

Constitutional Obstacles to Peace in Chechnya

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A fatal miscalculation in Article 65

When Russia's current Constitution was ratified in December 1993, Yeltsin had just emerged, victorious but chastened, from a violent confrontation with the Russian Supreme Soviet. He and his allies believed that the struggle had cost them time and political capital, and they wanted a new constitution adopted as quickly as possible so that they could move forward immediately with economic reforms and an ambitious legislative agenda. They were also aware that support for democracy in Russia was weak, both popularly and at the elite level. Accordingly, they wanted a constitution that would make life difficult for anti-democrats and establish new rules of the political game that would give fence-sitters incentives to accept the new order. Finally, they had been made wary by their experience with the preceding constitution in which powers of amendment rested entirely with the opposition-dominated Congress of Peoples' Deputies. As a result, they attempted to lock in democracy with a nearly unamendable constitution.

Indeed, it is even more difficult to amend the Russian Constitution than to amend the U.S. Constitution. To amend the "fundamental" provisions included in Chapters 1, 2, and 9 (which deal with the "Foundations of the Constitutional System," "Human and Civil Rights and Freedoms," and "Constitutional Amendments and Revisions of the Constitution," respectively), there must be a vote by three-fifths of the total number of the members of the Federation Council and the Duma to convene a constitutional assembly (Art. 135). The way the assembly is to be constituted is to be specified by a federal constitutional law (which has yet to be passed). The Constitution specifies that the assembly either must endorse the Constitution as a whole or adopt a new constitution, which would require the approval of two-thirds of the assembly's delegates. Amending Chapters 3-8 is less politically fraught but perhaps even less practicable, requiring approval by at least three-fourths of the members of the Federation Council, two-thirds of the deputies of the State Duma, and two-thirds of the legislatures of all of Russia's 89 "subjects of the Federation" (sub'ekty).

To the extent that there is flexibility in the Constitution's federation provisions, it is not to be found in its amendment procedures. There is, of course, some vague and ambiguous language (what is meant, for instance, by calling a republic a "state" [gosudarstvo]?). But most importantly, the distribution of powers between the federal government and the sub'ekty is made elastic by Art. 78.2, which allows the federal executive to delegate its reserved powers to individual sub'ekty as long as doing so does not violate the Constitution or federal laws; by Art. 78.3, which allows executive bodies of the sub'ekty to delegate their powers upwards and by Art. 11.3, which states that the jurisdiction and powers of the federal government and the sub'ekty may be governed in part by bilateral treaties between Moscow and individual regional governments. It is these latter provisions that give Moscow the option of granting Chechnya considerable autonomy to manage its own affairs, just as it has done already with Tatarstan.

Nevertheless, the extent of Moscow's flexibility in negotiating with the Chechens is limited. To begin with, Chechnya's secession would be illegal in the absence of a constitutional amendment. Article 65.1 specifically identifies "the Chechen Republic" as one of Russia's 21 republics. Moreover, there are no provisions for secession in the Constitution. On the contrary, Art. 4.1 specifies that the "sovereignty of the Russian Federation extends to its entire territory," while Art. 4.3 requires that the Russian Federation "ensure the integrity and inviolability of its territory." Likewise, Art. 67.1 states that Russia's territory "shall comprise the territories of its members, inland waters and the territorial sea, and the airspace above them." Both the drafters of the Constitution and the voters who ratified it on December 12, 1993, clearly understood Russia's "territory" to include Chechnya, an understanding that was shared by the international community, which afforded Russia formal territorial recognition on the basis of the Soviet-era borders of the Russian Soviet Federated Socialist Republic (RSFSR). The RSFSR included Chechnya, which was then part of the Chechen-Ingush Autonomous Republic.

