COMPARATIVE STUDY OF THE CONSTITUTION OF THE RUSSIAN FEDERATION, 1993 AND THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996

Dissertation submitted to the Jawaharlal Nehru University in partial fulfillment of the requirements for the award of the Degree of

MASTER OF PHILOSOPHY

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DECLARATION

I declare that the dissertation entitled **"COMPARATIVE STUDY OF THE CONSTITUTION OF THE RUSSIAN FEDERATION, 1993 AND THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996"** submitted by me for the award of the degree of **Master of Philosophy** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this university or any other university.

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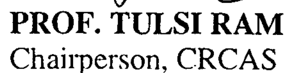
We recommend that dissertation be placed before the examiners for evaluation.



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to all those who sacrificed their life
for freedom and dignity

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Acknowledgement

In an academic journey, like writing dissertation or thesis, a person needs guidance, supports, encouragement etc. as his/her logistics. As a research pursuer, I did not lack anything aforementioned from my supervisor Dr Sanjay Kumar Pandey. He not only guided me but also his fret about the availability of matters for my research work and his own attempt to get them, his invaluable suggestions etc. make me indebted to him. People who helped me prepare this dissertation by cooperating from various ways are many but the names, which I should not forget, are- Hari Roka and Deepak Bhatta. They had inspired and led me to JNU. I think, Shanti, who laboriously earns and supports me, deserves the maximum credit for my work. My mother, who needs care in her elderly age, encouraged and sent me to study living on her own. Uncle Laxmi Dutta and younger brother Dharm have also been sources of strength.

I am appreciative of the all the faculty members in our centre for their cooperation. I am particularly grateful to my senior Sudhir for his valuable suggestions and inputs. The helping hands of Mahendra, Uddhab especially in computer proved invaluable for me. Apart from the aforementioned persons the JNU library staff also deserve my gratitude. Finally I express thanks to my two children, who sometimes call and say "dedi lamlo chhita padha haai" (childish tongue in Nepali word, which means study well).

Preface

I entered JNU just afrer the historic Jana-Aandolan II of Nepal winded up in 2006 and when the Nepali state was in the process of restructuring. My JNU days are coinciding with the great discourse of constitution-making in Nepal. To engage myself in those discussions and contribute to it in my own humble way I belived that I should have better knowledge in the field of constitution and constitution making. So I decided to take a topic which deals with the ideas of the constitution and constitutionalism. One of my major concerns has been to understand how major organs of the government function. As the discussion on federalism is very relevant for Nepal, I decided to give particular attention to this issue in my study.

I decided to choose two contemporary constitutions which would have maximum relevance for Nepal. I found that the Republic of South Africa and the Russian Federation have made transition from one type of political regime to a democratic political system. Moreover both have adopted federal principle to accommodate their diversity.

In the first chapter of my study I have dealt with the theoretical aspects of the constitution and constitutionalism. The brief discussion about the constitutions of UK, USA, France and Switzerland was to show the different trends in the constitutional experiences. job In the second chapter the historical development of the constitutions of the Russian Federation and the Republic of South Africa, have been I dealt with. The third chapter discusses the powers and functions of the various organs of the government. The fourth chapter makes a comparison of the federal systems of the two countries and the fifth one sum-up my main findings.

Chapter I

Introduction

Constitution and Constitutionalism

The constitution, which establishes the structure, procedures, powers and duties of the government, is fundamental political principle and law of the state. It is the principle upon which the government is founded and the divisions of the sovereign powers regulated.[1] It provides for the different forms of organization of the political entity. It guides the system of governance, and it is often codified as a written document that establishes the rules and principles of an autonomous political entity. During the course of its evolution, constitutions adopted new norms, values and forms. Constitution limits the power of the political authority and binds the functionaries of the state within its norms. It divides the power among the organs of the government and provides for the guidelines according to which government and other political institutions exercise their power and perform their duties. In this sense the constitution can be taken as the means to achieve the goals of a state. Constitution may be viewed both as a process - a description of what actually takes place in the running of the national government - and as a stated or assumed expectancy that may vary to a greater or lesser degree from the actual practices of governing authorities (Maddex 1996: 2). The constitution incorporates the aspirations of the people according to which the political life of the society should develop and progress. In this sense, constitutions can be defined as the guidelines of the government to achieve a goal.

However all constitutional practices of the government are impossible to codify in a single document. Some unwritten traditions also become part of the constitutional practice. In the United States the role of political parties in organizing elections and executive legislative branches of the government after

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[1] "Constitution"- is available at the site of Lectric Law Library-URL:http://www.lectlaw.com/def/c290.htm.

elections is not dealt with in the written constitution. Court verdicts, customs, social, political and historical context can guide the practice of the constitution.

The constitution performs mainly three functions- it constitutes a political authority/entity; gives forms to the institutions and procedures of governance and defines the limits within which power can be exercised politically (Castiglione 1996: 421-422).

Constitutions or political institutions may vary in form in different country but it is well established principle now that there should be limited government, rule of law, maximum of individual liberty and peoples' participation in the politics. This is what is sometimes referred to as constitutionalism. The powers of the persons in authority should be limited; institutions to check them should be created; people's participations should be guaranteed etc. are new trends in the modern states to which constitutionalism focuses. Modern concept of constitutionalism involves a political system of checks and balances, regulated by law and designed to protect the liberty of individual[2] (Salmon 2007). Governmental authority has to be exercised only in accordance with law established consistent with constitutional prescriptions and limitations. Henkin (1998: 11-22) describes that the constitutionalism also implies that the constitution can not be suspended, circumvented, or disregarded by political organs of government, and that it can be amended only by procedures appropriate to change of constitutional character and that give effect to the will of the people acting in constitutional mode.

Constitutionalism is the principle behind modern constitutional governments because it provides for the ideological context within which constitutions emerge and constitutionalization functions (Tsagourias 2007: 1). So, the constitutionalism as an ideology is not applicable in a fixed territory as the constitutions do. Popular sovereignty, separation of power, independent judiciary, democratic government,

[2] Salmon, J. H. M. (2007). "Constitutionalism" is available at-URL:http://www.answers.com/topic/constitutionalism.

individual rights, the rule of law and civilian control of military are some elements of constitutionalism. The constitutions may be of different types in different countries but constitutionalism is the soul of all democratic governments.

Evolution of Constitution

The United States, which adopted a constitution in 1787, was not the first country in the world to do so. Plato (427-347 B.C.) talks about constitutions in his works *'The Republic'* and *'The Laws'*. Aristotle also compiled and made a comparative study of the constitutions of 158 Greek city- states. Magna Carta of 1215 is a landmark in the history of the constitutional development and freedom of the individual.[3] Bills and Acts passed by the British Parliament thereafter together with customs and conventions are the corner stones of the modern British constitution. The tradition of constitutional development in the United Kingdom established a liberal parliamentary system of government. The US constitution deserves the glory of being the first modern written constitution. These two constitutions are the epitome of the parliamentary and presidential type of government respectively. Most of the constitutions today are inspired by either of them, albeit there has also been a communist tradition of constitution making after 1917.

The French constitution, which envisaged the co-existence of the president and the prime minister, can be seen as having features of both the parliamentary as well as presidential systems. This has been another innovation in constitution making. The existing Russian constitution has amply been influenced by the constitution of the French Republic. The constitution of the Swiss Confederation which has more parliamentary less presidential features and collegial executive is

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[3]The article 39 of Magna Carta reads- " No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land." Available at- http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html

unique one. It exerted influence over the constitution of the Republic of South Africa especially due to its provision of the co-operative federalism. The Constitution of the Russian Federation, which envisioned strong presidency with weak parliament and the Constitution of the Republic of South Africa, which provides for the strong parliament with the president in place of the prime minister have taken above mentioned constitutions as the guiding sources.

The Constitution of the United Kingdom

The history of modern liberal constitutions starts from Magna Carta of 1215. The partially written British constitution which is like a tapestry woven over a period of time in the English soil has the glory of being the mother of modern liberal parliamentary form of government. The development of British constitution as political and legal document established vivid principles in constitutional studies. British constitution, which heralded parliamentary supremacy and rule of law, is the agglomeration of statutes, judicial interpretations, conventions, laws and customs of parliament, common law principle and selective jurisprudence. The salient features of the English constitution can be counted as- parliamentary sovereignty, limited monarchy, rule of law, unitary and parliamentary form of government, bicameral legislature, evolutionary nature etc. Since it is a partially written constitution, it has peculiarly 'pragmatic' or 'common sense' character (Prosser 1996: 1).

The state, having constitutional monarchy is based on the concept of 'the king can do no wrong.' As the king has no authority and opinion in running of the government, the cabinet is responsible for his work. If the king had issues and opinions in cabinet, he would be dragged in politics. The growth of ministerial responsibility has been responsible for taking the king away from the field of party politics. That has added to the popularity of the king. The credit or discredit goes to the minister in power, not to the king.

The king is the commander of the army, navy and air forces. He appoints the ministers, ambassadors, consuls. He has prerogative of pardon and reprieve. The king is the head of the Church of England and grants honors on behalf of the state. The king summons the parliament and dissolves the House of Commons and his assent is necessary for a bill passed by the parliament in order to become law. The paramount constitutional convention is that the sovereign must act on the advice of the ministers and, in particular, the prime minister (Maddex 1996: 296).

The cabinet is formed by the leader of the majority party in the House of Commons and s\he wields power till s\he enjoy majority in the house. S\He appoints the ministers who are responsible to parliament. They have collective responsibility for the whole administration. The Prime Minister is the centre of power. A minister or ministers, who oppose the PM's policy, should resign otherwise can be sacked. In 1914, ministers Lord Morley and Mr. Burns had to resign because they didn't agree with the government policy regarding the war (Mahajan 2000: 44). The king does not attend the cabinet meetings. As George I didn't know English, he stopped attending the cabinet meets. Gradually this became a tradition. The PM is the most powerful person in the political system. He can ask for the king\queen to dissolve the House of Commons and call for fresh elections. The prime minister decides the agenda for cabinet meetings makes key policy decisions, develops foreign and domestic policy.

The British parliament is the outcome of gradual evolution of the political system. Of the two houses, the clergymen and big nobles started remaining in the House of Lords and common people remained in the House of Commons. The struggle between the king and the parliament resulted in raising the parliament as a powerful body. The Reform Acts of 1832, 1867, 1884, 1918, and 1928 democratized the House of Commons and the Parliament Act 1911 established the supremacy of this chamber.

