239 at p. 351.

[31]R. Sakwa, *Russian Politics and Society*, 4th edn. (Routledge 2008) p. 40.

[32]R. Sakwa, 'The Struggle for the Constitution in Russia and the Triumph of Ethical Individualism', 48 *Studies in East European Individualism* (1996) p. 115 at p. 131.

[33]B. Ackerman, 'The Rise of World Constitutionalism', 83 *Virginia Law Review* (1997) p. 771 at p. 786.

[34]R. Weaver and J. Knechtle, 'Constitution Drafting in the Former Soviet Union: The Kyrghyzstan and Belarus Constitutions', 12 *Wisconsin International Law Journal* (1994) p. 29 at p. 30.

Twenty-five years later, however, it has become clear that the commitment to breaking with the Soviet past and implementing broad rights protection in the text of the 1993 Russian Constitution has not been realised. As time has gone on, legal power has been further centralised in the presidency and rights have been limited by legislation. Meanwhile, the Russian Constitutional Court has not just failed to implement the transformative nature of the rights provisions in the constitution.[35] On the contrary, the Court has increasingly justified the underimplementation of these rights on the basis of Russia's own traditions.[36] Comparative law scholars are therefore faced with a critical question: Why has the Court failed to limit government power or strengthen judicial independence?[37]

One view has been that the Russian constitution cannot overcome Russia's long history of autocratic government.[38] For instance, one scholar argues that the effectiveness of Russia's Constitution 'ultimately relies upon the individuals occupying the various offices of state power and much less upon the ideals on which the Constitution is based'.[39] Others have argued that Russia's semi-presidential system of checks and balances has broken down. In particular, they argue that this system of government is particularly prone to autocratic backsliding. Cindy Skach, for instance, has argued that Russia's adoption of a semi-presidential form of constitutional government undermined its pursuit of limited government by creating incentives for 'legislative immobilism, presidential-legislative deadlock or impasse, and the resulting use of presidential decrees to counteract immobilism'.[40] Others take a more optimistic view. They argue that Russian constitutionalism is still in a transitional phase.[41] For instance, Anders

[35]A Troitskaya, *The Proportionality Principle in Russian Constitutional Court Jurisprudence* (on file with author); Mazmyan, *supra* n. 9.

[36]*See* e.g. S Belov, 'The Limits of the Universality of Constitutionalism: The Influence of National Values in Judicial Decision Making', [in Russian] *Sravnitel'noe Konstitutsionnoe Pravo* (2014) p. 37-56.

[37]Freedom House has labelled the majority of post-Soviet republics, including Russia, as 'not free': R.W. Orttung, 'Nations in Transit: Russia', *Freedom House* (2008) ⟨freedomhouse.org/report/nations-transit/2008/russia⟩, last visited 5 November 2019.

[38]Mazo, *supra* n. 10.

[39]I. Brown, 'Clinging to Democracy: Assessing the Russian Legislative-Executive Relationship under Boris Yeltsin's Constitution', 33 *Vanderbilt Journal of Transnational Law* (2000) p. 645 at p. 663. The underlying approach was that the Russian President was unconstrained by the separation of powers. *See* e.g. W. Hayden, 'Seeds of Unrest: The Political Genesis of the Conflict in Chechnya', 24 *Fletcher Forum of World Affairs* (2000) p. 49 at p. 69. ('Yeltsin's exercise of super-presidential power threatened the precarious separation of powers contained in the 1993 Constitution').

[40]C. Skach, 'The "Newest" Separation of Powers: Semipresidentialism', 5 *International Journal of Constitutional Law* (2007) p. 93 at p. 108.

[41]J. Henderson, *The Constitution of the Russian Federation: A Contextual Analysis*, 1st edn. (Hart Publishing 2011) p. 256.

Fogelkou argues that Russia's constitution is in a transitional stage as it is 'potentially thick' or transformative but at the moment is 'formal or thin'.[42]

This article will contribute to this literature by arguing that another key impediment to Russian transformative constitutionalism was the failure to seize the moment and fundamentally reassess Russian constitutional design during the Russian founding period. Instead, the continued use of Soviet-era formal legislative centralism during that crucial founding period reduced the possibility of compromise and forced a winner-takes-all outcome in which Yeltsin pushed through a presidentially-dominated constitutional system to allow him to continue his reforms. Although this new constitution did allow Yeltsin to push through short-term market reforms, its presidential centralism has actively hindered the development of transformative constitutionalism in Russia, and will continue to do so. Formal change to Russian constitutional design is therefore necessary for transformative constitutionalism.

Second, this article will more broadly demonstrate the neglected link between the process of constitutional founding and transformative constitutionalism.[43] Recent research has described the benefits of a multi-step process of negotiated constitutional foundation.[44] Tracing back to at least the Spanish founding, this 'post-sovereign' approach to founding ultimately rejects *both* a complete revolutionary break with an authoritarian past as well as full legal continuity.[45] Instead, in this approach, constitutional foundation proceeds according to interim rules that reduce the chances that partisan factions can run away with the process of constitution-making and impose constitutional rules that entrench their own power.[46] By relying on interim rules for constitution-making, the post-sovereign process of constitutional foundation therefore helps to overcome the 'status quo problem' in constitutional foundation that a pre-existing elite will use pre-existing legality to block transformative constitutional change. It also avoids the dangers of revolutionary constitutional foundation in which one faction will use the new constitution to ultimately advance their short-term interests.[47] The post-sovereign use of interim rules for constitutional foundation then in turn increases the chances of a checks-and-balances constitutional design.