The Constitution does not preclude merely secession, however. Article 4.2 gives the Constitution, as well as federal laws, supremacy (*verkhoventsvo*) throughout Russian territory. Article 6 specifies that citizenship is "uniform and equal," that each citizen has, "throughout [Russian] territory, all rights and freedoms," and that "no citizen of the Russian Federation shall be deprived of citizenship or the right to change it." Citizens of Chechnya are thus citizens of the Russian Federation, regardless of whether they are ethnic Chechens, ethnic Russians, or members of any other national minority. As such, they are entitled to all the individual rights, liberties, and duties specified by the Russian Constitution. These include the extensive set of rights and liberties specified in Chapter 2 ("Human and Civil Rights and Liberties"). For example, all Russian citizens have a right to "participate in the management of state affairs both directly and through their representatives" (Art. 32.1) and "the right to elect and be elected to bodies of state authority ... and to participate in referenda" (Art. 32.2). Each citizen is also guaranteed "judicial protection of his/her rights and liberties" (Art. 46.1). As for duties, Art. 57 states that "each person is obliged to pay statutory taxes and levies," while Art. 59.2 provides that all citizens "shall perform military service in accordance with federal law." Were citizens of Chechnya denied any of these rights and liberties, or were Chechens to refuse to pay taxes or to serve in the military in the absence of special federal legislation, individuals or groups would have a constitutional right to appeal to the Russian courts for relief against the infringement of their rights or the arbitrary application of federal law.

Finally, the Constitution imposes numerous constraints on the freedom of action of regional governments, constraints that the Chechens will almost certainly ignore. For example, Art. 8 states that Russian territory constitutes "a unified economic space and guarantees the free movement of goods, services, and capital. Article 74.1 bans internal custom frontiers, duties, levies, or other trade restrictions. Article 14.2 mandates that all religious associations be "separate from the state and equal before the law." Article 19.2 bans any restriction on individual rights on the basis of, inter alia, nationality or religious affiliation. Article 27 provides that any person legally in Russia has the right to freedom of movement, including the right to live anywhere temporarily or permanently. Article 75.1 bans the introduction and use of any currency other than the ruble. Finally, the sub'ekty are constitutionally obligated to send representatives to the Federation Council and to hold elections for deputies to the Duma (Arts. 95.2, 95.3, and 97.1). These provisions, if adhered to, would preclude any compromise agreement between Moscow and Grozny providing for some kind of "associated" status for Chechnya—that is, an arrangement whereby Chechnya would be neither fully independent nor a constituent unit of the Russian Federation. (Examples of this "neither fully in nor fully out" status are the relationship between the United Kingdom and some of its self-governing territories, or the relationship between the US and Puerto Rico.) Moreover, these provisions impede not only a creative solution to the conflict in the long run but also create serious political problems for Yeltsin in the short run.

Understandably, the Chechens have concluded that they have won their war with Russia and that Chechnya is *de facto*, if not yet *de jure*, independent. From their perspective, the five-year delay on resolving Chechnya's status provided for in the Khasavyurt Accords of August 31, 1996 is simply a face-saving device that allows the Russians time to prepare themselves psychologically for Chechnya's independence. In an effort to consolidate their political control inside Chechnya, the rebels held presidential elections on January 27, 1997. However, they clearly have no intention of holding elections to place representatives in Russia's Federation Council or the Duma. And most alarmingly for Moscow, Islamic law is now enforced at least in parts of Chechen territory. These developments are manifestly unconstitutional.

Even Chechnya's January 27 presidential elections are constitutionally problematic for Russia, despite the fact that they led to the election of Aslan Maskhadov, the candidate most acceptable to Moscow. Under federal law (which the Constitution makes binding throughout the Federation's territory), not only ethnic Chechens, Russians, and other national minorities living in Chechnya at the time of the Russian invasion, but also the many "internally displaced persons" (IDPs) now located outside the republic who had residency permits in the republic when it declared its independence in November 1993 and then fled the chaos of Dudaev's rule between 1991 and December 1994, should have been allowed to participate in the January elections if they so desired. Moreover, the international community has endorsed this principle by refusing to recognize the legitimacy of recent elections in Abkhazia, Nagorno-Karabakh, and South Ossetia on the grounds that IDPs who had fled the violence in those territories were not allowed to participate. While the Chechens did manage, with the help of the OSCE, to set up polling stations along the borders of Ingushetia and Dagestan, eligible voters living in other areas of the Russian Federation had to return to Chechnya to vote, something that the many Russians who had fled the republic, as well as many Chechens, were unable or unwilling to do.

For all these reasons, Chechnya confronts Yeltsin with an acute political dilemma. He has accepted, as he puts it, that there can be no "military solution" to the crisis and that resolving it is critical to the success of his second term. But the Constitution greatly constrains Moscow's ability to reach a compromise with the secessionists.. And, because it is very much his Constitution, Yeltsin cannot simply ignore the fundamental law of the land—he has invested too much political and psychological capital in it to announce openly that it should be blithely ignored in the interest of political expediency.