The House of Commons is the popularly elected chamber of the parliament. The whole country has been divided into 659 constituencies- 529 in England, 72 in

Scotland, 40 in Wales and 18 in Northern Ireland (Goyal 2005: 79). People elected from these constituencies make up the House of Commons. It is one of the most powerful legislative chambers in the world. The role of the House of Commons is greater than the upper house as well. To pass ordinary legislation the consent of the House of Commons is essential and money bill is introduced only in the House of Commons (Mahajan 2000: 86). The council of ministers is responsible to the House of Commons alone.

The members of the House of Lords comprise of two categories. They are Lords Spiritual - 26, and Lords Temporal. Lords Spirituals are senior Archbishops and Bishops; and Lords Temporal are Princes of Royal blood, Hereditary Peers- 92, Scottish Peers- 5, Law Lords- 12 and Life Peers- all. Since the Parliament Act of 1911 and 1949 the powers of the House of Lords have been very much curtailed than those of the House of Commons. All bills except money bills are debated and voted in the House of Lords; however by voting against a bill, the House can only delay it for a maximum of two parliamentary sessions over a year. After that the House of Commons can force the Bill through without the Lords' consent under the Parliament Acts. The House of Lords can also hold the government to account through questions to government ministers and the operation of a small number of select committees.

The British legal system is divided into two branches- courts of civil cases and courts of criminal cases. Civil courts deals with the matters relating to property, marriage, divorce, professional matters etc. and the criminal courts deals with the offences against the states and society. The British judiciary is independent, though it does not have power to declare the acts of the parliament as unconstitutional (Goyal 2005: 210). The judges have security of tenure. They can only be removed by the king after impeachment motion passed by the parliament.

The British constitution was not born in a particular date like other constitutions which have been enacted by the legislatures or constituent assemblies. It can largely be said that most events of the struggles in the British

history between the king and the parliament paved the way for the constitution. In the king-parliament struggle the king was defeated by the parliament and the parliament expanded its powers. This constitution is highly regarded for parliamentary system of the government.

The US Constitution

The thirteen colonized states of North America, after their independence, convened the first constituent assembly of the world in Philadelphia in 1787 and prepared a historic document, which was described by the British Prime Minister William Gladstone in 1887 as "the most wonderful work ever struck off at a given time by the brain and purpose of man", is the oldest written constitution. In this short document of seven articles, the theories of 'separation of power' and 'checks and balances' have been envisioned in the practical way. There is unique division of powers between the states and the centre as it is federal presidential system of government.

The president in the US is the powerhouse of the executive who is elected for maximum of two terms of four years each.[4] The president is commander in chief of the armed forces; grants reprieves and pardons, except in cases of impeachment; makes treaties with the advice and consent of two- thirds of the upper house of the legislature. Subject to confirmation of the upper house, he\she appoints the ambassadors, public ministers, federal judges and other high officials of the national government (Maddex 1996: 303). The president advices the legislature from time to time on the state of the nation, he\she may convene and adjourn the legislature on extraordinary occasions. Members of the cabinets are not responsible to the legislature but to the president. They are only administrative chiefs of the department. They must perform duties assigned by the president.

There are two houses of the legislature: lower house - the House of Representatives - and the upper house - the Senate. Together they are called the

[4] 'The US constitution' is available at www. Google,com-
http://www.house.gov/paul/constitution.html

Congress. The lower house consists of 435 members elected every two years on the basis of population and by districts in the states. The majority party in the house elects the speaker after every general election. The members of the Senate represent the states. They are elected for six-year terms but one third of the membership is terminated every two years. Although the proposal for the legislation may originate from the executive, formal enactment of the law takes place in the Congress. The Congress is the chief legislator of the nation. It can impeach the president, Vice President and all civil officers. President can veto the bills but the congress can override by passing it again by two-thirds majority. The constitution can not be amended without the approval of two thirds majority in both the houses of the Congress. The House of Representatives elects the president when no candidate gets a majority of the electoral votes. Likewise the Senate does the same job in the case of the vice-president. The Senate has some exclusive powers as well. The President must consult the Senate while appointing top functionaries, i.e. cabinet members, judges of the Supreme Court, ambassadors, commanders of the three armed forces etc. Treaties come into effect only when the Senate confirms them by two- thirds majority.[5]

A strong and independent federal judiciary is another crucial feature of the American political system. Judicial power is vested in the Supreme Court and such inferior courts which the Congress may from time to time ordain and establish. Power of the federal judiciary extends to all cases arising under the constitution - the national laws, treaties, cases between states, cases between states and citizens of another states etc. There is three-tier judiciary with district courts throughout nation, circuit courts of appeal in many regional centers and Supreme Court in the national capital. The US envisioned the supremacy of the constitution and the judiciary has absolute right to judicial review.

The US constitution is rigid. It is very difficult to amend. There are two ways spelled out in the constitution to propose an amendment. According to the first method an amendment bill should be passed by both the houses of the

[5] Article 1, section 3 of the US constitutiton.

legislature by a two-thirds majority in each. Once the bill has passed in both houses, it goes on to the states. It should then be ratified, or approved, by three-fourths of states. The second method prescribed in the constitution is a Constitutional Convention called by two-thirds of the legislatures of the States. The Convention can propose one or more amendments. These amendments are then sent to the states to be approved by three-fourths of the legislatures or conventions.[6] The text of the amendment must specify whether the bill should be passed by the state legislatures or by a state convention.

The US constitution is a short document which could be read in two hours but establishes norms of the presidential system of the government. As the constitution of the UK is 'mirror' of parliamentary norms, the US constitution is known for its ideal type of presidential system of government.

The French Constitution

France promulgated its first constitution on Sep 3, 1791 after the revolution and experimented with about a dozen constitutions over the next century and half till the constitution of the Fifth Republic was enforced on Oct. 4, 1958 with a strong presidency. With the ascendancy of then Prime Minister De Gaulle to power for the second time in 1958, he vowed to make a new constitution for which National Assembly itself was in favor. The prime minister was given emergency power for six months to make a new constitution. A committee, comprising of ministers and experts, drafted the constitution and 79.3 percentage of the people supported through a plebiscite. Stevens (2003: 35) says that the parliament proposed five basic principles to enact the new constitution which were- all power must proceed from a system of direct suffrage; both organizationally and operationally legislative and executive powers must be separated; the government must be responsible to the Parliament; the independence of judiciary must be guaranteed; the constitution must define the relationship between metropolitan France and 'her associated peoples', i.e. her overseas colonies and territories.

[6] Article 5 of the US constitutiton

Following the above mentioned principles, the French governing system became a combination of both the presidential and parliamentary systems. The French President is guarantor of national independence, territorial integrity and observance of treaties.[7] As in the presidential system, s\he presides over the council of ministers, promulgates and vetoes the law, appoints and receives foreign representatives etc. but as in parliamentary system, s\he appoints the prime minister; ministers in the recommendation of the prime minister; dissolves the house; signs the ordinances and the decrees of the council of ministers. However he is not given the rights to attend parliamentary sessions even for purely formal purposes but he can send message to the parliament (Stevens 2003:73). The French prime minister directs the government, ensures the execution of law, is responsible for the national defense etc. He ensures the implementation of the legislation and deputizes for the president if the situation arises.[8] As in parliamentary system, the prime minister and the cabinet constitute the government. The government determines and directs the policy of the nation (Maddex 1996: 85).

French parliament comprises of two chambers. The National Assembly, the lower house, consists of 577 members called *depute* who are elected for five year term. The Senate is the second chamber of the parliament. It represents the local authorities. Senators are elected from the constituencies consist of one department by an electoral college comprising of members of parliament, the members of the department's council and mayors and town councilors. This is the permanent chamber of 321 members. Members of the Senate are elected for nine year's term and one third members are replaced every three years. Twelve senators represent French citizen's resident abroad. Since the parliamentary sovereignty is limited by the constitution, the French parliament does not have absolute power of legislation. Bills may be introduced by the government or the members of the parliament. However, members' bill can not reduce public financial resources or increase public expenditures. The limited area of competence of the parliament to legislate

[7] the source has been taken from 'The 1958 Constitution and its amendments' available at-http://www.elysee.fr/elysee/elysee.fr/anglais/the_institutions/founding_texts/the_1958_constitution/the_1958_constitution.20245.html

[8] Article 5 of the French Constitution.

has been specified in the article 34 of the constitution. It includes: civic rights and the fundamental guarantees granted to citizens for the exercise of their public liberties ; the obligations imposed for the purposes of national defense upon citizens in respect of their persons and their property; nationality, the status and legal capacity of persons, matrimonial regimes, inheritance and gifts; the determination of serious crimes and other major offences and the penalties they carry ; criminal procedure ; amnesty ; the setting up of new categories of courts and the status of members of the Judiciary; the base, rates and methods of collection of taxes of all types ; the issue of currency. In the same way the constitution enshrines the right of the parliament to legislate on the matters concerning: the electoral systems of parliamentary assemblies and local assemblies; the creation of categories of public establishments; the fundamental guarantees granted to civil and military personnel employed by the state; the nationalization of enterprises and transfers of ownership in enterprises from the public to the private sector. The parliamentary statutes determine the fundamental principles of the general organization of national defence; the self-government of territorial units, their powers and their resources; the preservation of the environment; education etc. The parliament has competence also in the area of labour law, trade-union law and social security.

The Finance Acts of the parliament determine the resources and obligations of the state in the manner and with the reservations specified in an institutional act. Social security finance acts determine the general conditions for the financial balance of social security and, in the light of their revenue forecasts, determine expenditure targets in the manner and with the reservations specified in an institutional act. Likewise the Programme Acts determine the objectives of the economic and social action of the state.

Other areas are considered regulatory in nature and may be modified by the presidential decree. The Senate has the same powers as the National Assembly but the Assembly can force the government to resign with a vote against an important governmental proposal.

The President of the Republic is the guarantor of the independence of the judicial authority. He is assisted by the High Council of the Judiciary and judges of the courts are irremovable.[9] In the French political system there is a constitutional council composed of nine members- three appointed by the president of the Republic, three by the president of the Senate and three by the president of the National Assembly. Before promulgating organic laws, they must be submitted to the council to check the constitutionality of the laws. There is also high council of judiciary which is presided over by the President of the Republic and it makes the proposal for the appointments of judges of the Courts of Cessation and of presiding judges of the Courts of Appeals (article 65.3). It is consulted in the question of pardon and acts as a disciplinary council for Judges. The High Court of Justice is composed of members elected in equal number by the National Assembly and Senate from within their ranks after each general and partial election to these Assemblies. There is an Economic and Social Council which gives its opinion on the government bills, draft ordinances and orders, and private member's bill submitted to it.