[42]Fogelklou *supra* n. 15, p. 194.

[43]*See* e.g. Arato, *supra* n. 17; J.I. Colon-Rios, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012).

[44]Arato, *supra* n. 17 (discussing the role of post-sovereign constitution-making in the South African example).

[45]Arato, *supra* n. 16.

[46]W. Partlett, 'The Dangers of Popular Constitution-Making', 38 *Brooklyn Journal of International Law* (2012) p. 193; D. Landau, 'Abusive Constitutionalism', 47 *UC Davis Law Review* (2013) p. 189.

[47]Partlett, *supra* n. 46.

Andrew Arato explains that different political players in this post-sovereign process ultimately do not know who will be ascendant in the new constitutional order and therefore choose a balanced constitutional design with a strong court to protect themselves if they lose.[48]

Russia shows the link between this process and transformative constitutionalism. In particular, the use of pre-existing legality allowed status quo reformers to block reform. This increased the chances that the reformers must violently break with the old system to continue their reforms. In this revolutionary scenario, however, the new constitution the reformers introduce is likely to emerge as a short-term instrument for eliminating their former status quo adversaries and cementing the success of their short-term reforms.[49] This instrumental use of a 'reformist' constitution is, of course, deeply problematic. Although it might solve a short-term problem, it generally will create a centralised constitutional design that, in the long term, will hinder the development of independent, judicially-led constitutional oversight of politics.[50] Thus, as in the Russian example, it is likely to undermine the prospects of transformative constitutionalism.

Russia's status quo problem: overcoming formal legislative centralism

Russia has a long history of centralised and personalised power. During the Soviet period, this legacy manifested itself in two ways. For most of the Soviet period, the Soviet Union's real constitutional system was largely 'unwritten' and centralised power in the leader of the Communist Party of the Soviet Union.[51] This was underpinned by the Leninist concept of 'vanguardism,' in which the Party ultimately played the leading role in formulating policy and directing the state.[52] The written constitutional system – contained in the succession of Soviet and republic constitutions – was largely irrelevant. It created a centralised hierarchy of legislative bodies that largely served as 'transmission belts' of Party policy.[53] This legislative arrangement was underpinned by the Leninist principle of

[48]*See* Arato, *supra* n. 17 and accompanying text.

[49]Parlett, *supra* n. 46.

[50]W. Partlett and Z. Nwokora, 'The Foundations of Democratic Dualism: Why Constitutional Politics and Ordinary Politics are Different', 26 *Constellations* (2019) p. 177.

[51]Partlett, *supra* n. 12, p. 114-116.

[52]W. Partlett and E. Ip, 'Is Socialist Law Really Dead?', 48 *NYU Journal of International Law and Politics* (2016) p. 463 at p. 470-471.

[53]The concept of 'transmission belts' was used by Lenin in a 1920 speech (and borrowed from his ongoing fascination with mechanisation and focused development). *See* V.I. Lenin, 'The Trade Unions, The Present Situation and Trotsky's Mistakes' (Speech, Joint Meeting of Communist Delegates to the Eighth Congress of Soviets, 30 December 1920).

'democratic centralism' that fundamentally rejected the separation of powers as hindering the will of the people.[54] This legislative system therefore bore little resemblance to western-style parliamentarism and instead concentrated vast power in the legislative chairman.[55] For instance, deliberation in the full legislature was largely decorative, as the full legislature normally only gathered for a very short time (1–3 days) from 2 to 6 times a year.[56]

The unwritten constitutional system of Party vanguardism, however, began to unravel in the final years of the Soviet Union. It disappeared on 29 August 1991 when the Soviet legislature formally banned the Communst Party of the Soviet Union in the wake of a failed Party coup d'etat.[57] This disappearance did not, however, erase the Soviet legacy. Instead, the Leninist principle of democratic centralism and its reality of formal legislative centralism lived on in the written constitutional system, concentrating vast power in the legislative chairman.

After the collapse of the Soviet Union on 25 December 1991, a key, initial goal of post-Soviet constitution-making was, therefore, to overcome this Soviet legacy of formal legislative centralism. In particular, the goal was to build a constitutional system of checks and balances that would help ensure the recognition of human rights, pluralism, and free-market economics. A key question of 'agenda setting' emerged: What set of institutions and rules would govern the constitutional drafting period?[58] Would Russia's new, post-Soviet constitution be drafted and adopted outside of the pre-existing institutional system? Or would it be built within the pre-existing constitutional legacy of formal legislative centralism?

