

<https://helda.helsinki.fi>

---

# Beware of the Bulldozer : What We Can Learn from 1993 Extra-Constitutional Constitution-Making

Kurnosov, Dmitry

2022-01-07

---

Kurnosov, D 2022, 'Beware of the Bulldozer : What We Can Learn from  
Extra-Constitutional Constitution-Making', Verfassungsblog . <https://doi.org/10.17176/20220107-195039-0>

---

<http://hdl.handle.net/10138/342095>

<https://doi.org/10.17176/20220107-195039-0>

---

cc\_by\_sa

publishedVersion

---

*Downloaded from Helda, University of Helsinki institutional repository.*

*This is an electronic reprint of the original article.*

*This reprint may differ from the original in pagination and typographic detail.*

*Please cite the original version.*

# Beware of the Bulldozer

---

Dmitry Kurnosov

2022-01-07T12:33:08

Today we are used to seeing Russia as an example of an authoritarian constitutional structure, especially since last year's amendments that removed most of the liberal pretense. It is easy to forget that initially the country's basic law has been the outcome of extra-constitutional constitution-making that emphasized popular sovereignty, democracy, and human rights. The 1993 constitution was universally seen as a superior document compared to the previous unwieldy text of 1978 with subsequent amendments. Nonetheless, the document contained the seeds of future authoritarianism that would ultimately undo most of the liberal-democratic elements in the basic law. Thus, it can serve as a cautious reminder to anyone considering extra-constitutional constitution-making. My contribution to [this blog debate](#) will contour the history leading to the 1993 Russian constitutional crisis and explain why the resulting constitutional text has proved problematic. I argue that the case of Russia teaches us how dangerous extra-constitutional constitution making can be – and that it should always be just a last resort.

## What's a Soviet?

The dominant Orientalist vision tends to portray the current political regime in Russia as a natural successor to the Tsarist rule before 1917 and the Soviet totalitarianism/oligarchy between 1917 and 1991. The reality, however, is messier and more nuanced (see generally [Henderson](#) 2011, 13-58). The very word 'Soviet' actually refers to workers' and peasants' assemblies which nominally held all the political power in the country since the October Revolution in 1917. In practice, however, they soon became merely a façade for the Bolshevik/Communist party rule as all other parties were banned. The constitutions of the Soviet Union and its constituent republics (including Russia) envisaged parliamentary regimes with a collective head of state (Presidium). Practically, the assemblies were elected in sham elections. They only met a few times per year to rubber-stamp the Party decisions.

All of that changed in 1989-1990, when the Soviet authorities under Mikhail Gorbachev have decided to hold free elections at all levels. These elections produced a groundswell of opposition support in many Soviet republics and major urban centers. Communist Party officials, many of whom have ruled for decades, were voted out of office. Activists and intellectuals without prior experience in government found themselves behind the real levers of power. Shocked by the change and unable to agree, they would often outsource some of the assembly's powers to independently elected executive officials. Similar moves have occurred in many Soviet republics that have established a directly elected presidency. Amidst political uncertainty and the lack of established political parties, a president seemed to embody stability and resolute decision-making. In Russia over 70 per cent of voters supported the establishment of the presidency in a referendum. Then a majority of them elected Boris Yeltsin as president. Despite his background as

a Communist Party chief in Sverdlovsk (now Yekaterinburg) and Moscow, he embodied a decisive break with the Soviet past. As one of his colleagues has put it, Yeltsin was 'a bulldozer for democratic change'.

## The Institutional Conflict

Yet, in many cases (including Russia) the introduction of an executive presidency conflicted with the constitutional structure based on parliamentary supremacy. For instance, the Russian parliament could decide on 'any matter within the federal jurisdiction'. Initially, Yeltsin and the parliament were on the same side. In August 1991 they together resisted a coup attempt by Soviet hardliners. Three months later the parliament gave Yeltsin an exceptional mandate to conduct wide-ranging economic reforms. It included an ability to issue decrees having the force of law. However, precisely these reforms have ultimately exacerbated tensions between the president and parliament. Yeltsin used the mandate to push for neoliberal reforms that severely impacted the Russian population. The parliament pushed back against Yeltsin, refusing to extend his exceptional mandate, and turning down the candidate for prime minister. Furthermore, a 'tripwire' provision was inserted into the constitution, whereby the president would automatically leave office were he to attempt dissolving the parliament. The rising tensions between the legislature and the executive could not be resolved neither through negotiations, nor through a referendum. The stalemate between Yeltsin and the parliament ensued.

The crisis in legislative-executive relations contributed to the already low respect for the then-Russian Constitution. Other contributing factors were numerous elements of the Soviet legacy and the ease of amending the document (a super-majority of all MPs was sufficient). Back in 1990, the legislature was set to write a new constitution. Yet, the growing chasm between President and Parliament eventually consumed the drafting process. While the legislature extended the work of the constitutional commission, Yeltsin established his own constitutional assembly in summer of 1993. The two bodies' drafts generally converged on the federal nature of the state and the human rights catalogue. Yet, they widely differed on the institutional structure of the state. Legislators envisaged a semi-presidential republic, generally in tune with developments in Central Europe ([Partlett and Krasnov 2019, 664](#)). In contrast, the presidential draft saw a strong head of state and a weak parliament. From the standpoint of the Constitution in force, the parliament had a stronger hand. It only needed one vote with a two-thirds supermajority to make its draft the supreme law of the land. The President, by contrast, had no legal way to force his draft and to bypass the legislature. Furthermore, any attempt to dissolve the parliament would activate the constitutional 'tripwire' and automatically remove him from office. Politically, however, the situation was in favor of Yeltsin. Though legally inconclusive, the referendum had shown that the President and his policies enjoyed greater support than the Parliament.