The French constitution is flexible. The President of the Republic, on a proposal by the Prime Minister, and members of parliament can initiate amendment of the constitution. But both the government's and private member's bill to amend the constitution should be passed by the two assemblies. The amendment shall have effect after approval by referendum. However, a government bill to amend the constitution is not submitted to referendum. The President of the Republic decides to submit it to parliament convened in Congress. The government bill to amend the constitution shall then be approved only if it is adopted by a three-fifths majority of the votes cast.[10] There can not be amendment process where the integrity of the territory is jeopardized and the republican form of government can not be the object of an amendment as well.

[9] Article 64 of the French Constitution.
[10] Article 89 of the French Constitution.

The French constitution provided for the double executives. The president and the prime minister co-exist in the French system of government. Many countries including Russia have imitated this system. These days the 'system of double executives' has become one of the trends in constitutional systems.

The Constitution of the Swiss Confederation

The constitution of the Swiss Confederation envisions a federal form of government. Though it's not a confederation, the constitution has been using this term for very long. The cantons, the units of the confederation, which enjoy considerable autonomy, have no right to secede from the union. Thus it is a federal state in real sense. There are two kinds of cantons in Swiss Confederation- Full Cantons and Half Cantons. The confederation consists of twenty full cantons and six half cantons.[11] Cantons are not only regional or administrative units but have real autonomy. They have their own parliaments, executives and courts. The residuary powers are vested in the cantons. In the case of half cantons, they have equal constitutional status but send only one representative to the Council of States whereas full cantons send two. The relation between the federal centre and the Cantons is based on the principle of co-operative federalism. The Federation and the Cantons support each other in the fulfillment of their responsibilities and work together. They owe each other consideration and support. They grant each other administrative and judicial assistance. Disputes between Cantons or between Cantons and the Federation are as far as possible resolved through negotiation or mediation.[12]

Cantons have been divided into communes. The powers of the communes have not been mentioned in the constitution but they are delegated by the respective cantons. So the powers that the communes enjoy vary. The government in the centre is neither parliamentary nor presidential. The Swiss Confederation opted for a collegial executive, called Federal Council, comprising of seven

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[11] Article 1 of the Constitution of the Swiss Confederation, 1998.
[12] Article 44 of the constitution of the Swiss Confederation, 1998.

members. They are chosen for four years and posts of the president and vice president rotate among the members on the yearly basis. The Swiss government is presidential one in the sense that the president is at the helm of affairs but unlike in the US, the members of the Federal Council are elected by the Swiss legislature- the Federal Assembly. Also the president can not veto the bill passed by the legislature. The members of the council do not resign even if their policy fails but they give up that policy and frame a new one.

The Swiss parliament is known as the United Federal Assembly which comprises of two chambers - National Council\ the House of Representatives and Council of States\ Senate. Both the houses have equal powers. The House of Representatives has 200 members and the Senate has 46. The Federal Assembly elects the members of the National Council and has the power to pass the annual budget. It appoints the Commander-in-chief of the army. The Federal Assembly shapes the foreign relation and approves alliances and treaties.[13] It also declares war and peace.

The Federal Supreme Court is the highest federal judicial authority. It has jurisdiction over violation of federal laws, public international law, inter cantonal law, cantonal constitutional rights, autonomy of municipalities, and other guarantees granted by the cantons to public corporate bodies, federal and cantonal provisions and political rights. The Federal Court, the supreme judicial body, has right to partial judicial review- no right to review laws passed by Federal Assembly but by cantons(Goyal 2005: 668-669).

The amendment process of the constitution is very unique. There is a process of popular initiative for total or partial revision of the federal constitution. 100 000 citizens entitled to vote may within 18 months of the official publication of their initiative demand a total revision of the federal constitution. This proposal has to be submitted to the people by referendum. 100 000 citizens entitled to vote

[13] Article 166 of the Constitution of the Swiss Confederation, 1998.

may within 18 months of the official publication of their formulated initiative demand a partial revision of the federal constitution. If the initiative violates the principle of unity of form, the principle of unity of subject matter, or mandatory rules of international law, the Federal Parliament declares it invalid, in whole or in part. The initiative is submitted to the vote of the people and the Cantons. The Federal Parliament recommends the initiative for adoption or rejection. It may contrast the initiative with a counterproposal.

As per article 139(a) of the constitution, an equal number of citizens as above entitled to vote may, within 18 months of the official publication of their initiative in the form of a general suggestion, demand to change or abolish provisions of the federal constitution or statutes. If the Federal Parliament consents to the initiative, it adopts the requisite change of the Federal Constitution or of federal law but if it denies the requisite change it may initiate a counterproposal. The requisite change of the Federal Constitution and the counterproposal are submitted to the vote of the people and the Cantons, and the requisite change of federal law and the counterproposal are submitted to the vote of the people. If the initiative is adopted, the Federal Parliament establishes the requisite change of the Federal Constitution or of the federal law.

The constitution of Switzerland has largely influenced the South African constitution especially the concept of cooperative federalism. It provides for the parliamentary system but not exactly the same as it is in the UK.

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Chapter II

Making of the Russian and South African Constitutions

The constitutions are the manifestations of the political societies. By observing constitution one can understand the political and sociological milieu of any society and its evolution. Abrogation of one constitution and the promulgation of other, invariably means that the political balance of the social order has changed therefore there is a need for a new constitution. The new constitutions are designed to adapt to new situations. The constitutional history of the Russian Federation and the Republic of South Africa illustrate the same reality. As the political balance changed, the new constitutions emerged in both the countries. This chapter takes up the constitutional history of Russia since 1905 and that of South Africa since 1909 when the first attempts at constitution making were undertaken in the two countries.

Historical Development of the Russian Constitution

As a response to the Russian revolution of 1905, Tsar Nicolas II was forced to issue a manifesto on 17 October 1905 granting limited rights to the people. This may be taken as the first constitution of the country. The official name of the manifesto is 'The Manifesto on the Improvement of the State Order' (Манифест об усовершенствовании государственного порядка). The Tsar signed a manifesto containing a promise to convene a legislature, the State Duma, and stating that a law could not come into force without the Duma's approval (Schmidt et al 1984:104). The Manifesto addressed the uprising in Russia and pledged to grant civil liberty to the people including personal immunity, freedom of religion, freedom of speech, freedom of assembly and freedom of association; a broad participation in the state Duma; introduction of universal male suffrage; and a decree that no law should come into force without the consent of the state Duma.[1] (Manifesto) The people were accepted to be vested with the voting rights and

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[1]The text of the 'October Manifesto' is available at- http://en.wikipedia.org/wiki/October_Manifesto

confirmation of the State Duma was must for any law.[2] However, on the other hand the State Duma itself had been victim of the Tsar many times.

The Manifesto did not result in a significant increase in freedom or representation of the Russian people in government. Contrary to his pronouncement, the Tsar continued to exercise veto power over the Duma, and he dissolved it several times in the name of reform. The elections to the State Duma did not also take place on the basis of equality. The electors elected deputies to the Duma from among themselves; one vote by a landlord equalled 3 votes of town bourgeoisie, 15 peasant votes and 45 workers votes (Schmidt et al 1984:107).

The Tsar first circumvented the Duma and during the war days (First World War) he ignored it. Even after the dethronement of the Tsar the Duma had always been a chamber for discussion but it had never been in a position to make policies and to carry them out. The laws passed by the provisional government provided for universal suffrage; all people were declared equal and all government officials had to be elected by the people.[3] However, none of these could tackle the immediate problems that Russia was experiencing.

Through the great 'October Revolution, communists seized power in Russia in 1917, for the first time in the world history. The Bolsheviks of Russia, under the charismatic leader V. I. Lenin accomplished it. Earlier during the 'February Revolution' of the same year the Tsarist regime had ceased to exist and new 'Provisional Government' had been formed. However, it was not supported by the Bolsheviks who had a good base among the urban working people. Lenin returned to Russia from exile with an *April Thesis* which emphasized the slogan 'No

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[2] Point 2 of the Manifesto reads- 'Without postponing the scheduled elections to the State Duma, to admit to participation in the Duma (insofar as possible in the short time that remains before it is scheduled to convene) of all those classes of the population that now are completely deprived of voting rights; and to leave the further development of a general statute on elections to the future legislative order.' And point 3 says- 'To establish as an unbreakable rule that no law shall take effect without confirmation by the State Duma and that the elected representatives of the people shall be guaranteed the opportunity to participate in the supervision of the legality of the actions of Our appointed officials.'

[3] Sources taken from the matter on 'The Provisional Government'- available at- http://www.historylearningsite.co.uk/provisional_government1.htm

support to the Provisional Government; all powers to the Soviets'. He made all preparations for the armed struggle against the 'Temporary Government' and dethroned it on 25 October, 1917. The Bolsheviks consolidated their power to regime.

The Bolsheviks formed their own constitution in 1918. It was based on the communist ideology. The Fifth All-Russian Congress of Soviets adopted the constitution on 10 July 1918. It was the first communist constitution of the world. The country was declared a republic of the Soviets of Workers', Soldiers', and Peasants' Deputies and all the central and local power belonged to these soviets.[4] This document seems more like a manifesto than a constitution. It provided for the fundamental policy of the communist government in favor of the oppressed people and nations.[5] The constitution believed that the power must belong entirely to the toiling masses and to their plenipotentiary representitives- the Soviets of Workers', Soldiers', and Peasants' Deputies. The constitution demands every citizen to work and provides for principle "he shall not eat who does not work." The All-Russian Congress of Soviets was the supreme power of the Russian Socialist Federated Soviet Republic which was composed of representatives of urban soviets (one delegate for 25,000 voters), and of representatives of the provincial (*gubernia*) congresses of soviets (one delegate for 125,000 inhabitants). The All-Russian Central Executive Committee was the supreme legislative and executive body of the Russian Socialist Federated Soviet Republic. However a Council of People's Commissars was entrusted with the general management of the affairs of the country. The Peoople's Commissars looked after the affairs of the particular department (Commissariat).

The main objective of introducing 1924 constitution of Russia was to legitimize the December 1922 union of the Russian Soviet Federative Socialist

[4]The text of the '1918 Constitution of the Russian Soviet Federated Socialist Republic'- available at- http://www.marxists.org/history/ussr/government/constitution/1918/article1.htm

[5] Chapter 3 (5) of the 1918 constitution of Russia reads- "It is also to this end that the Third Congress of Soviets insists upon putting an end to the barbarous policy of the bourgeois civilization which enables the exploiters of a few chosen nations to enslave hundreds of millions of the working population of Asia, of the colonies, and of small countries generally."