A process outside of the pre-existing institutional system could have taken a number of forms. One option would be an extraordinary, two-step process of constitutional foundation.[59] The first step might include the use of roundtable negotiations between reformers and status quo interests to decide on an interim set of rules for constitutional change. The second step would include the formation of a new constitutional system by an irregular constitutional body operating under this set of interim rules. This would follow the process of constitutional

[54]R. Ludwikowski, 'Judicial Review in the Socialist Legal System: Current Developments', 37 *International and Comparative Law Quarterly* (1988) p. 89.

[55]Partlett and Ip, *supra* n. 52, p. 482-483.

[56]R. Service, *The Bolshevik Party in Revolution: A Study in Organisational Change 1917–1923*, 1st edn. (Palgrave Macmillan 1979) (discussing how the Bolsheviks increasingly exercised centralised power after the Russian Revolution).

[57]L. March, *The Communist Party in Post-Soviet Russia* (Manchester University Press 2002) p. 39 (describing how the Communist Party of the Soviet Union was abolished in 1991); D.R. Marples, *The Collapse of the Soviet Union 1985–1991* (Routledge 2004) p. 88.

[58]C. Saunders, 'Constitution-Making in the Twenty-First Century', 4 *International Review of Law* (2012).

[59]Arato, *supra* n. 16.

change begun in Spain and continued in Poland and South Africa in the early 1990s.[60] In these processes, interim rules helped to encourage negotiation and compromise in the creation of a new constitutional order.

This kind of extraordinary process was rejected, however, for a number of reasons. First, the rapidity of events hindered an understanding of the nature of the changes taking place and undermined the ability to work out a corresponding plan of action. Second, although proposals for early elections to Parliament and the Presidency sometimes surfaced in public discourse, the President and most of the deputies in the legislature ignored them. On the one hand, this was due to the fact that both had received their status quite recently and did not want to face the electorate again. Third, this reluctance demonstrated the quality of the post-Soviet elite. In the past 30–40 years of Soviet power, people had become accustomed to treating ideological slogans as empty 'ritual spells'. Such an attitude was transferred to the principles of democracy. And finally, the catastrophic economic situation demanded urgent, radical and, in some cases, unpopular measures. Russian society was waiting for decisive leadership in a situation that threatened starvation, and not political actions which most people would not understand. Of course, such measures could be carried out by some temporary body (something like a national salvation committee). But many feared that such a body would eventually become a cover for personal dictatorship.

The rejection of an extraordinary process created a problematic situation for the Russian President. Added to the constitutional system in May 1991, the President was formal head of the executive branch and wielded immense informal power as the only public official elected by the whole Russian electorate. But, despite this informal power, the continued system of formal legislative centralism meant the President was constitutionally subordinate to the legislative power. This section will describe the formal weakness of the President.

Legislative power

At the basis of the Soviet-era formal legislative centralism was the Congress of People's Deputies. This unwieldy and large legislative body had a near monopoly on formal, constitutional power. Article 104 stated that '[t]he Congress of People's Deputies of the Russian Federation is entitled to accept for its consideration and resolve any issue within the jurisdiction of the Russian Federation'.[61] Furthermore, the Congress was the complete 'master' of the constitution-making

[60]Ibid.

[61]*Constitution of the Russian Soviet Federative Socialist Republic* (1978), Art. 267 (as amended 15 December 1990) ⟨constitution.garant.ru/history/ussr-rsfsr/1978/red_1978/5478725/⟩, last visited 5 November 2019.

process, possessing a monopoly over adopting a new Constitution as well as making changes and additions to the existing one. The Congress also had the power to suspend and reintroduce certain constitutional norms.[62] In addition, the Congress defined domestic and foreign policy, and also approved 'long-term state plans and the most important programs for the economic and social development of the Russian Federation and its military construction'. At the same time, the Congress could repeal decrees and orders of the President of the Russian Federation, as well as the laws adopted by the Supreme Court and laws signed by the President.

The Congress was too numerous to effectively exercise these vast powers. Instead, it was a 'tool' in the hands of the leadership. Of course, it is natural for legislatures to have bodies and individuals whose task is to organise and coordinate the activities of parliamentary structures. But it is precisely the Soviet constitutional legacy of formal legislative centralism that reduced the full collegial body into decoration while concentrating power in a small leadership group. This personalised legislative leadership wielded immense power over the legislative branch; none of these legisative powers had a counterbalance on the presidential side.

There were three steps in this legislative form of formal legislative centralism. First was the *Supreme Soviet*. This body was formed from the Congress of People's Deputies and was described in the Constitution both as an 'organ of the Congress of People's Deputies of the Russian Federation' and as a 'permanent legislative, regulatory and controlling body of state power of the Russian Federation'. It had broad explicit and implied powers. For instance, although the existing constitution had almost no provision delineating control over the military, it contained a formula that provided the Supreme Soviet the power to decide 'other issues'. On this basis, the Supreme Soviet – or more precisely, its leadership –often invaded the competence of the President.