Complicating Yeltsin's dilemma is his extreme reluctance to amend the Constitution. Should he try to amend it to accommodate a political settlement with the Chechens, he fears that his opponents would use the amendment process to reopen fundamental questions about Russia's precarious democracy and about his own extensive powers. This would become a particularly acute problem if the Constitutional Court ruled that Chechnya's secession was precluded by Ch. 1, Art. 4, which guarantees the federation's territorial integrity. Chechnya's secession, or recognition that Chechnya was no longer a constituent unit and a republic within the Russian Federation, then would require the convening of a constitutional assembly and the adoption of an entirely new constitution. If, on the other hand, the Court ruled that Chapter 1 does not bar secession, a constitutional amendment removing Chechnya from the list of republics in Art. 65.1 would be extremely unlikely to receive the necessary support from national and regional legislatures. Almost equally unlikely, given the vehemence of the opposition's criticism of the Khasavyurt Accords, would be political support for an amendment providing Chechnya with some kind of special constitutional status.

Yeltsin's preferred solution to this dilemma is to put an end to the fighting and postpone a decision on Chechnya's status for at least five years, as provided for in the Khasavyurt Accords. By then, advocates of peace in Moscow hope that passions will have cooled, economic ties between Chechnya and Russia will have been re-established, and the Chechens will have accepted the advantages of an autonomous status that falls short of full independence. Equally important, Yeltsin's second and final term will have ended.

Even this course, however, creates major short-term problems for the Russian president. As we have seen, Chechnya almost certainly will remain in violation of the Russian Constitution for the remainder of Yeltsin's term. But unlike the situation prior to the invasion, Yeltsin no longer will be able to argue that he is doing all that he can to enforce the Constitution's writ in the republic. On the contrary, he already publicly, albeit guardedly, has endorsed the Khasavyurt Accords, and he ordered the withdrawal of Russian troops from the republic. According to Art. 80.2 of the Constitution, however, the president as the "guarantor" of the Constitution is obligated to take "measures to protect the sovereignty, independence, and state integrity of the Russian Federation and to ensure the coordinated action and interaction of bodies of state authority." It is difficult to see how he could be discharging those obligations by tacitly endorsing the Chechen position that the Russian Constitution is not binding on Chechen territory.

Yeltsin has been careful not to sign any documents with the Chechens. The Khasavyurt Accords were signed by then-Security Council Secretary Aleksandr Lebed, who was not legally a member of the Russian government. Hence the opponents of the accords argue that the agreement itself has no legal status. A November 23, 1996, interim agreement between the Russian and Chechen governments was signed by Russian Prime Minister Viktor Chernomyrdin and interim Chechen Prime Minister Aslan Maskhadov. Nevertheless, in principle at least, Yeltsin is vulnerable to impeachment for failing to defend Russia's territorial integrity. It is, however, almost as difficult to impeach the Russian president as it is to amend the Constitution. To initiate the impeachment process, at least one-third of the Duma's deputies must approve an initiative to bring the matter to a vote, and a "special commission" established by the Duma then must endorse the motion. At that point, at least two-thirds of all deputies to the Duma must vote to bring charges formally, the Supreme Court must rule that the president's actions were indeed criminal, and the Constitutional Court must agree that the procedures for bringing charges have been observed. Finally, at least two-thirds of all members of the Federation Council must vote to remove the president from office, and this vote must take place no later than three months after the Duma votes to bring charges. A failure by the Supreme Court, the Constitutional Court, or the Federation Council to address the issue in a timely fashion brings the entire process to a halt.

Most members of the opposition, of course, do not wish to see Yeltsin impeached. For example, Communist Party representatives, who make up the largest bloc of votes in the Duma, have little reason to believe that their party

could field a candidate who could fare any better in a presidential election now than did Gennady Zyuganov in the last presidential election in June 1996. On the contrary, most observers believe that Aleksandr Lebed, Viktor Chernomyrdin, or Yury Luzhkov would be odds-on favorites, and none of them is likely to be enthusiastically received by the Communists, or indeed by most of Russia's legislators. Finally, most members of the parliamentary opposition are also well aware that they, too, have no satisfactory answer to the Chechen crisis, and they understand that bringing matters to a head with Yeltsin on this issue would be a political mistake given popular opposition to the war.

