



Why Don't You Just Write Us a Constitution and Be Done With It

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How do you write a constitution? The Russians need one—badly. They are still operating under Brezhnev's 1978 constitution, which was written for Russia as a republic within the Soviet Union, rather than for Russia as a sovereign state. Times have clearly changed, and the Russian Congress of People's Deputies has amended that document more than 300 times since 1991. But they have refused to amend or eliminate what many consider an especially serious deficiency—Article 104, which essentially gives the Congress the right to do anything, wiping out everything else established by the constitution and making the rest of the document irrelevant. This did not matter until 1991, but trying to live under that document in a meaningful democracy has resulted in chaos. Russia's Constitutional Reform Commission has been laboring for a year and a half and has produced several drafts, but has not come close to writing an acceptable constitution or even a draft of such a document. President Yeltsin has his own proposal, which is for the most part no better than any of the alternatives—a ponderous document that seems designed only to ensure a president with powers that parallel those of a czar.

"Why I cared about it, I'm not sure," says Professor of Political Science Peter Ordeshook, who speaks no Russian and has not, until recently, been particularly concerned with Russian politics. But in the last couple of years Caltech's Division of the Humanities and Social Sciences has played host to a number of Russian social scientists—both visiting faculty and graduate students (*Caltech News*, February

1993)—who drew the Americans into discussions of the political problems faced at home. In the immediate aftermath of the Soviet Union's breakup, says Ordeshook, everything seemed to focus on the issue of economic reform. "When people talked about social scientists going over to Russia or to Eastern Europe to make suggestions, they were really talking about economists," he says. "From my perspective, as a political scientist, I wasn't sure initially what comes first—economic reform or political reform." But after observing the political chaos there preclude sustainable economic transformation, the necessity for simultaneous political institutional change became self-evident. Unfortunately, he did not see much serious effort going toward political reform. When Russian graduate students asked Ordeshook to look at the Constitutional Reform Commission's first draft of a constitution, he promptly pronounced it "terrible." He wrote an analysis of its deficiencies for *Izvestia* (in which he diplomatically described it as "a valiant attempt") at the end of 1991, and made a couple of trips to Russia to consult with politicians and academics wrestling with the constitution problem. But as subsequent drafts of the document appeared and he did not see any improvement—"they didn't seem to be getting anywhere; they just didn't seem to have any understanding of what they were doing"—Ordeshook's frustration level rose. "It was clear they were operating from a wholly incorrect philosophy, or a wholly incorrect set of principles. Or no principles at all. I couldn't tell."

Finally Vyacheslav Nikonov, a Russian

With Lenin's legacy gone, the inexperienced Russians are seeking new democratic political structures.



Peter Ordeshook (left) and Vyacheslav Nikonov (right) discuss the Russian constitution with another visiting lecturer at Caltech, Fuad Aleskerov, a Moscow economics professor and research department director at the Institute of Control Sciences of the Russian Academy of Sciences.

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counselor for the International Fund for Economic and Social Reforms (and following the 1991 coup, second in command of the KGB), who was visiting Caltech in the 1992 fall quarter and had to listen to Ordeshook’s grumbling, invited him to put up or shut up—specifically, to write a series of newspaper articles on what the democratic process was all about, a sort of “pre-Federalist Papers” for ordinary Russians. A subsequent discussion with the editor of *Nezavisimaya Gazeta*, Russia’s largest independent newspaper, to ascertain interest in such a series, evoked from the editor the half-kidding comment, “Why don’t you just write us a constitution and be done with it.” So, in addition to the essays, Ordeshook decided to write a constitution. He drafted a colleague, Tom Schwartz, professor of political science at UCLA, another visitor to Caltech, to collaborate on the task.