Next was the *Presidium*. The Presidium was a permanent body of delegates from the Supreme Soviet. These delegates worked on a professional basis while all other deputies in the Supreme Soviet worked on on a part-time basis. The Presidium had wide power: it was not only responsible for organising the activities of the supreme councils, but also issued decrees. Regulatory decrees were approved at the regular session of the Supreme Soviet (always unanimously) and then became laws. After 1991, the Presidium retained key levers of influence on the deputy corps. At the same time, the Presidium still had not only internal organisational powers, but also external public authority. These powers included: monitoring compliance with the Constitution and ensuring that the constitutions

[62]O. Rumiantsev, *Konstitusiya Devyanosto Tret'ego. Istoriya yavleniya*. [*The Constitution of '93. A History of the Movement*] (Moscow 2013) p. 176-177.

and laws of the republics of the Russian Federation are in compliance with the federal Constitution and laws; announcement, preparation and holding of referendums; publication of laws of the Russian Federation; and the exercise of other powers provided for by the laws of the Russian Federation.

Finally, at the top of the system was the leader of the Presidium and *Chairman of the Supreme Soviet*. The Chairman had the power: (1) to manage the issues to be considered by the Congress and the Supreme Soviet; (2) to prepare a presentation to the Congress and the Supreme Soviet of a message on the situation of the republic and on important issues of its internal and external political activities, as well as on participation in ensuring the defense capability and security of the Russian Federation; and (3) to submit to the Congress candidates for election to the posts of first deputy and deputy chairmen of the Russian Supreme Court, constitutional judges, chairmen of the Supreme and Supreme Arbitration Courts. The Chairman of the Supreme Soviet (together with his deputies) therefore actually managed the legislature, excluding issues from the agenda of the congresses, including others, determining their sequence, setting the deputies in a certain way, and making political statements. Simply put, the influence of the Chairman of the Supreme Soviet was fed by the immense powers of the legislature and therefore his formal powers significantly outweighed the Russian President.

Executive power

The President was added to this form of formal legislative centralism through constitutional amendment in May 1991. The new constitutional provisions stated that the President was the highest official and the head of the executive power (Article 121.1). It also stated that the President was directly elected by the Russian people. This could have potentially led to a presidential or semi-presidential form of government which would imply either the direct leadership of the President over the executive-branch government (presidentialism) or shared authority over the government (semi-presidentialism).

However, other constitutional norms suggested the continuing weakness of the President vis-à-vis the Soviet-era legislature. First, the President was formally accountable to the Congress. For example, the President was obliged to submit, at least once a year, reports to the Congress on the implementation of the 'socio-economic and other programs adopted by him and the Supreme Soviet, on the situation in the Russian Federation' (Article 121.5). Second, the President had little control over the executive-branch government, known as the Council of Ministers and what would be called the cabinet in many other presidential systems. Article 120 stated that the legislature 'exercise[s] control over the activities of all state bodies accountable to them'. Furthermore, Article 122 stated that the Council of Ministers was 'an executive body accountable to the Congress of

People's Deputies, the Supreme Soviet and the President of the Russian Federation'. Finally, the constitution created a complicated process for forming the Council of Ministers. It consisted of two stages: (1) the appointment of the chairman; and (2) the appointment of deputy chairmen of the Council of Ministers, ministers, chairmen of state committees by the newly-appointed chairman (Article 123).[63] The President's appointment of the chairman of the Council of Ministers could take place only with the consent of the Supreme Soviet. After December 1992, the consent of the Supreme Soviet was also required for the appointment of ministers: foreign affairs, defence, security and internal affairs.

This arrangement might seem to approximate a semi-presidential constitutional system. The key difference, however, is that the Soviet legislature did not accord with 'the canons' of parliamentarism. Although factions and deputy groups existed in the Congress, their composition and number were constantly changing.[64] Most importantly, these factions, groups, and blocs did not have party representation in the strict sense of the term. Therefore, their positions, as a rule, were unpredictable, and the outcome of a vote on a certain issue was largely dependent on how the chairman set up the deputies. To make matters worse, the appointment of the prime minister required the consent of the Supreme Soviet, which did not have party factions. As a result, the consent procedure was dominated by the legislative chairman. This can be contrasted with the western-style semi-presidential model, where the President appoints the prime minister based on the opinion of the parliamentary majority (formed by a party or coalition party).

In addition, the grounds for removal of the Council of Ministers were also dominated by the legislative Chairman. Ministers could be removed: (1) by the Congress or the Supreme Soviet by expressing no confidence; (2) the President for any reason, but with the consent of the Supreme Court; or (3) the President at the request of the Chairman of the Council of Ministers. Again, in abstract, these are quite normal grounds that accord with the semi-presidential model. A parliamentary vote of no confidence, however, could not play its normal role, because – as mentioned above – the parliament was easily manipulated by its leadership. Finally, the right of the President to veto laws actually did not exist. First, it did not apply to laws adopted by the full Congress, which the President was obliged to sign. And, second, the return (rejection) by the President of the law adopted by the Supreme Soviet actually

[63]In the final versions of the 1978 Russian Constitution we can find different formulations including 'The Council of Ministers; The Council of ministers-Government; The Government of the Russian Federation'. This constitution is available online (including its frequent updates) at ⟨constitution.garant.ru/history/ussr-rsfsr/1978/red_1978/⟩ last visited 5 November 2019.