Republic (RSFSR), the Ukrainian Soviet Socialist Republic, the Belarussian Soviet Socialist Republic and the Transcaucasian Soviet Faderative Socialist Republic to form the Union of Soviet Socialist Republic. This constitution also altered some of the structure of the central government. Central Executive Committee (C.E.C.) was divided into the Soviet of the Union, which would represent the constituent republics, and the Soviet of Nationalities, which would represent the interests of nationality groups. The Presidium of the Central Executive Committee was formed to serve as the collective presidency.[6] Between the two sessions of the Central Executive Committee of the USSR, the Presidium of the C.E.C. was the supreme organ of legislative, executive, and administrative power of the country. It had the right to suspend and abrogate the orders of the Council of People's Commissars and of the different Councils of the People of the U.S.S.R. as well as those of the C.E.C. and Councils of People's Commissars (C.E.C.) of the component Republics. The judiciary did not seem to be an independent branch but a subsidiary component of the communist mission.[7]

The 1936 constitution of the USSR commonly known as the 'Stalin Constitution' redesigned the government of the Soviet Union. It repealed restrictions on voting and added universal direct suffrage and the right to work. It also adopted various rights guaranteed by the previous constitution. The constitution also recognized collective social and economic rights including the rights to rest and leisure, health protection, care in old age and sickness, housing, education, and cultural benefits. It provided for the direct election of all government bodies as well. The Supreme Soviet of the USSR was the supreme body of the governmental authority which consisted of two chambers- the Soviet of the Union and the Soviet of Nationalities.[8] The joint sitting of the Supreme Soviet had right to appoint the government of the USSR, that is, Council of the

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[6] The text of the '1924 Soviet Constitution'- available at. http://users.cyberone.com.au/myers/ussr1924.html

[7] Article 43 of The USSR Constitution of 1924, reads- 'In order to maintain revolutionary legality within the territory of the U.S.S.R., a Supreme Court under the jurisdiction of the C.E.C. of the U.S.S.R. is established....'

[8] The text of the '1936 constitution of the USSR' article 33 available at- http://www.departments.bucknell.edu/russian/const/36cons02.html#chap03

people's Commissar.[9] Likewise, the highest organ of the federating republic was the Supreme Soviet of the Union Republic. Judges were said to be independent but the courts used to be elected by the respective committees of the Soviets, e.g. - the Supreme Court used to be elected by the Supreme Soviet of the USSR.[10]

The new Soviet constitution of 1977 marked the socio- economic development of the country although it incorporated the principles of the three old constitutions of the Soviet. The new constitution described the USSR as the state of the whole people, expressing the will and interests of the workers, peasants, intelligentsia, and the working people of the all nations and nationalities of the country (Jitendra 1978: 14). But the 1936 constitution had defined the USSR as a socialist state of workers and peasants. On the other hand the preamble of the 1977 constitution said, - "the aims of the dictatorship of the proletariats having been fulfilled, the Soviet state has become the state of the whole people." The rights were also amplified in the new constitution by adding right to choose one's trade, profession, job or work in accordance with one's ability, training, education and one's inclination (Jitendra 1978:15). The constitution had changed the name of the Council of Peoples' Commissar of the USSR into 'Council of Ministers of the USSR'.

After mid-70s, the economy of the USSR began to decline. One of the reasons for this was - the military competition with the West. It resulted in more expenditure in the defense industries which further weakened the whole economy. The production of the consumer goods declined and shortages were rampant in the market and quality of the goods was also low. The agriculture sector of the country could not feed its population. Thus the food import increased. The problems began to be seen in the political field as well. The leaders of the communist party were unaccountable to the people and the bureaucracy had control and access to the information. This created a kind of grudge among the people.

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[9] The '1936 constitution of the USSR, article 56.
[10] The '1936 constitution of the USSR, article 105.

A new leader, Mikhail Gorbachev came to power in 1985 and he sought to restructure the entire economic and political sphere. He introduced a plan of restructuring and openness, which was named as the *Perestroika* and *Glasnost.* Gorbachev hastily implemented his scheme in political and economic fields. He sacked many senior leaders from the party's top job and improved the electoral system by introducing direct franchise. By this, new faces came up who were no longer dedicated to the soviet system. On the one hand, he brought reformist like Boris Yeltsin to the post of secretary of the Moscow party. He introduced the new laws and institutions. But the beaurocratic apparatus were old which, invariably, were not willing to implement laws that were not beneficial to them. This also made difficult the process of reform (Chenoy 2001: 21). The result of his initiatives culminated in the disintegration of the USSR. Further, the policy of *Glasnost* resulted in weaking of the grip of the Communist Party on the media leading to the exposure of severe social and economic problems that Soviet government had long denied and actively concealed. Waltson (1998) says- "*Glasnost* inadvertently provided the means of unspoken discontent among ethnic minorities to become articulated in the policies of individual political factions or of governing bodies of the national republic- often at the expense of the union." Moreover, the war in Afghanistan, and the mishandling of the 1986 Chernobyl disaster, which Gorbachev tried to cover up, further damaged the credibility of the Soviet government at a time when dissatisfaction was increasing.[11] Due to the openness in the political sphere, the union republics either began to demand seccesion or faced ethnic movement. On the one hand the CPSU's grip over the political system weakened and government itself lost control over the economic situation.

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[11] The source of the matter is 'History of the Soviet Union (1985–1991)' available at- www.google.com- http://en.wikipedia.org/wiki/History_of_the_Soviet_Union_(1985-1991)

Gorbachev tried to keep the Union intact. He drafted a Union Treaty in haste and a referundum was held on March 17, 1991. It was supported by 76.4 per cent of votes although six of the republics did not take part. The Treaty had removed much of the power of the Union which the conservatives (traditional communist) did not like. They plotted a coup under the leadership of Gennady Yanayev on 18 August, 1991 two days before the treaty was to be executed. Gorbachev was home detained in Crimea. But the coup lasted for just three days. After the failed attempt, the Soviet republics accelerated their process towards independence, declaring their sovereignty one by one. Finally on December 25, 1991 with the resignation of Gorbachev as president of the USSR, the Soviet Union dissolved.

Making of the Constitution of the Russian Federation, 1993

An emerging reformist Boris Yeltsin was elected as the chairman of the Russian Congress of People's Deputies (CPD) in 1990. The CPD announced 'Declaration of Sovereignty' of the RSFSR and set up a Constitutional Commission to prepare a constitutional document. The new draft document rejected the communist and socialist doctrine but it was not adopted by the Supreme Soviet. The conservatives in the CPD prepared their own draft constitution. After August coup Constitutional Commission started to work on another draft constitution but there were divergent views in the CPD on the question of separation of power between executive and legislative and status of Russian regions and republics (Chenoy 2001: 54). Dispute between president Yeltsin (directly elected in 1991) and the parliament (elected during soviet period) on the method and speed of the transition to a capitalist economy was at its peak. The direct presidential election in Russia and Yeltsin's clear-cut victory changed the political set up both in biggest republic and in the Soviet Union in general (Biryukov and Sergeyev 1997: 97). The president was seen as an icon of the reforms who intended to swiftly change the old political and economic orders and for that wanted to weild unlimited powers. The considerable number of the conservative communists in the parliament used to check the president in his every move that could jeopardize their interest. So the president and the parliament were rivals. The president started

issuing decrees bypassing the parliament. Such moves led to wide rift between the president and the parliament.

Amid this, the Constitutional Commission presented a draft constitution to the sixth session of the CPD but it was rejected not only in the parliament but by the autonomous republics and regions as well. Several other drafts were produced in the CPD. The parliamentary draft proposed the 'parliamentary republican form of the government'. One draft produced by Sergei Shakrai known as the 'president's draft' and another by Anatony Sobchak were both rejected by the sixth session of the CPD which accepted only some general principles of the Constitutional Commission's proposal and called for a new draft (Chenoy 2001: 56) which was presented in the seventh session of the CPD in December 1992 but it was rejected as well by the parliament. Yeltsin introduced his own draft constitution which favoured strong presidency.[12] These ideas once rejected by the parliament were adopted forcefully by Yeltsin. The parliament challenged his arbitrary method of adopting constitution. At last the parliament accepted the idea of referndum and it was held on 25 April 1993. the referendum put forward four choices to the people-support for president Yeltsin, support for his economic policies and whether early presidential and parliamentary elections should be held (Chenoy 2001: 57). The referendum did not deal with the issues of the constitution but Yeltsin took it as a licence for adopting his own version of constitution.

On the other side, the Constitutional Commission presented the fifth version of the draft constitution to the parliament in May 1993 incorporating suggestions made by the deputies. This proposal was not acceptable to Yeltsin. He composed a Constitutional Assembly (Constitutional Conference) choosen by himself. The parliament did not recognize it as it was a body arbitrarily appointed by the president. The president- parliament struggle was at the climax. Yeltsin dissolved the Supreme Soviet and suspended the acts of the Constitutional Court. It was not regarded as a right move by many people. The political deadlock had lingered the

[12] "Yeltsin's draft Constitution of Russia", (1993), *Current Digest of the post-Soviet Press (CDPSP)*, XLV(20): 10-19.

process of making of the constitution but the dissolution of the representative institution was not logical at the time of making constitution. The impasse held-up policy making and enactment of the new constitution. Yeltsin unilaterally and illegally dissolved the parliament (Bacon and Wyman 2006: 72). The deputies opposed the dissolution by refusing to leave the House but Yeltsin vacated it by using army. He hastily ordered a committee under Sergei Filatov to finalise the draft for a constitution in his own favour. The idea in the new constitution was opposed by the autonomous regions and republics etc. Yeltsin convinced them about their status and pushed the draft constitution to a referendum in haste. The draft constitution was published on 10 November 1993 and placed before the people on 12 December 1993. 53 percentage of the people voted and 60 percentage of them supported the new constitution although less than 50 percentage of votes were cast in eight republics. The arithmatics shows that the constitution has been supported by not more than 30 per cent of the people.

The Russian constitution of 1993 was introduced in the backdrop of the president- parliament struggle. In this quest of power, the president won and so a strong presidency became the key feature of the constitution. The president has been given enormous power. The personal misconceptions of Yeltsin as well can be seen in the constitution. Since Vice- President Rutskoi did not favor him during constitution making, he abolished the post of the Vice President in the new constitution.

Historical development of the South African constitution

The Republic of South Africa is situated at the southernmost end of the African continent which has 1.2 million square kilometers of area. It is bordered by Namibia, Botswana, and Zimbabwe to the north and Mozambique to the northeast. South Africa's southern half is surrounded by water, the Indian Ocean to the southeast and the Atlantic Ocean to the southwest. In its central eastern region South Africa territorially surrounds Lesotho. Poised in a geographically strategic location, South Africa for centuries was the object of battles fought between

European invaders and the indigenous Africans. South Africa today is a rich kaleidoscope of people, languages, and cultures.