“It was interesting to actually try to write a constitution,” said Ordeshook. “It’s not easy. There’s no handbook sitting out there.” But he found himself intrigued and challenged by what he calls “probably the greatest political engineering-design problem of the 20th century. For a political scientist, it involves some really fundamentally interesting questions—particularly in institutional design. It’s an empirical challenge to try to figure out what the right institutions are for this rather crazy place.” Ordeshook isn’t a bit sanguine about the Russians actually adopting his draft but is glad to have undertaken the challenge. “We didn’t write this thing with the idea that we’re going to go over there, and people are going to read it and say, ‘Wow, this is

brilliant; let’s use it.’ But we hoped to draft something that at least presented a structure in which people could see the philosophy behind a constitution.”

Ordeshook and Schwartz sat down and wrote their draft in three weeks in January. Even the American founding fathers took the whole summer of 1787 to complete their enterprise, which is actually the world’s oldest surviving written constitution. But if the two professors did not have a handbook, they did at least have a model in that document. “Aside from the fact that it has a completely different history and a completely different economy, and there’s 140 million of them and, when we began as a country, only 3 or 4 million of us, America is still probably the most relevant model for Russia,” says Ordeshook. “It’s not a perfect model for many reasons, but none of the other stable democracies—Germany, France, Italy, Switzerland—comes close to approximating the match between the U.S. and Russia. Its size and ethnic diversity are similar to ours, and the fact that it’s a federation with regional and local interests means that there will be a continuing tension between Moscow and the regions over jurisdiction and authority, just as there has been here.”

The Ordeshook/Schwartz draft runs to less than 10 pages, double spaced, and 40 articles—approximately the same length as the U.S. Constitution. Compared to the 69 pages and 133 articles of the Commission draft, and 50 pages and 130 articles for Yeltsin’s, this sounds rather skimpy. But Ordeshook believes, “A constitution should say *no more than necessary* to start the

Article 13: The state is responsible for promoting these objects:

- *Adequate income for all, including wage earners, the unemployed and disabled, widows and orphans, veterans, victims of repression, and retired persons.*
 - *Primary, secondary, and vocational education for all, and higher education for all according to ability.*
 - *The viability of families.*
 - *Medical care for all.*
 - *Housing for all.*
 - *Compensation for damage done illegally to one's health, dignity, good name, or property.*
 - *Environmental and ecological safety.*
 - *Preservation of the natural and cultural heritage of the Russian Federation.*
 - *The safety and healthfulness of the workplace.*
 - *Promotion of the arts and sciences.*
 - *Development of industry and transportation.*
 - *Promotion and efficient regulation of commerce.*
 - *Protection of ethnic, social, national, and religious minorities.*
 - *Safety against crime.*
 - *Protection of consumers against fraud, unsafe products, and anti-competitive practices.*
 - *Protection of proprietary and contractual claims.*
 - *Defense of the state and this Constitution.*
 - *Democratic self-government in every federal subject.*
 - *The ready means to petition the state for a redress of grievances.*
- The state shall not act but in support of these objects.*

Russians expect social guarantees to be included among the state's responsibilities. Ordeshook and Schwartz had to put them into their Article 13 but with very careful wording.

government and create a self-enforcing, adaptable, and fair process." And any constitution writer needs to begin with the idea of what a constitution is. In Ordeshook's view, it is "a document that the sovereign, the people, use to define their agent, the state, to act on their behalf, and to place limits on the state. If you begin expanding the document beyond that, it starts to muddy things up and to lose its real purpose." The Russians, in contrast, have tried to include clauses that cover just about everything a citizen could ever wish for—decreeing, for example, that parents will take care of their children and that the children will take care of aged parents. The constitutions of Stalin and Brezhnev were a "complete candy store of every conceivable right, including the right to free housing, free medical care, paid vacations, and so on." Although he would have preferred to do away with such social guarantees altogether, Ordeshook did not manage to escape the universal expectation that they should be in there. His article 13 includes such things as adequate income for all; the viability of families; medical care for all; housing for all; and environmental and ecological safety. But the trick lay in converting the article's meaning from guarantee into merely empowering the state to act in these domains. Article 13 reads: "The state is responsible for promoting these objects: . . ." "It enables the state to seek to establish, say, housing for everybody," says Ordeshook. "It does not necessarily mean that the state's *going* to do anything, but it says the state *can* do something. It is then up to the political process as directed by the institutions the constitution establishes, to determine whether and to what extent the national government will become involved with such matters."