[64]J. Gleisner et al., 'The Parliament and the Cabinet: Parties, Factions and Parliamentary Control in Russia (1900–93)', 31 *Journal of Contemporary History* (1996) p. 427.

had only an 'informational' meaning, since this body could ignore the presidential veto by a simple majority of deputies.

Finally, the constitution afforded the Congress broad powers to remove the President from office. The President could be impeached 'in the event of a violation of the Constitution of the Russian Federation, the laws of the Russian Federation, or the presidential oath' (Article 121.10). It is true that an actual attempt to impeach Yeltsin was hampered by this provision's super-majority requirement: the decision to remove the President from office required a two-thirds majority of the total number of deputies (712 of 1068), and the decision itself was made 'on the basis of the opinion of the Constitutional Court of the Russian Federation'. This increased quorum saved Yeltsin in the spring of 1993 from impeachment, and, possibly, the country from civil war.[65] But the constitution allowed Congress additional powers to remove the President. Along with impeachment, there was another possibility of removing the President from office for attempting 'to change the national-state structure of the Russian Federation, to dissolve or suspend the activities of any legally elected state bodies'. At the height of a confrontation between Yeltsin and the legislature in December 1992, this article was supplemented with an automatic removal provision: 'otherwise, they (the powers of the President) cease immediately'. Thus, it was unclear how and under what procedure the President could be removed.

At the climax of the conflict between the President and the legislative leadership in autumn 1993, a bare majority of the Russian Constitutional Court removed the President under this automatic removal provision. Four judges – E.M. Ametistov, N.V. Vitruk, A.L. Kononov, and T.G. Morshchakova – dissented.[66] These dissenters questioned the legality of implementing the automatic removal provision. For instance, Justice Vitruk wrote:

> The content of Article 121.6 contradicts the content of Article 121.10 of the Constitution of the Russian Federation (on dismissal). By virtue of this, and also due to the absence of any mechanism for implementing the provisions of Article 121.6, the Constitutional Court was not entitled to apply to this article of the Constitution of the Russian Federation.[67]

[65]At the IX (Extraordinary) Congress of People's Deputies, the agenda included questions about the removal of the President of the Russian Federation from office and about re-election of the Chairman of the Supreme Soviet, but did not garner the necessary majority (617 votes were cast for the dismissal of the President of the Russian Federation and 268 against).

[66]Vestnik Konstitutsionnogo Suda RF [The Bulletin of the Russian Constitutional Court] No. 6 (1994).

[67]Ibid.

In sum, Russia's founding period – despite the introduction of a directly-elected President – was still underpinned by the Soviet-era system of formal legislative centralism. As we will see in the next section, this constitutional grounding ultimately undermined the chances of compromise as the President and the legislature disagreed over policy in 1993.

From formal legislative centralism to presidential centralism

A close examination of the events of Russia's constitutional founding (1992–1993) shows that President Yeltsin can be faulted for creating a constitutional crisis. The legislature as a whole did not go beyond its constitutional powers. This is understandable, however, given the vast powers afforded to the legislature. In particular, the following circumstances must be taken into account:

(1) the President had a direct mandate from the people to carry out reforms, yet had few formal constitutional powers to carry out these reforms or even force the legislature to compromise on this issue;[68]
(2) the elected legislature increasingly represented the views of Russians who wanted a slower pace of economic reforms and enjoyed a near monopoly on formal constitutional power under Soviet-era formal legislative centralism;
(3) both the President and the legislature represented different views of the Russian populace but the near monopoly of power given the legislature decreased the chance of any compromise between them.

As a general matter, compromise is always less likely when one side has all formal legal authority and the other has very little. In these situations, the side with limited legal leverage has two choices: submit to the superior authority of the other side or seek to win through the bare use of force. In the Russian context, the imbalance of power between the legislature and the President was not problematic during times of cooperation. But when the chairman of the legislature and the President came into conflict, the constitutional vulnerability of the President undermined the possibility of compromise and instead created strong incentives for a revolutionary break with the pre-existing legal order.[69]

In the early period (1991 to the end of 1992), the Congress initially cooperated with President Yeltsin. In the autumn of 1991 (not long after Yeltsin's landslide election win), the majority of deputies supported Yeltsin and delegated broad

[68]In spring 1991 in Russia, 57% of the Russians voted for Yeltsin and radical reforms: *see* Y. Baturin, *Epokha El'tsina: Ocherki politicheskoi istorii [The Yeltsin Epoch: Descriptions of Political History]* (Vagrius 2001) p. 1 at p. 118.