After annexation of Afrikaners-ruled Republic of South Africa (later known as Transvaal) and Orange Free State (Orange River Colonies) by the British, a proposal was sent to the British parliament to form a union combining two other republics Cape of Good Hope Colony and Natal, which were already under British control. As forwarded by the South African Convention, the British Parliament passed a Bill on 20 September 1909. This bill was known as the South Africa Act 1909, which was the basis of the constitution of South Africa. Through the Royal Proclamation of the British monarch on 2 Dec. 1909, the date for the establishment of the was decleared to be 31 May 1910. Although South Africa was called a 'Union' after the bill passed but in reality it was a unitary state, not a federation, because the so- called units of the union were controlled by the Governor-General in the centre. The act envisioned an Executive Council headed by the Governor-General in Council who had power to choose other members of the council.[13] Parliaments and executives of the provinces could be dissolved by the union government. The commander-in-chief of the navy and the army was the king or the Governor-General in Council as his representative.[14]

The British monarch was the part of the South African parliament. The parliament seems to have been under the Governor-General's control as he had power of dissolution of both houses- the Senate and the House of Assembly and the nominees of the Governor-General in the Senate would not be affected by the dissolution.[15] The members of the House of Assembly were elected ones. In the so called self-governing provinces, the chief executive officer would be appointed by the Governor- General. The Governor-General had the power to reserve signing bills, and all South African laws were subject to the British Colonial Laws

[13] South Africa Act, 1909, article 12, reads-"There shall be an Executive Council to advise the Governor- General in the Government of the Union, and the members of the council shall be chosen and summoned by the Governor- General and sworn as executive councilors, and shall hold office during his pleasure." http://www.law.wisc.edu/gls/cbsa1.pdf
[14] Article 17 South Africa Act, 1909 -available at- http://www.law.wisc.edu/gls/cbsa1.pdf
[15] South Africa Act, 1909, article 20.

Validation Act. The judges of the Supreme Court were generally not removal but the Governor- General could urge for their removal in the parliament on the grounds of misbehavior or incapacity.[16] This act had worked as a constitution in the Union of South Africa but a large chunk of Africaners were not satisfied.

Though the English rulers used to argue that there was a self government of the Afrikaners, in reality the English had control over the business and Afrikaners were just farmers. There was increasing inequality between the two. Afrikaners felt that they were second level citizens and their feeling about it became more serious when they were removed from the work in the mines and the black Africans were allowed to work. The Afrikaners formed a party named the National party in 1914 to enhance their movement against both the British rulers and the black Africans.

After the First World War the British grip over its colony became loose. In accordance with the Statute of Westminister 1931, British Parliament gave up its right to legislate for the dominions. This was recognized in South African legislation by the Status of the Union Act 1934, which declared the Union a "sovereign independent state" although there were still strong political links of South Africa with Britain and they shared a common king. In 1948 National Party won the elections and its prominent leader Daniel Malan became prime minister. His government was resolved to limit the English influence and prevent the blacks from any meaningful role in the country. He got many legislations of segregation passed.

The government passed Prohibition of Mixed Marriages Act and Immorality Act, which outlawed interracial marriage and interracial sexual relation in 1949 and 1950 respectively (Kryzanek 2004: 385). The Groups Areas Act of 1950 prohibited the black Afrians to live in white areas. The Reservation of Separate Amenities Act, Extension of University Education Act etc. were the other bases for the apperthied system. The 'Native Land Act' of 1913 had set aside 7.3 per

[16] South Africa Act, 1909, article 101.

cent of South African territory as reservations for the blacks and barred them from buying land outside these areas. The Population Registration Act of 1950 introduced an identity card for all persons over the age of sixteen, stipulating their racial group on the card. The Suppression of Communism Act of 1950 banned the South African Communist Party as well as any other party that the government chose to label as 'communist'. The Unlawful Organisations Act of 1960 outlawed certain organizations that were deemed threatening to the government.

The Promotion of Black Self-Government Act of 1958 entrenched the NP's policy of separate development. It set up separate territorial governments in the Homelands, designated lands for black people where they could have a vote.These Homelands were created outside the white areas. The Black Homeland Citizenship Act of 1970 marked a new phase in the Homelands strategy.[17] It changed the status of the inhabitants of the Homelands. They were no longer citizens of South Africa. All of them became citizens of one or other of the ten autonomous territories. The aim was to ensure that the white Africans become the demographic majority within South Africa.

Apartheid system in South Africa was the legacy of the British rulers. The legal seed towards this heinous system was first introduced in 1760 as the Pass Laws to regulate the movement of slaves in Cape. The Pass Laws Act 1952 made it compulsory for all black South Africans over the age of 16 to carry a pass book all time.[18] The law stipulated where, when, and for how long a person could remain.The document was similar to a passport in their own country where there should be fingerprint and a photograph besides the name of his/her employer. Employer could only be a white person.

After the 1960 referendum in which only white voters were permitted to cast their votes, South Africa became a republic on 31 May 1961 but the structure of

[17] The description about this can be found in website under the title of 'Apartheid legislation' http://en.wikipedia.org/wiki/Apartheid#cite_note-b-6
[18] The Pass Law Act, 1952 of South Africa is available at- http://en.wikipedia.org/wiki/Pass_Laws_Act#Pass_Laws_Act

the constitution remained the same, with an indirectly elected State President performing the role of head of state in place of the King/Governor-General, and the prime minister remaining head of government.[19]

In the new constitution of 1984, the offices of Prime Minister and State President were combined into the State President's office making a provision of the powerful State President. On 2 November 1983, around seventy percent of the country's white population voted in favour of the changes in the constitution but black South Africans were not consulted. They continued to be denied representation although they were said to be the citizens of so- called independent or autonomous Bantustans (Homelands).

Parliament was restructured to comprise House of Assembly- 178 members, reserved for whites; House of Representatives- 85 members, reserved for coloureds; or mixed-race people and House of Delegates - 45 members, reserved for Asians.[20] The Senate was replaced by the Presidential Council in the new constitution.

Making of the Constitution of the Republic of South Africa, 1996

Along with the above developments there arose a strong anti-apartheid movement of the black people in the South African history. The African National Congress (ANC), which was formed in 1912, had been playing a leading role in that movement. Many people had been sacrificed during the movement. The ANC at first adopted non-violent methods, but after supression by the white government they resorted to arms. The Sharpesville massacre (1960) instigated them to take up arms. Many prominent leaders of the black community, including Nelson Mandela, were either banished or jailed. On the other side the movement carried forward by various groups. Overt African resistance inside South Africa was

[19] The source under the title 'South Africa Constitutional History: 1900-1993' - available at- http://stason.org/TULARC/travel/south-africa/2-2-1-South-Africa-Constitutional-History-1900-1993.html

[20] Article 37 (1) of the Republic of South Africa Act 110 of 1983, - available at - http://www.law.wisc.edu/gls/cbsa2.pdf

mounted largely by the Black Consciousness Movement and student unions like South African Students' Organization. When there was no respite in the movement and due to severe international pressure on the government, the white rulers began to accept that suppression was not a solution. In 1989, President P W Botha was replaced by F W De Klerk. He released Nelson Mandela from the jail and began to repeal the apartheid laws. After Mandela's release there were intense negotiations conducted by the Conference on a Democratic South Africa (CODESA) in which different parties were represented, but the most critical negotiations occurred between Mandela and De Clerk. The two leaders and Buthelezi, leader of the Inkatha Freedom Party signed a peace accord on September 14, 1991 (Maddex 1996: 253) which set the stage for a new constitution.

The Interim Constitution of the Republic of South Africa, 1994 was the first democratic constitution and it founded a basis for the final constitution of South Africa. It had clear provisions of fundamental rights of the people. It forbade discrimination on any basis. The constitution provided for two chambers of the parliament- National Assembly and the Senate.[21] The National Assembly and the Senate consisted of 400 and 90 (10 from each province) members respectively. Apart from the traditional jobs the parliament (combination of both houses) worked as the Constituent Assembly. The Interim Constitution had adopted some constitutional principles according to which the new constitution would be framed. The bills of the new constitution had to be certified by the Constitutional Court, which was given a shape under section 98 of the new constitution. The new constitution had provided for the president as the head of the state and government. S\He was elected by the National Assembly from among its members. S\He had been directed to form the cabinet with not more than 27 members excluding the deputy presidents.

The Interim Constitution of the Republic of South Africa made the task of framing new constitution easy. It had set out the 34 constitutional principles in its

[21] Chapter 4 of the South Africa- Interim Constitution, available at- http://www.servat.unibe.ch/icl/sf10000_.html

schedule 4. To access the suggestions of the ordinary people various mechanism like public hearing, talk lines etc.were adopted (Sarkin 1998: 70). The text would have no legal force until the Constitutional Court certified that all the provisions complied with these principles. The Constitutional Court was established with the new members thinking that the functionaries in the old judiciary might not have adopted the new change. The drafts (section by section) passed by the Constitutional Assembly with at least two-thirds of the majority and certified by the Constitutional Court became the final constitution of the Republic of South Africa. Nelson Mandela, who was then the president, in Sharpeville on 10 December 1996, signed it. It was implemented on 4 February 1997.[22]

The Bill of Rights in the final constitution has protected more rights than the interim constitution did. The rights of cultural, religious and linguistic communities have been protected as the right to freedom of religion, belief and opinion (Sarkin 1998: 72). One of the very good features of the South African constitution of 1996 is the provision of socio-economic rights as fundamental ones. The constitution provides for the right to basic education, right of access to adequate housing and food, water as well as social security. Having long suffered discrimination internally, the constitution has provided for many institutions in support of democracy. The provisions of Public Protector, the Human Right Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Linguistic and Religious Communities, the Commission for Gender Equality etc. have strengthened the democratic aspirations of the South African people.

The constitution adopted parliamentary system of government but largely deviates from the Westminster. The constitution provides for the president but not the prime minister. The president is elected by the National Assembly among its members. S\He appoints the deputy president and ministers. He acts both as the head of the state and as the head of the government.

[22] Matters under the title 'Constitution\Certification Process'- available at- http://www.concourt.gov.za/site/theconstitution/thecertificationprocess.htm

The important fact to remember about the historical circumstances which influenced the making of the Russian and the South African constitutions is that whereas in case of the former there was no popular mass movement demanding a new democratic constitution, in case of latter there was a long struggle for individual rights and a democratic constitution. The actual making of the constitution in Russia was the handiwork of a select few without adequate debate and discussion. In case of South Africa the process involved extensive deliberation and consultation, including various communities and groups as well as common people. These different circumstances and methods explain the difference in the nature of the two constitutions which we will be discussing in the subsequent chapters.