The risk for Yeltsin, then, is not that he will be impeached. Rather, it is that he will be vulnerable to charges that he is willfully ignoring a Constitution that he struggled to adopt and that was ratified only after the bloody events of November 1993. In addition, the legal ambiguity of "no war, no real peace" with Chechnya undermines the legitimacy of the Constitution. And by undermining the legitimacy of the Constitution, the Chechnya stalemate undermines the rule of law and the legitimacy of Russian democracy. Finally, by repeatedly pointing out that Yeltsin is sanctioning the violation of the Constitution, his opponents remind the Russian public that it was Yeltsin himself who was, and remains, ultimately responsible for the debacle in Chechnya.

Unlike the Chechens, the Georgians took a decidedly different constitutional approach in dealing with their country's acute regional conflicts. As the Georgian Constitution was being drafted in early 1995, its sponsors were acutely aware of Tbilisi's violent conflicts with Abkhazia and South Ossetia, regional tensions throughout the country, and disagreements in Tbilisi over whether to constitute the Georgian state as a federation. They therefore decided that provisions on the relative powers of the national government and the regions should be omitted from the Constitution's text and that Georgia should, for the time being at least, establish a unicameral legislature. The drafters understood that only after a political solution had been found to the country's regional conflicts could Tbilisi regularize its relations with Georgia's subnational governments.

With the benefit of hindsight, the drafters of the Russian constitution might have been wise to adopt a similar approach with Chechnya. As the Russian Constitution was being drafted, Chechnya had already declared its independence and refused to participate in the writing of the federal constitution. Under these circumstances, savvy constitutional drafters could have decided to leave Chechnya out of the list of republics in Art. 65 and to include a provision stating that Chechnya's status would be determined at a later date. Alternatively, Art. 65 could have been made easier to amend. Had such a course been adopted, Moscow would be much freer today to negotiate some kind of associated status for Chechnya, or to accept the republic's independence.

An alternative, and far more controversial option, would have been to include a provision on secession in Russia's Constitution. To be sure, allowing for the possibility of secession would have been a gamble. The fear of many in Moscow in 1991–1993 was that Russia, like the USSR before it, was disintegrating, and they took for granted that allowing for secession would simply make Russia's disintegration more likely. Accordingly, there was no serious discussion on providing for secession in the Constitution.

In fact, Russia's territorial integrity, and even more clearly the consolidation of Russian democracy, might have been facilitated by making secession constitutionally possible. Procedures for this dramatic move, like procedures for impeachment, could have been made burdensome. For example, secession might have been allowed, but only after two referendums five years apart in which at least 60 percent of the electorate in a particular member of the federation voted for independence. Only in Chechnya might popular support for secession have been sufficient to meet these terms. And even in Chechnya, a realistic exit option for Chechnya might have ameliorated tensions and avoided the war. Alternatively, it might have postponed a crisis long enough for Dudaev, who was deeply unpopular in Chechnya prior to the war, to lose power, at which point it might have been possible to negotiate autonomy for Chechnya on the Tatarstan model.

All this is speculative hindsight. Nevertheless, it is important to appreciate that, while providing for secession would have been a gamble, so too was the decision to include Chechnya in Art. 65 and to make the Constitution so difficult to amend. In effect, the Constitution's sponsors were guessing that, despite Russia's unsettled condition, the Constitution would lock in and accommodate all future problems. They guessed wrong, at least in the case of Chechnya.

Having made the deeply misguided decision to invade, and having in effect lost the war, Russia would now be better off either negotiating some kind of associated status for the republic or letting Chechnya secede. As we have seen, however, the Constitution makes this very difficult, if not impossible. Instead, Yeltsin is being forced to accept a "no war, no real peace" impasse. And this impasse will likely persist for the remainder of his term.

This outcome is as much a misfortune for Chechnya as it is for Russia. In the coming years, Chechnya will not receive the reparations it is hoping for from Moscow, which, after all, cannot even fund its own financial obligations, let alone cover the massive costs of rebuilding the Chechen economy. Economically in ruins, and unable to regularize its relationship with either Russia or the outside world, Chechnya will remain politically unstable. Most likely, Moscow will respond by trying to isolate the republic, rerouting rail lines and energy pipelines to avoid it. More ominously, Moscow, or at least part of the Russian security apparatus, may succumb to the temptation to meddle in Chechen affairs, supporting those factions inside the republic that seem least inimical to Russian interests. In short, the impasse that existed before the December 1993 invasion will return, but in the wake of tens of thousands of deaths, hundreds of thousands of refugees, the devastation of the Chechen economy, and an even profounder Chechen enmity toward Moscow.

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