[69]*Poslanie Prezidenta Rossiskoi Federatsii Verkhovnomu Sovetu RF 'O Konstitutsionnost' [Presidential Address to the Supreme Soviet "On Constitutionalism']* Izvestiya, 25 March 1993.

powers to him to carry out reforms. For instance, the Congress adopted two resolutions 'On the organization of executive power during the period of radical economic reform' [70] and 'On legal support for economic reform'[71] which allowed Yeltsin vast decree power to carry out reforms. The legislature initially supported Yeltsin because the 'deputies [in the legislature] could not ignore the new political situation after the [August 1992] coup [when the Communist Party of the Soviet Union was disbanded]. The "Left" deputies were demoralised and felt the power of Yeltsin and his supporters'.[72] In addition, many of the deputies were also willing to delegate power to President Yeltsin to carry out economic reformers because they wanted the President to be held accountable for their negative effects. It was clear that Yeltsin 'had to start reforms in extremely unfavorable conditions and all responsibility for the results of these reforms were borne by him. Everyone understood that the transformation would be painful. This meant that his popularity in the near future would directly depend on the success of the reforms'.[73]

Towards the end of 1992, however, the social difficulties engendered by these economic reforms undermined this cooperative relationship. Although the shelves of stores were literally empty, some believed that economic reforms were carried out too painfully (in the 'shock therapy' mode). We will not evaluate the validity of this position. It is enough to say that, with the beginning of the transition to a market economy, a political pattern worked: social difficulties played the role of a trigger for attacking the President by various political forces and individual figures. Some decided it was time to stop the reforms; others had their own ambitions of power, which, as it seemed to them, were easier to satisfy as 'defenders of the people'; still others were sincerely convinced that reforms were necessary, but they were carried out using the wrong methods. It is difficult to say which group the leaders of the legislative body belonged to. The main thing is that they personified the opposition to the reforms and increasingly used their constitutional prerogatives against the President.

President Yeltsin was not, however, just a victim of the legislature. He sometimes made decisions that were questionable from a constitutional point of view. These decisions were frequently invalidated by the Constitutional Court of the Russian Federation. It is worth recalling two acts contrary to the Constitution. On 19 December 1991, a presidential decree 'On the establishment of the Ministry of Security and Internal Affairs of the RSFSR' was issued that was a clear

[70]Vedomosti CPD i SS RSFSR [Report of the Congress and Supreme Soviet of Russian Federation] № 44, (1991) p. 1455.

[71]Ibid., at p. 1456.

[72]Baturin, *supra* n. 68, p. 177-178.

[73]Ibid.

attempt to recreate a 'power monster' under the control of the Preisdent. This Decree was invalidated by the Constitutional Court as inconsistent with the Constitution.[74] The second case is more complicated. On 20 March 1993, Yeltsin made a televised address to the citizens of Russia, in which he announced the signing of the Decree 'On Special Management Procedure Until the Power Crisis Is Overcoming'.[75] On 23 March 1993, the Constitutional Court issued a decision declaring this unofficial address unconstitutional.

Nevertheless, these presidential actions were frequently a defensive reaction to the statements, decisions, actions of the Congress, the Supreme Soviet and, above all, its leaders. In a decisive moment in early 1993, Yeltsin did attempt to compromise with the legislature. As Rumyantsev describes:

> The ninth (extraordinary) Congress of People's Deputies of the Russian Federation was convened [at the end of March 1993]. Seriously alarmed by the prospect of dismissal, Yeltsin took two steps towards the Congress. First, he offered to support the draft Constitution of the Russian Federation adopted by the same Congress in April 1992. This constitutional order would have created a checks-and-balances system of power between the legislature and the President. The Congress, unfortunately, ignored this initiative. Secondly, Yeltsin agreed with the idea of holding early elections for both the legislature and the President of the Russian Federation.[76]

Again, no action was taken.

In the end, and particularly given his formal constitutional weakness, President Yeltsin finally realised the futility of attempts to reach a compromise with the leaders of the legislative body. By the autumn of 1993, Yeltsin decided that the situation could only be solved using the method of Alexander the Great – by cutting the Gordian knot. And President Yeltsin faced a fundamental question: What constitutional system did he want to create?

A number of pre-existing constitutional drafts – most notably the one produced by the officially sanctioned and long-running Constitutional Commission – offered long-term design solutions to Russia's tradition of centralised power. These drafts would have built a balanced constitutional design that would become an important precondition for Russian transformative constitutionalism. But, given the growing

[74] *Postanovlenie Konstitusionnogo Suda RSFSR 'Po Dely o proverke konstitutsionnosti Ykaza Prezidenta RSFSR ot 19 Dekabrya 1991 "Ob obrazovanii Ministerstva bezoposnosti i vnutrennikh del RSFSR"' [Decision of the Russian Constitutional Court of the RSFSR 'On the Constitutionality of the Presidential Degree from 19 December 1991 "About the Creation of a Ministry of Security and Internal Matters of the RSFSR"'*, Sobranie Zakonodatel'stvo RF. № 6, (1992) p. 247.

[75] Vedomosti CPD i SS RSFSR № 13 (1993) p. 466.

[76] O. Rumyantsev, *Ukaz. soch.* [*Collected works*] (1996) p. 178.

polarisation between the leaders of the legislature and the President, they were viewed as unsuitable for the pursuit of Yeltsin's short-term reformist agenda. In particular, from the perspective of the economic reformers in Yeltsin's team, they preserved the institutional weakness of the President and would only prolong the struggle with the legislature.