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Chapter III

Separation of Powers in Russian and South Africa: A Comparison

Legislature, Executive and Judiciary constitute the three pillars on which the government edifices. Before the study moves on to discuss in detail about the different dimensions and separation of power among the three organs of the state, it would be desirable to discuss in brief, what do one really means by executive, legislature and judiciary in general and separation of power in particular. Firstly, the 'executive' refers to one of the three basic powers of the state designed to carry out or to implement the will of the legislature. However, it varies from one political system to another in its functioning. Secondly, the 'legislature' is the most important organ of the government as it deals with official rule making functions of the state and organizes debates and discussions. Finally, the 'judiciary' is that branch of the government which is empowered to decide the legal disputes and adjudicate the legislative and executive decisions. However, the significance of this role varies from state to state and from system to system.

The separation of powers doctrine proposes that each of the three functions of the government (legislation, execution and adjudication) should be entrusted to a separate branch of government i.e. the legislature, executive and the judiciary respectively. The very essence of the doctrine is to fragment government powers in such a way as to defend liberty and keep tyranny at a bay. It demands independence, interdependence and efficiency in each sphere of governmental activities.

Russian Executive

The Russian constitution envisions double executive. These are the institutions of presidency and the government. A Russian citizen, over 35 who has been residing in Russia for not less than 10 years can be elected as the President of Russian Federation on the basis of general, equal and direct vote by the means of

secret ballot. He is elected for four years and a maximum of two terms. He wields enormous powers as the head of the real executive in the Russian political system. There is a government under the Chairman of the Council of Ministers (Prime Minister) but it is like a puppet in the hands of the President. The office of the President is the powerhouse of Russian political system. Fish (1997) argues that the most salient consequential feature of the Russian political system is superpresidentialism best understood as a constitutional order that provides extraordinarily strong president and weak legislature. The Russian President is not only the head of the state but also the guarantor of the Constitution of the Russian Federation, and of human and civil rights and freedoms. As per constitution, he has to take measures to protect the sovereignty of the state, its independence and integrity, and ensure concerted functioning and interaction of all bodies of state power.[1] He defines the basic domestic and foreign policy guidelines. In accordance with the constitution, he has the right to appoint the Chairman of the Government (the Prime Minister) of the Russian Federation, subject to consent of the State Duma, and to preside over meetings of the Government.[2] Likewise, he can dismiss the government and decides on its resignation.

The President plays a crucial role in the appointment of the judges of the different courts. He introduces to the State Duma a candidate for appointment to the office of the Chairman of the Central Bank of the Russian Federation and submits to the State Duma the proposal on relieving the Chairman of the Central Bank of the Russian Federation of his duties. The President forms and heads the Security Council; endorses the military doctrines; appoint and dismiss the Supreme Command of the Armed Forces of the Russian Federation. He appoints and dismisses plenipotentiary representatives of the President of the Russian Federation; appoints and recalls diplomatic representatives of the state to foreign states and international organizations.

[1] Article 80.2 of the Constitution of the Russian Federation, 1993 - available at-http://www.departments.bucknell.edu/russian/const/ch4.html
[2] Article 83 (a & b)of the Constitution of the Russian Federation, 1993.

To check the legislature, the president has been given enormous powers. He can dissolve the State Duma and introduce draft laws to it.[3] But Acting President is forbidden to dissolve the State Duma, to schedule referendum or to submit proposals on amendment to the Russian constitution. The President signs and publishes federal laws; presents annual messages to the Federal Assembly on basic directions of the internal and external policies. He has the privilege of the veto as well. The President of the Russian Federation can issue decrees and executive orders that are binding throughout the territory of the Federation but they should not contravene the constitution or federal laws.

The Russian President is vested with the rights of dispute- settlement. He settles differences between organs of state power of the Federation and organs of state power of the subjects of the Federation, and between organs of state power of the subjects of the Federation. If no decision is agreed upon, he turns the dispute over for review by the respective court of law and he can even suspend the acts of the organs of executive power of the subjects of the Federation if such acts contradict the constitution or other federal laws; or the international obligations of the Russian Federation.[4]

The Russian Federation exercises the executive power through the government led by a Chairman (Prime Minister). The government may have a number of Deputy Chairmen and federal ministers. The President nominates the Chairman of the government subject to approval of the State Duma; but, if the State Duma thrice rejects candidates for Chairman of the Government nominated by the President, the President must appoint a Chairman of the Government and dissolve the State Duma with a call for new election.[5] The government mainly acts out the policies of the president. It can issue decrees as per the constitution, federal laws and presidential decrees.

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[3] Article 84 (b & d) of the Constitution of the Russian Federation, 1993.
[4] Article 85 of the Constitution of the Russian Federation, 1993.
[5] Article 111.4 of the Constitution of the Russian Federation, 1993.

The government submits the federal budget and a report on the execution of the budget to the State Duma; ensures the implementation of a uniform financial, credit and monetary policy and uniform state policy in the field of culture, science, education, health, social security and ecology; manages federal property; adopts measures to ensure the country's defense, state security and the implementation of the foreign policy.[6] The Prime Minister has not been given the rights that even the French Prime Minister wields. He is susceptible to the President. The Prime Minister can be appointed and sacked by the President for latter's political benefit anytime. Recollecting the six changes in the prime-ministership (chairmanship) of the government in the latter days of the Yeltsin's presidency, Masood Khan ironically says "the President brought out Prime Ministers as a conjurer presents rabbits out of a hat" (quoted in Pandey 2002:114). The Prime Minister exerts only partial control over his own ministers and he is deprived of control over the so-called 'power ministers' responsible for domestic security (Sakwa 2002: 104).

South African Executive

The South African presidency stands on the parliamentary system of government but deviates from the Westminster model. The President is elected from among the members of the National Assembly (Lower House). Like the Russian President, he is the head of the state and national executive. The executive authority of the Republic is vested in the President but he exercises the executive authority together with the other members of the cabinet. Constitution of South Africa seems to have combined the offices of the President and the Prime minister. He is both the ceremonial head of state as also the head of the executive. The South African President has the power of giving assent to bills; referring a bill back to the National Assembly for reconsideration of its constitutionality; summoning the National Assembly, the National Council of Provinces or the Parliament to an extraordinary sitting. He has the right to appoint commissions of inquiry; call a national referendum according to the terms set by the Act of

[6] Article 114.1of the Constitution of the Russian Federation, 1993.

Parliament. He receives and recognizes foreign diplomatic representatives and appoints ambassadors, plenipotentiaries, and diplomatic and consular representatives[7]. The President nominates Deputy Presidents, ministers and deputy ministers from among the National Assembly (maximum of two ministers and two deputy ministers from outside). He can also dissolve the National Assembly in certain circumstances. As the South African political system is based in the parliamentary system, the President can not be separated from the government.

Comparison of the Two Executives

Comparing the powers of the Russian and South African Presidents, the former wields more powers than the latter. The powers like appointing plenipotentiary representatives, diplomatic representatives of the state to foreign states and international organizations are common to both but there are many powers that the Russian President weilds but not the President of South Africa. The Russian President has the veto, which can be overridden by two-thirds majority of both houses. He has the right to issue binding decrees, which do not have to be approved by the parliament and have the power of law (Sakwa 2002, 104). As the President has the right to initiate legislation and veto. Troxel (2003: 27) rightly says "due to the power to initiate legislation and ultimate veto power the President has significant agenda setting capabilities and these powers can ensure that only the bill supported by him/her are passed." He can send any bill passed by the parliament back in fourteen days but the South African President can send a bill back to the parliament or the Constitutional Court only for consideration of its constitutionality.[8] Likewise, dissolution power of the South African president is very much limited. He cannot dissolve the lower house until three years of the elections to the National Assembly and he must dissolve it if the National Assembly passes a motion by majority asking for dissolution. The Russian President can dissolve the State Duma under minor pretexts. It has been

[7] 'South Africa - Constitution 1996' is available at-
http://www.servat.unibe.ch/icl/sf00000_.html

[8] Section 84.2 (b & c) of the Constitution of the Republic of South Africa, 1996.

easy for the Russian President to control the popular house by threatening it with dissolution. The State Duma can refuse president's candidate for the post of Prime Minister (chairman) thrice only at the cost of its dissolution. The Russian lower house has been compelled to endorse the candidacy of Kiriyenko in 1998 after threat of dissolution by the President (Chenoy 2001: 145).

The Russian President has decisive role in appointing the functionaries of the judiciary. He presents names for the post of the President, Deputy President and other members of the Constitutional Court; judges of the Supreme Court and the Supreme Arbitration Court of Russian Federation to the Federation Council. The South African President appoints these functionaries on the recommendation of the Judicial Service Commission and after deliberation with the parties in the National Assembly.[9] Both of the Presidents can call for the extraordinary sittings of their respective parliaments and both are the Commanders-in-Chief of the defense forces. Any orders affecting defense forces should promptly be informed to the parliament in South Africa whereas Chenoy (2001) says Yeltsin approved Russian's military doctrine when the parliament was not in session.

Russian Legislature

The two-chambered Russian parliament or the Federal Assembly consists of the State Duma and the Federation Council. The State Duma is the popular house and has 450 members elected on the basis of proportional representation system. Besides passing bills, it has powers to approve the appointment of the Chairman of the Government (i.e. the Prime Minister) by the President of the Russian Federation; to decide on the confidence motion in the government and; to appoint and dismiss the Chairman of the Central Bank. It also has power to appoint and dismiss the Chairman of the Accounting Chamber and half of its staff of auditors; to appoint and dismiss the Plenipotentiary for Human Rights acting in accordance

[9] Section 174 of the Constitution of the Republic of South Africa, 1996.

with the Federal Constitutional Law; to grant amnesty and; to bring charges against the President of the Russian Federation for his impeachment.[10]

The act of initiating legislation is not the sole right of the Duma. The President of the Russian Federation, the Federation Council, the members to the Federation Council, the deputies to the State Duma, the Government of the Russian Federation and the legislative (representative) bodies of the subjects of the Russian Federation also have the right of legislative initiative. Even the Constitutional Court, the Supreme Court and the Supreme Court of Arbitration of the Russian Federation also have the right of legislative initiative within their jurisdiction.[11] The state Duma has a role in amending constitution. Although there are so many examples of bypassing the parliament by the President by issuing decrees, in the cases of contradictions the legislative acts take precedence over presidential decrees. The Constitutional Court adjudicates in the cases. However the Duma lacks sufficient power to monitor the implementation and observance of the laws it passes, without which the legislative activity becomes meaningless.

Troxel (2003:40) says "Parliament's ability to form opposionist coalitions which can defeat the President's vetoes and challenge the President on the ratification of the treaties and approval of Prime Minister means that the parliament has greater bargaining power in the policy process and the President can not as easily dictate his will on the legislature."