Yet another problem is that Russians want to write a constitution, especially its provision of rights, like a business contract in which every circumstance and contingency is explicitly recognized and planned for, says the Caltech professor. "They're afraid of overly constraining the state." Instead of saying, for example, that the legislature shall pass no law infringing on freedom of the press, they want to say "the legislature shall pass no law infringing the freedom of the press except in the following cases. . ." Similarly, the Russians want to put in a constitutional provision saying that the legislature will pass no law infringing on the right of the people to peacefully assemble—except when people are trying to agitate for war, to undermine the democratic institutions of Russia or to cause enmity among groups. If the document does state a right without conditions, it's usually undermined later

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by another clause that says "these rights can only be infringed upon by law." "The net result of all of these qualifications, of course, is that you end up with no rights at all," says Ordeshook.

While the Russians are eager to expend thousands of constitutional words trying to describe specifically all the instances in which the state may be allowed to infringe upon a right, they are willing to tolerate a remarkable amount of ambiguity when it comes to defining institutional structure. This they expect the "law" to do for them. The Commission draft, for example, is very weak on constructing a separation of powers and Yeltsin's draft wholly abrogates any separation in favor of a presidential near-dictatorship. Also, neither version defines how the president and legislators are to be elected (there are numerous possibilities for a presidential election: simple plurality, regional distribution requirements, electoral college, or a simple majority vote with runoffs, which the Russians favor), or when they will take office or leave it. Ordeshook finds this approach of too much specificity in one place and too little in another, ominously inconsistent. It's in their understanding of the role of institutions, he believes, that the Russian approach completely breaks down. If institutions are designed well, then the appropriate legislation guaranteeing and qualifying rights to suit society's needs will follow. "The Russians don't trust institutions," he says. "They don't understand that it's not the words in a constitution that guarantee individual liberties; it's the institutions that the document establishes. In Marxist philosophy institutions were ephemeral things, merely dictated by the

flow of events in society." Thus, rather than focus on the critical matter of political institutional design, Russians instead focus on elaborate and unenforceable statements of rights and vague principles.

Institutional design, the ultimate basis of the enforcement of rights, is what Ordeshook considers the most interesting challenge currently facing the Russians, in particular the debate over whether the country should have a presidential or a parliamentary system. Yeltsin's draft opts for an overly strong presidency. The Commission draft specifies a more modest and reasonable presidential system. An alternative constitution proposed by Anatoly Sobchak, mayor of St. Petersburg, opts for a mixed presidential-parliamentary system, which, unsurprisingly, the current members of the Russian Supreme Soviet prefer. Ordeshook comes down on the side of the presidency, but not for the same reasons that the Russians do. They claim that Russia needs a strong leader, either because it's a cultural tradition or because a strong leader is needed in these times of chaos and economic struggle, says Ordeshook. He, on the other hand, sees the presidency as necessary to prevent the political fragmentation and disintegration of the Russian Federation as a product of the nature of the political parties that will emerge eventually to compete against each other. "If you want to keep Russia whole, you have to ask the question: what kind of political party system is best, given Russia's circumstances? What you don't want is a system in which there are a lot of small ethnic regional political parties competing against each other. And that's what parliamentarianism is likely to generate—dozens of small regional parties and complete government instability. I could easily see a parliamentary Russia in which no government survived longer than six months—a replay of Poland or Italy.

"A presidential system, on the other hand, at least has the advantage of providing a chief prize for the parties to win, and this creates an incentive for parties to coalesce across regional and ethnic boundaries," says Ordeshook. Again, he finds relevance in the United States, which, he says, doesn't have merely two major political parties, but 100—50 Democratic Parties and 50 Republican Parties. This isn't surprising, because all elections except the presidency take place on a state or local level. "Delegations of state parties meet at a national convention every four years to nominate a president. They find it convenient to coalesce under two labels for the sake of winning this prize. Thus, although the state parties provide a natural protection for local interests, the



Ordeshook snapped this street scene of Russian capitalism on a recent Moscow visit.

lure of the presidency leads the parties to negotiate many of their regional conflicts internally, before they are allowed to disrupt national politics.”