As a result, constitutional drafts began to emerge from President Yeltsin's inner circle. The most important came from Sergei Shakhrai (from November 1992 he was the Deputy Chairman of the Government, and from May 1993 he was also the representative of the President in the Constitutional Commission). It was Shakhrai's project that ultimately formulated the key basis for the current Constitution of the Russian Federation. Like the others, Shakrai's draft constitution declared a fundamental break with the Soviet system and listed a number of political, social, and cultural rights. The key difference was in constitutional design: this draft created a system of presidential centralism that ultimately would allow Yeltsin to continue his reforms.

For Yeltsin, it was important to legitimise the Shakhrai draft. Thus, Yeltsin's team of reformers came up with the idea of convening a Constitutional Assembly – a consultative body and alternative to the Constitutional Commission which consisted of representatives of government bodies, local self-government, public organisations and academic institutions (appointed by President Yeltsin). It opened in early June 1993 and ended on 12 July with the signing of the draft Constitution. The main design differences between this draft and that of the officially sanctioned Constitutional Assembly are presented below.

Table. The main differences between the last draft of the Constitutional Commission (September 1993) and the draft of the Constitutional Assembly (July 1993)

Project of the official Constitutional Commission	Project of Yeltsin's Constitutional Assembly
The President appoints, with the consent of the Supreme Soviet (bicameral Parliament), the Chairman of the Government, his deputies and members of the Government who are responsible for: economic management, finance, internal affairs, foreign affairs, defense and security	The President submits to the State Duma (the lower house of Parliament, the Federal Assembly) a proposal for the appointment of the Prime Minister. But if the Duma does not agree twice with the proposed candidacy of the Prime Minister, the President may dissolve it.
The President accepts the resignation of the Government, his deputies and members of the Government. Commentary: this is not a political decision, but only a decision on the resignation – at the initiative of the Government or by the decision of the Supreme Soviet.	The President poses the question of the resignation of the Government to the State Duma. If the Duma does not consider this issue within a week, the President may re-announce the resignation of the Government, which leads to the resignation without the consent of the Duma.

(*Continued*)

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Table. (*Continued*)

Project of the official Constitutional Commission	Project of Yeltsin's Constitutional Assembly
The institution of a vote of no confidence in the Government is not binding. The Supreme Soviet raises before the President the question of the resignation of the Chairman, his deputy or a member of the Government. The President can justify his refusal to dismiss. If the refusal is deemed unsatisfactory, the President is obliged to dismiss the person concerned. The resignation of the Prime Minister does not entail the resignation of the Government	The State Duma may issue a vote of no confidence in the government. But if the President does not agree with this decision, then after a second vote of no confidence, the President may dissolve it.
The President presents to the Supreme Soviet nominations of all federal judges.	The President appoints the Federation Council (upper chamber) and judges on the Constitutional, Supreme and Supreme Arbitration Courts; independently appoints judges of other federal courts.
The President presents the draft federal budget and a report on its execution.	The government submits a draft federal budget and a report on its execution.
The Supreme Soviet makes decisions on the main directions of domestic and foreign policy.	Comment: This authority is eventually transferred to the President in the fall and is included in the final text of the Constitution. But in a more rigid wording: 'defines the main directions . . .'.
The Supreme Soviet exercises control powers.	Nothing is said about the control functions of the federal legislature.
The dissolution of the Supreme Soviet or one of its chambers is not allowed.	The dissolution of the State Duma by the President is allowed in two cases, mentioned above
The Supreme Soviet calls a referendum	The President calls referendums.
The Supreme Soviet declares a state of emergency, martial law, general or partial mobilisation. Only in urgent cases can this be done by the President.	The President introduces martial law (with the support of the Federation Council).

The reader can see that the Constitutional Commission's draft adopted a checks-and-balances design that was generally characteristic of a number of European, semi-presidential states (for example, Poland, Slovenia, Bulgaria). In a time of compromise or deliberation, this draft would probably have had more influence on the final design of Russia's first post-Soviet constitution. But for Yeltsin and the economic reformers who were growing frustrated with the legislature, this kind of constitutional structure was not viewed as corresponding to the short-term needs of reform. As a result, Yeltsin's Constitutional Assembly draft significantly degraded the role of Parliament. This design was clearly aimed at solving the short-term political deadlock rather than overcoming the Soviet legacy of centralism.

But all was not lost. After the appearance of the Constitutional Assembly's draft, it was still possible to make the design more balanced. In particular, President Yeltsin's decree disbanding the Russian system of legislatures stated that the President agreed 'to submit to the Constitutional Commission and the Constitutional Council a *single agreed draft* of Constitution of the Russian Federation in accordance with the recommendations working group of the Constitutional Commission'.[77] At this stage at least, it appeared that President Yeltsin was ready to compromise.