## Tanks and Intellectuals

Political considerations ultimately led President Yeltsin to choose the road of extra-constitutional constitution-making. On 21 September 1993, he issued a decree 'on gradual constitutional change in the Russian Federation'. In truth, the change was anything but gradual. In a true 'bulldozer' fashion, Yeltsin dissolved the parliament, ordered elections to a new bicameral legislature, and called a 'popular vote'<sup>1)</sup> This was done in order to circumvent the requirements of the referendum law. A similar fix has been employed by President Vladimir Putin to stage a vote on the 2020 constitutional amendments. Ultimately, the move proved to be a shrewd one as the presidential draft was approved by a relatively narrow majority of 58 per cent of votes. on the new constitutional draft. Later the same day, the Constitutional Court in a hastily convened session found the President's actions unconstitutional. The Parliament, relying on the 'tripwire' provision, declared that Yeltsin had forfeited his office. Two weeks of a tense armed standoff followed. Mediators, including regional leaders and Orthodox Church clergy, proposed a 'variant zero', whereby both Yeltsin and the parliament would rescind their decisions and submit to early elections. Instead, the standoff degenerated into brutal violence. Ultimately, pro-president troops shelled the parliament building, forcing its surrender. In total, several hundred people have perished in the short civil conflict.

In spite of the brutality of the events, Yeltsin's actions were widely supported by his power base, including the liberal intelligentsia. If anything, they wanted the President to go even further. The 'letter of 42' cultural figures, published shortly after the shelling of the legislature, called, *inter alia*, to 'declare illegitimate all the bodies formed by the parliament (including the Constitutional Court)'. This aspect of the 1993 extra-constitutional constitution-making in Russia seems particularly troubling to me. Neither the parliament, nor the Constitutional Court were beholden to the old Soviet regime. Rather, they were just politically 'inconvenient' for President Yeltsin and his reform agenda. Yet, with passions running high, the zero-sum mentality set in, leading to one-sided institutional arrangements and radical proposals. In extra-constitutional constitution-making, there are no safeguards against such a scenario. That said, the equation might be different in case of institutional arrangements specifically designed to entrench the previous regime beyond its electoral mandate. Reversing such arrangements might be the only way to ensure that the new government is actually able to function. However, this should be an exception, rather than the rule. The Russian example of 1993 warns us that mere political inconvenience cannot be a reason for extra-constitutional constitution-making.

## Conclusion

The stakes are high. Destroying institutions for the sake of democracy might be a futile endeavor. As Partlett and Krasnov show, Yeltsin's constitutional process was far from open and transparent ([Partlett and Krasnov 2019, 665-667](#)) Instead, the drafting reflected frustration with the legislature and the short-term goals of economic reform. Yet, the consequences were long-term ones. Effectively, the use of extra-constitutional means helped create a blueprint for authoritarian government. The

new constitutional text was heavily tilted in favour of the president, who determined 'the basic objectives of the internal and foreign policy of the State' (1993 Constitution of the Russian Federation, Article 80, Section 3). The parliament wasn't able to effectively check on presidential power. The President had a carte blanche on forming the government, a tight control over the military and law enforcement. He also had an option of issuing legally binding executive orders. For the time being (especially in the late 1990s), the presidential powers were limited by Yeltsin's low popularity and health issues. His successor Vladimir Putin, however, was able to make full use of the vast presidential powers. Tellingly, while Russia has been consistently ranked as an authoritarian regime by various democracy metrics since the mid-2000s, no significant constitutional changes were required until 2020.

In my opinion, the bad choice of institutional design may be the biggest potential pitfall of extra-constitutional constitution-making. Just like in 1993 Russia, there might be no impetus to install proper checks and balances. Instead, choices could be driven by the short-term agenda of those pursuing constitutional change. Such an outcome would be particularly unwelcome when the previous regime was built on violations of the rule of law and the new constitution, too, would serve only as a mean to political ends.

Thus, I argue that extra-constitutional constitution-making can only be a tool of last resort. It could only be applied in a 'negative' sense, i.e. by annulling individual provisions aimed at perpetuating the previous regime. Yet, any 'positive' extra-constitutional rule-making must be limited to the establishment of an interim framework with clear deadlines and outcomes. No substantive institutional changes should be made outside of the constitutional bounds. Otherwise, there will always be the danger that breaking the rule of law will continue even after constitutional change has taken place. This is precisely what Russian intellectuals and jurists, who supported Yeltsin in 1993, learned under the rule of Vladimir Putin. We should try to avoid repeating their mistakes.

## References

- This was done in order to circumvent the requirements of the referendum law. A similar fix has been employed by President Vladimir Putin to stage a vote on the 2020 constitutional amendments. Ultimately, the move proved to be a shrewd one as the presidential draft was approved by a relatively narrow majority of 58 per cent of votes.