The problem, though, with explaining the potential role of parties in ensuring political stability, says Ordeshook, is that Russians have no concept of what a political party is or does in anything other than the most superficial sense. “Brezhnev’s 1978 constitution says: here’s a constitution *but* the Communist Party is the leading authority on everything.” Stalin’s constitution doesn’t even mention the Communist Party, which the political science professor found paradoxical. When he asked about it, he was told, “Under Stalin they didn’t have to say it.” In any event, with no experience in democratic process, Russians only have the example of the Communist Party when thinking about parties under any new constitution.

The failure to appreciate the nature of parties in a democracy causes Russians to fail to appreciate the fact that the U.S. state party system has provided an important protection of the enormous autonomy of the American states and consequently of the overall stability of the American federal system. Even though there has been gradual erosion, the autonomy of the individual states remains greater than in most federal countries, with the possible exception of Switzerland. The representation given to states in the Senate provides an additional protection of states. So Ordeshook and Schwartz put a bicameral legislature into their constitution, with an upper chamber similar to the American Senate and a

lower chamber to be elected through single-member districts. Unfortunately, the Russian Federation is a hodge-podge of republics, oblasts, krais, and autonomous okrugs, which makes developing a fair system of representation in an upper house a nightmare. About half of the republics are populated by a majority of ethnic Russians, but the rest contain significant numbers of other ethnic groups. Oblasts, which largely derive from 19th-century administrative divisions, are between 90 and 95 percent ethnic Russian, but occasionally territories exist within them that have been carved out for ethnic minorities and given some special consideration, like an Indian reservation. These are called autonomous okrugs; an oblast with an autonomous okrug in it is called a kray. They all have different internal political structures and different degrees of autonomy with respect to Moscow—differences that the Yeltsin draft maintains (the other drafts are too ambiguous to identify their implications in this matter).

This makes for a very asymmetric federation, which is bound to lead to what Ordeshook calls “the teachers union problem: When it comes time to negotiate a contract, every teachers union in the U.S. can find some other school district that’s rewarding its teachers more in terms of salary, pensions, hours in the classroom, etc. And so when new contracts are negotiated you get an escalation of demands across school districts.” Or across republics and oblasts and krais in this instance. “Every republic or oblast can find some other republic or oblast that on some dimension is in a more advantageous position than it is with

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PREAMBLE

We, the multinational people of the Russian Federation, to secure the peace and safety of society, to establish the legal foundations for general prosperity, to foster justice and harmony among all of us, to protect the freedom and dignity of each one of us, and to preserve the unity and patrimony of Russia, adopt this Constitution and proclaim the Russian Federation to be a democratic, federal, and social republic based on the rule of law, the inalienable rights of the individual, and the separation of legislative, executive, and judicial powers.

Right: Ordeshook (left) and Schwartz stroll in the Moscow snow, which, they discovered, is pretty much like snow everywhere.

Left: The preamble to the constitution drafted by the two Americans alludes to universal principles that should hold for Russia as they do for other countries.

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respect to its relationship with Moscow. These leapfrogging demands are all headed in one direction, and that is toward the division of Russia," Ordeshook maintains. He and fellow constitution writer Schwartz sought to clean up some of these fuzzy boundaries, combine some of the oblasts into single units, and establish uniform degrees of autonomy and regional responsibility, but their Russian colleagues tell them this is unrealistic—for unexplained reasons.

Russia does already have a legislature, elected in 1990 under the former constitution (most of its members ran unopposed). But they were elected as the legislature not of a country but of the U.S.S.R. Ordeshook likens the situation the Russians now find themselves in to a hypothetical California—a California in which the governor and the legislature didn't really have much to do. "And then all of a sudden Washington disappears, and these characters in Sacramento are left with the nuclear weapons. That's what basically happened." If this weren't a frightening enough predicament, the Russians have had no experience with democracy. Other countries in this century that started writing constitutions from scratch at least had some democratic traditions ("And Germany and Japan had the American army sitting there too.") Even China, says Ordeshook, has more experience with democracy than Russia. "Russia has absolutely none! Zero. It's really hard to imagine. Russia is almost the proverbial blank slate."