But the situation had progressed too far. After an attempted uprising by supporters of the Parliament, an armed confrontation took place on the streets of Moscow in October 1993. Soon thereafter, on 15 October, Yeltsin issued Decree No. 1633 'On holding a nationwide vote on the draft Constitution of the Russian Federation' [78] which no longer discussed the concept of a 'single agreed draft' and instead called for a referendum for 12 December 1993. It is true that the process of finalising the constitutional draft was given the appearance of democracy:

> To finalize the draft Constitution, approved as early as 12 July, the State Chamber of the Constitutional Council was formed, consisting of representatives of the President, government, constituent entities of the Russian Federation, the Constitutional Court, the Supreme Court, the Supreme Arbitration Court, General Prosecutor's Office. Together with the Public Chamber of the Constitutional Council established on 24 September, the State Chamber was to complete the preparation of the document in a short time (the President set the task to publish the draft Constitution on November 10).[79]

But neither the choice of participants, the atmosphere that prevailed, nor the place where the revision took place (in the building of the Presidential Administration), suggested that the final constitutional draft was being prepared in an atmosphere of compromise or desire to fundamentally reshape the structure of the state. On the contrary, when legal experts in Yeltsin's team objected, their opinions were dismissed. In the polarised atmosphere, Russia's first post-Soviet constitution became a tool of short-term economic reform. This constitution would in turn have deeply problematic long-term implications.

The key problem, therefore, in Russia's founding period was not Yeltsin's break with Soviet-era legality. Although this did undermine a culture of adherence

[77]Sobranie aktov Prezidenta RF i Pravitel'stvo RF [Collection of acts of the President and Government of the Russian Federation], № 39 (1993) p. 3597.

[78]Sobranie aktov Prezidenta RF i Pravitel'stvo RF [Collection of acts of the President and Government of the Russian Federation] № 42 (1993) p. 3995.

[79]Baturin, *supra* n. 68, p. 370.

to rules, a break with the old system was necessary. As stated above, a serious reformation of the state could not be carried out on the basis of formal legislative centralism; a new set of rules was needed to ensure compromise. Instead, the continued presence of this Soviet legacy ultimately provoked Yeltsin's reformist forces into a violent break. This violent break with the past system in turn ultimately led to a victor's constitution.

Russian constitutional design ultimately recreated a dangerous imbalance of power prerogatives, though this time 'with the opposite sign': if the omnipotence of the legislative chairman had been established before, now the President dominated. Russian constitutional design had ultimately transitioned from formal legislative centralism to presidential centralism. Thus, despite the long list of rights in the new constitution, the opportunity to transform Russia's centralist and personalist tradition was ultimately missed.

Conclusions

This analysis of the Russian founding period contributes to our understanding of both the Russian constitution and transformative constitutionalism. Unlike transformative constitutions elsewhere, the Russian constitution was not drafted in a process that was likely to yield a document that limited and divided constitutional power.[80] Instead, continuity with Soviet-era formal legislative centralism encouraged President Yeltsin to violently break with the past and design a new system of presidential centralism. This suggests that the problems with Russian transformative constitutionalism emerged much earlier than previously thought, during the very process of constitutional foundation. It also demonstrates that a key precondition for any future realisation of the textual potential of the constitution in Russia is a process in which the current presidentially-dominated constitutional order is redesigned to allow more space for judicial enforcement of the constitution.

More broadly, the Russian example provides an important operative lesson for reformers drafting new constitutions about the critical link between the process of constitutional founding period and transformative constitutionalism. First, it reveals the dangers of choosing to draft a new transformative constitution under the rules of an old, authoritarian system. In this context, reformers are frequently presented with a terrible dilemma: either give up their reforms by consenting to law or violently break with the old system of legality. The revolutionary answer to the status quo problem, however, increases the chances that the new constitution

[80]K. Samuels, 'Post-Conflict Peace-Building and Constitution-Making', 6 *Chicago Journal of International Law* (2006) p. 663.

will centralise power in the interests of the reformers. Although this design might improve the short-term chances of reform, its centralism will undermine the long-term prospects of a judicially-led application of a transformative constitution. Comparative experience – from countries such as Colombia where constitutionalism has proven to be highly transformative – suggests that a better approach is a middle one that involves a multi-stage process of deliberation that breaks with the past but also gives all interests a voice in the founding process.[81] Reformers therefore must carefully seek to design the *process* of constitutional foundation itself so that it encourages compromise and deliberation. This deliberative process increases the chances of a successful form of post-authoritarian transformative process by instilling democratic norms of deliberation and increasingly the likelihood of a checks-and-balances constitutional design.

This finding reminds reformers of the importance of constitutional design in transformative constitutionalism. It suggests that transformative constitutionalism requires more than a document that textually declares a break with the past and includes a number of individual, social, and cultural rights. Reformers, therefore, need to go much further than simply creating the ideal textual constitution. Instead, they must carefully seek to place checks and balances on the concentration of power in both the process of constitution-making as well as the resulting post-authoritarian constitution. Although this alone will not guarantee the success of transformative constitutionalism, it is an important precondition for the realisation of transformative constitutionalism.

[81]Arato, *supra* n. 16; Partlett, *supra* n. 16.