Federation Council, the permanent upper house of the Federal Assembly, consists of 178 members, two from each subject of the Russian Federation. The Federation Council shares the legislative role with the State Duma. For most of the bills to be passed, they need to be approved by majority in both the houses. The Federation Council considers the federal laws adopted by the State Duma on a mandatory basis if such laws deal with the issues of the federal budget; federal

[10] Article 103.1 of the Russian constitution of 1993.
[11] Article 104.1 of the Russian constitution of 1993.

taxes and levies; financial, monetary, credit and customs regulations and money emission; ratification and denunciation of international treaties of the Russian Federation; the status and protection of the state border of the Russian Federation and; war and peace.[12] Since the Federation Council is the body of the nominated members, questions have been raised with respect to its powers to declare state of emergency, to authorize the use of military abroad, to appoint and remove the Prosecutor General etc. The constitution had given these powers to the Federation Council as earlier it was a popularly elected body. Disgruntled with this fact, the President of Chuvashia, Nikolai Federov, noted that the change destroyed the system of checks and balances, and is very dangerous for democracy (Sakwa 2002: 137).

South African Legislature

The South African parliament consists of the National Assembly and National Council of provinces. The lower house National Assembly, which contains 400 members elected through the proportional representation system, wields enormous powers. The National Council of Provinces, upper house, safeguards the interests of the provinces. The national legislative authority is vested in the parliament composed of above-mentioned two houses. The National Assembly can assign its legislative power to any legislative body to any other sphere of government in the country. Section 49(4) of the constitution says- "The National Assembly remains competent to function from the time it is dissolved or its time expires, until the day before the first day of polling for the next Assembly."

The Assembly has power to pull down the government with or without the President through its simple majority. In case of serious violation of the constitution, serious misconduct and inability to perform the functions of office, the President can be removed by a resolution of the National Assembly with the

[12] Article 106 of the Russian constitution of 1993.

supporting vote of two-thirds majority.[13] The National Assembly can consider, pass, amend or reject any legislation and initiates or prepares legislation, except money bills. It is given the right to maintain oversight on the exercise of national executive authority including the implementation of legislation and of any organ of the state.[14] Likewise, the National Assembly has to provide for the mechanisms to ensure all executive organs of state in the national sphere of government accountable to it. The Assembly amends the constitution along with the National Council of Provinces.

The National Council of Provinces is composed of a single delegation from each province consisting of ten delegates in which four are special delegates- one premier or any member of provincial legislature designated by the premier plus three other and six permanent delegates.[15] Special delegates are members of the provincial legislature and permanent delegates should as far as possible from outside the legislature. If one is from the provincial legislature his\her membership ceases. The members to the National Council of Provinces are nominated as per the proportion of parties represented in the provincial legislature. The National Council can consider, pass, amend, propose amendments to or reject any legislation before it and can initiate or prepare legislations of the provincial concern. In the amendment process of the South African constitution it plays as crucial a role as the National Assembly.

Comparison of the Two Legislatures

Comparing the powers of the two legislatures, the South African one seems to be wielding more power than the Russian. Whereas South African parliament holds total control over the executive, the swords of the Russian President always looms over the neck of the Russian parliament. There is no veto over the bills passed by the South African parliament but the Russian President can use veto and

[13] Section 89.1 of the Constitution of the Republic of South Africa, 1996.
[14] Section 55.2 of the Constitution of the Republic of South Africa, 1996.
[15] Section 60 of the Constitution of the Republic of South Africa, 1996.

has decree power, which could only be overridden by the two thirds of majority in both the houses. But Bacon and Wyman (2006:78) argue "in the early period of post-communist transition in Russia, there was a legislative gap which was filled to some extent by the presidential decrees but the influence of the parliament has increased these days because more laws are being passed by the parliament and it left less legislative place of the presidential decree."

In the Republic of South Africa, the President can dissolve the lower house only under certain circumstances. However the Acting President must dissolve the National Assembly if there is a vacancy in the office of President and the Assembly fails to elect a new President within 30 days after the vacancy occurred. The Russian President has extensive powers to dissolve the lower house. He may dissolve the State Duma if it passes two no confidence motions against the government within three months, or if the Prime Minister raises the issue of confidence in the government before the State Duma and Duma passes a no confidence motion (Brown, 2000: 662). There are only four circumstances in which the President cannot dissolve the State Duma- during year following the Duma's election; during impeachment proceedings; while a state of emergency and martial law is in effect; or within six months prior to the conclusion of the president's term in office. Beyond the above mentioned conditions, the State Duma is vulnerable to dissolution by the President.

Although, Russian Federal Assembly (Parliament) can impeach the President but it does not have the exclusive power to do so. Checking presidential powers in the Russian political system by the parliament is very difficult since action against him may result in dissolution of the State Duma itself and impeachment is nearly impossible as it has to be confirmed by the Supreme and the Constitutional Courts and passed by two thirds of both the houses. Due to difficulty in curbing presidential power by the legislature, concepts like separation of powers and checks and balances are not very relevant in the Russian political system.

In South Africa the National Assembly can remove the President easily. The simple majority of the lower house of the parliament can discharge him from the office. In cases of violation of the constitution, serious misconduct and inability to perform duty, the lower house can remove him by two-thirds majority. However, the word 'impeachment' has not been used in the constitution.

Though the Russian parliament has right to amend the constitution but there are other stakeholders from the beginning of the amendment proposals, as article 134 of the Russian constitution says-

> *Proposals on amendments and revision of constitutional provisions may be made by the President of the Russian Federation, the Federation Council, the State Duma, the Government of the Russian Federation, legislative (representative) bodies of the subjects of the Russian Federation as well as groups of deputies numbering not less than one-fifth of the total number of deputies of the Federation Council or the State Duma.*

For the amendment of the chapters 1, 2 and 9 which treat the headings, **'The Fundamentals of the Constitutional System'**, **'Rights and Liberties of Man and Citizen'** and **'Constitutional Amendments and Revisions'** needs to convene the Constitutional Assembly with the support of the three fifths of the deputies of both houses (article 135). As far as the Republic of South Africa is concerned the power to amend the constitution is vested in the national Parliament only, though it takes into consideration the views of the provinces as also the public. Section 1 which deals with founding provisions and amendment subsection can be amended by a bill passed by the National Assembly, with a supporting vote of at least 75 per cent of its members and the National Council of Provinces, with a supporting vote of at least six provinces. Any other provision of the constitution may be amended by a bill passed by the National Assembly, with a supporting vote of at least two thirds of its members; and by the National Council of Provinces, with a supporting vote of at least six provinces.[16]

[16] Section 74 of the Constitution of the Republic of South Africa, 1996.

Russian Judiciary

The judiciary in Russia has been split into three branches: the regular court system with the Supreme Court of the Russian Federation at the top, the arbitration court system with the Supreme Court of Arbitration on top, and the Constitutional Court as a single body with no courts under it.

The Federation Council following nomination by the President of the Russian Federation appoints judges of the Constitutional Court of the Russian Federation, judges of the Supreme Court of the Russian Federation, and those of the Supreme Arbitration Court of the Russian Federation. Judges of other federal courts are appointed by the President of in accordance with procedures established by federal law.

The Constitutional Court which consists of 19 judges, besides interpreting constitution, resolves the cases pertaining to federal laws, normative acts of the President of the Russian Federation, the Federation Council, State Duma and the Government of the Russian Federation; republican constitutions, charters, laws and other normative acts of subjects of the Russian Federation published on issues pertaining to the jurisdiction of bodies of state power of the Russian Federation and joint jurisdiction of bodies of state power of the Russian Federation and bodies of state power of subjects of the Russian Federation. It also gives verdict on the cases of agreements between bodies of state power of the Russian Federation and bodies of state power of the subjects of the Russian Federation, agreements between bodies of state power of subjects of the Russian Federation and; international agreements of the Russian Federation that have not entered into force.[17] The Supreme Court of the Russian Federation is the highest judicial body on civil, criminal, administrative and other matters friable by general jurisdiction courts.[18] The Supreme Arbitration Court of the Russian Federation is the highest

[17] Article 125.2 of the Russian constitution of 1993.
[18] Article 126 of the Russian constitution of 1993.

judicial body for resolving economic disputes and other cases considered by arbitration courts. Whenever there is a dispute between business entities, the case is taken for trial by the courts of arbitration. The system of these courts is on two levels. There are eighty-two courts of arbitration with some two-thousand judges handling about three hundred thousand disputes annually.[19]

The Russian constitution provides for the institution of the *procuracy* which is responsible for the implementation of statutes by federal ministries, executive organs and officials, the observances by human rights of the ministries and also commercial and non-commercial organizations (Sakwa 2002: 74). The courts do not affect the *procuracy* and it controls on its hierarchy of procurators.

The South African Judiciary

The judicial authority of the Republic of South Africa is vested in the courts. There are five courts in the South African judicial system. The Constitutional Court; the Supreme Court of Appeal; the High Courts, including any high courts of appeal that are established by an Act of Parliament to hear appeals from High Courts; the Magistrates' Courts; and any other courts established or recognized in terms of an Act of Parliament including any court of a status similar to either the High Courts or the Magistrates Courts.[20]

The President of the Republic of South Africa, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the President and Deputy President of the Constitutional Court and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief Justice. He appoints the other judges of the Constitutional Court after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly. For that the Judicial Service Commission prepares a list of nominees with three names more than the number of

[19] The source under 'Legal system of Russia' available at-
http://darkwing.uoregon.edu/~jbonine/jud-syst.html
[20] Section 166 of the Constitution of the Republic of South Africa, 1996

appointments to be made, and submits it to the President. The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.[21] The President must appoint the judges of all other courts on the advice of the Judicial Service Commission. Other judicial officers are appointed according to the terms of the Act of Parliament.

The Constitutional Court, consisting of nine judges excluding the President and the Deputy President, is the highest court in all constitutional matters. It decides only constitutional matters and any issue connected with decisions on constitutional matters and makes the final decision.[22] Only the Constitutional Court may decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state. It decides on the constitutionality of any amendment to the constitution and decides whether Parliament or the President has failed to fulfill a constitutional obligation. It certifies a provincial constitution. The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and confirms any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.

The Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice and the number of judges of appeal determined by an Act of Parliament. The Supreme Court of Appeal decides appeals in any matter. It is the highest court of appeal except in constitutional matters and decides only appeals, issues connected with appeals and any other matter that is referred to it in circumstances defined by an Act of Parliament.