Nevertheless, the Russians are not exactly rushing to embrace an American-type constitu-

tion. Says Ordeshook, "Two years ago, if somebody had showed up in Moscow with a constitution labeled 'Made in the USA,' it would have had enormous appeal—Russians admire America more perhaps than any other country. But right now with much of the population believing that Russia's leaders are selling out their country to the West, it's the kiss of death." The two American political science professors did visit Russia again this past February to get a closer view of the problems. "Trying to understand it from here gets very murky and confusing." While there, they collaborated with an ad hoc committee of Russian academics, politicians, and businessmen who were also writing an alternative constitution—and which just happened to include Ordeshook's colleague Nikonov. "What exactly they will do with it I don't know. But we spent a couple of weeks going back and forth between our draft and the draft they were working on. We were learning some realities of the political situation, and I hope they were learning something about what it means to say, for example, 'the rule of law.' They would use such a phrase but not have the foggiest idea what it means."

They also met with a variety of other people, trying to get a sense of what different interests were. One such encounter took Ordeshook and Schwartz to a rural village outside of Moscow, a trip that came to epitomize for the two Americans their frustration with the Russian experience. Ordeshook calls it "The Parable of the Snows." They were driving back to Moscow with Nikonov, his mother-in-law (who had contacts

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with the village), and another Russian, who owned the car. It was snowing, and, in attempting a short cut back to the city, the car got stuck in three feet of snow on a sheet of ice. While Schwartz kept suggesting that they break up branches to put under the rear wheels and push the car out, the Russian men completely ignored him. Finally, without saying a word, they strode off into the night in the direction the car was headed, with Ordeshook in hot pursuit to find out what they were doing. They were going to the Minsk highway to wave down a truck to pull them out. "I commented that the truck would just get stuck in the snow too, but they said, 'Don't worry about this. We're Russians. We do this all the time.'" After about half an hour, a truck was flagged down, a deal negotiated, the truck started off on its rescue mission—and promptly got stuck in the snow. Ordeshook hiked back to the car, where, in the meantime, Schwartz and the mother-in-law, who spoke no English, had packed branches and other junk under the rear wheels. When the Russian men reappeared, they continued to ignore the potential of this solution, but the Americans finally insisted that the driver back the car up while they pushed. "It took about 15-20 minutes, a meter at a time, putting stuff under the wheels, and then we were out, free. We could turn the car around and go back the way we had come. Insofar as the truck is concerned, for all I know, it's still there."

Says Ordeshook: "The lesson you get out of this is that there are fundamental principles—force, friction, action-reaction, etc.—that apply

universally, regardless of culture, regardless of where you are on the planet, regardless of the language you speak, regardless of whose snow it is. But the Russians are doggedly determined to believe there's something special about Russian snow, something special about the Russian soul, something special about Russia that's not shared by anyone else. They just ignore common principles and go marching off in some bizarre direction. And this is what we encountered with the constitution. They'd say, 'You just can't do that in Russia.' It was obviously one of their beliefs that there was something special about their country that negated constitutional democratic principles that applied everywhere else on the planet."

Ordeshook figures the Russians may muddle along for a while and perhaps end up with a gigantic compromise document that will look like "fish soup." He has no clear preference over any of the current "official" proposals—by Yeltsin, the Commission, or Sobchak—since they are all of such inferior quality that Russia would only embarrass itself by adopting any one of them. But he can't really see how anything coherent is going to get written and adopted. "I don't see the current Congress of People's Deputies doing it; and I'm not sure about the next Congress or any other one. It's going to be a long process." □ —JD

Peter Ordeshook has been a professor of political science at Caltech since 1987. He plans another trip to Russia in July—unless his criticism of Yeltsin's constitution, recently published there, is taken amiss.