The High Courts decide the issues on any constitutional matter except a matter that is only the Constitutional Court has authority to decide, or

[21] Section 174 of the Constitution of the Republic of South Africa, 1996
[22] Section 167of the Constitution of the Republic of South Africa, 1996

the cases assigned by an Act of Parliament to another court of a status similar to a High Court and any other matter not assigned to another court by an Act of Parliament.[23] Likewise, Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court cannot enquire into or rule on the constitutionality of any legislation or any conduct of the President.[24]

Comparison of the Two Judiciaries

The courts in Russian Federation have less powers and authority as compared to their counterparts in South Africa. The Russian judiciary does not have the right of judicial review which can be a guarantee for defending fundamental rights of the people but they have right to legislative initiative and may submit their conclusions regarding the interpretation of laws. Unlike countries of common law tradition, in Russia the judgments of courts do not set precedents.[25] The Russian legal system is not based on judge-made law. In South Africa the judiciary has rights to judicial and constitutional review. Justice T H Madala (2000) says-

> *"This power of judicial review is an invaluable tool in the promotion of human rights and the protection of human norms. The Constitution in my view, gives explicit recognition to the role of judiciary by making provision for judicial review, based on openness, democratic principles, human rights, reconciliation, reconstruction and peaceful co-existence between the people of the country in national unity and reconciliation."*

The South African constitution envisages the supremacy of the constitution. The constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[26] The independence of the judiciary becomes clear if one looks at the process of

[23] Section 169 of the Constitution of the Republic of South Africa, 1996.
[24] Section 170 of the Constitution of the Republic of South Africa, 1996.
[25] The source was extracted from 'Judicial Review' - available at-
http://darkwing.uoregon.edu/~jbonine/review.html
[26] Section 2 of the Constitution of the Republic of South Africa, 1996.

appointing judges. The judges in Russia in top three courts are appointed by the Federation Council but recommended by the President. In South Africa they are appointed on the recommendation of the Judicial Service Commission and even in the case of appointing functionaries of the Constitutional Courts, the president should consult the leaders of parties present in the National Assembly as well. The South African process of appointing judges keeps away the courts from the influence of the executive. Nonetheless, in both of the constitutions, there are provisions for ensuring the independence, fearlessness and impartiality of the judiciary. Articles 120, 121, 122 of the Russian constitution provide for independence, irremovibility and impunity of the judges and Section 165 (2, 3, 4, and 5) of the South African constitution says-

> *"The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice; no person or organ of state may interfere with the functioning of the courts; organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts; an order or decision issued by a court binds all persons to whom and organs of state to which it applies."*

The South African judiciary had also helped a lot in making of the constitution as Kryzanek (2004: 393) said "the Constitutional Court played significant role in making new constitution. It rendered a decision stating that some provisions of the constitution did not comply with the principles established in the interim constitution of 1993. After court's ruling, second version was drafted."

The public accessibility to the Constitutional Court in Russia has been restricted. Only federal or regional executive and legislative authorities and members of the parliament in fixed number as group can appeal to it. But in South Africa any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court. The constitution of South Africa somewhat directs for the

racial and judicial composition. The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed. Many people in Russia look the court decision with doubt as Bacon and Wyman (2006: 86) accept that some rulings of the courts in favour of the authorities seem sufficiently perverse to arouse suspicion of collusion.

Both the constitutions have provisions for the office of the procurators which forms a single centralized structure. The main objective of providing this institution is to defend the citizen's rights. So they are helpful to the judiciary. The Russian constitution assigns the function of making detailed provisions for the offices of the procurators to the parliament, but the South African constitution assigns following powers to them apart from others provided by the national legislation-

- to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- to report on that conduct; and
- to take appropriate remedial action.

If we assess the situation of the 'balance of power' among the three organs of the government in the Russian Federation and the Republic of South Africa, we realize that the main difference lies in the way executive branch of the state, especially the institution of the presidency, and its relation with the other branches has been conceived and implemented. Generally in the presidential form of government, the chief executive cannot control the legislature and judiciary is given the right to defend the constitution by allotting it the rights to constitutional and judicial review. But in Russia the President dominates the political system and the judiciary lacks the right to judicial review and has limited right to constitutional review.

In the parliamentary system of the government, the cabinet is the product of parliament. So, in this system the parliament controls the government as it has

been done in the South African political system, although strictly speaking it is not a parliamentary system. But the supremacy of the parliament is not found in South Africa. It is in fact the constitution which is supreme and the judiciary has been assigned the function of defending it. So the executive is the dominant organ of the government in Russia whereas in South Africa there is balance of power among various organs of the government with constitution being supreme.

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Chapter- Four

Federal System in Russia and South Africa

Etymologically federalism is derived from the *Latin* term *foedus*, meaning 'pact' or 'covenant' and usually refers to legal and political structures that distribute power territorially within a state. As a political form, however, federalism requires the existence of two distinct levels of government, neither of which is legally or politically subordinate to the other. Its central feature is therefore the notion of shared sovereignty. Gress (1998: 5) says "federation is conceived as a means to protect liberty by the vertical separation of powers understood as a restraint on governmental jurisdiction according to the guiding principle of subsidiarity." The 'classical' federations are few in number: the USA, Switzerland, Belgium, Canada and Australia. However, there are states which have many federal features but are not regarded as federal states in the strict sense of the term. The two countries included in the present study, Russia and South Africa, although not following the classical federal model but should still be regarded as federal states for they have many federal features.

Each federal system is unique in the sense that the relationship between federal (national) government and state (regional) government is determined not just by constitutional rules, but also by a complex of political, historical, geographical, cultural and social circumstances. There is a further distinction based on the relations between the executive and legislative branches of government. On the one hand we have the presidential system (typified by the US) in which the government power is diffused both territorially and functionally, and on the other there is the parliamentary systems in which executive and legislative power is fused. As far as federal system is concerned there are certain features that are common to most, if not all, federal systems. These features are: two relatively autonomous levels of government with clearly defined powers and functions, written constitution, rigid constitution, independent judiciary etc. In the

comparative study of the federal systems of Russia and South Africa, note must be taken of their inherent nature, typologies and other relative factors of similarities and dissimilarities.

Federal Proposition in the Russian Constitution

Russia is the country of diverse ethnicity. It has adopted federal system of government to accommodate this diversity. Russia suffers from communist legacy of a weak legal system and enduring low level of legitimacy for legal institutions (Stoner-Weiss 2001: 127). So, the federal relations amongst the constituent units of the Russian Federation have not settled well.

The Russian Federation has 89 subjects including the Republics, Territories, Regions, Federal Cities, Autonomous Regions and Autonomous Areas which do not have equal rights. The Constitution of Russian Federation, article 65.1 has listed the names of the subjects of the federation. (see appendix 1)

In the language of the Russian constitution, the federal units are called the subjects of the Russian Federation. The status of the subjects of the Russian Federation has been defined by the constitution of the Russian Federation and the constitutions or charters of the subjects of the Federation which may be changed upon mutual agreement of the Russian Federation and the subjects of the Russian Federation in accordance with the federal constitutional law. The republics have constitutions and other subjects have their charters.

The constitution has clearly divided the jurisdiction of the Federation and the regions or subjects. There are two lists of jurisdiction- The exclusive jurisdiction of the Russian Federation and the joint jurisdiction of the Russian Federation and the subjects of the Russian Federation. The residuary powers have been vested in the subjects of the Federation. The article 71 of the constitution of the Russian Federation provides for the exclusive jurisdiction of the Federation. Those include- adoption and amending of the Constitution of the Russian

Federation and federal laws, control over their observance; the federal structure and the territory of the Russian Federation; regulation and protection of the rights and freedoms of man and citizen; citizenship in the Russian Federation, regulation and protection of the rights of national minorities; establishment of the system of federal bodies of legislative, executive and judicial authority, the rules of their organization and activities, formation of federal bodies of state authority; federal state property and its management; the establishment of the principles of federal policy and federal programmes in the sphere of state, economic, ecological, social, cultural and national development of the Russian Federation; establishment of legal groups for a single market; financial, currency, credit, and customs regulation, money issue, the principles of pricing policy; federal economic services, including federal banks.

The Federal centre, like other federal states retains the control on federal budget, federal taxes and dues, federal funds of regional development; federal power systems, foreign policy and international relations of the Russian Federation, international treaties and agreements of the Russian Federation, issues of war and peace; foreign economic relations of the Russian Federation; defense and security; military production; determination of rules of selling and purchasing weapons, ammunition, military equipment and other military property; the federal centre issues like the nuclear power-engineering, fission materials, federal transport, railways, information and communication, outer space activities; production of poisonous substances, narcotic substances and rules of their use. Determination of the status and protection of the state border, territorial sea, air space, exclusive economic zone and continental shelf of the expenditures; judicial system, procurator's office, criminal, criminal procedure and criminal-executive legislation, amnesty and pardoning , civil, civil procedure and arbitration procedure legislation, legal regulation of intellectual property are also under federal jurisdiction. Apart from the matters aforementioned, the centre is responsible on the affair like federal law and conflict of laws; meteorological service, standards, metric system, horometry accounting, geodesy and cartography,

names of geographical units, official statistics and accounting; state awards and honorary titles of the Russian Federation; federal state service.

The federal centre shares some important matters with the subjects of the federation. Article 72 of the Russian constitution provides the list of the joint jurisdiction of the Russian Federation and the subjects of the Russian Federation. Matters like-providing for the correspondence of the constitutions and laws of the Republics, the charters and other normative legal acts of the territories, regions, cities of federal importance, autonomous regions or autonomous areas to the Constitution of the Russian Federation and the federal laws; protection of the rights and freedoms of man and citizen; protection of the rights of national minorities; ensuring the rule of law, law and order, public security, border zone regime; issues of possession, use and disposal of land, subsoil, water and other natural resources; delimitation of state property. The utilization of nature, protection of the environment and ensuring ecological safety; specially protected natural territories, protection of historical and cultural monuments; general issues of upbringing, education, science, culture, physical culture and sports; coordination of issues of health care; protection of the family, maternity, paternity and childhood; social protection, including social security are also under joint jurisdiction of both of the authorities.

Other than above mentioned issues the constitution spells out the joint jurisdictional competence on areas like- carrying out measures against catastrophes, natural calamities, epidemics, elimination of their aftermath; establishment of common principles of taxation and dues in the Russian Federation; personnel of the judicial and law enforcement agencies; protection of traditional living habitat and of traditional way of life of small ethnic communities; co-ordination of international and foreign economic relations of the subjects of the Russian Federation, fulfillment of international treaties and agreements of the Russian Federation.

The federal practice of the Russian Federation is not an ideal one. The constitution provides for the residuary powers to the subjects of the Federation but the centre seems more influential even in the matters under the jurisdiction of the subjects of Federation especially after Putin's ascendancy. The exercise of relations between the federal and regional government is not constant from the disintegration of the Soviet Union. During Yeltsin era, there was a political instability due to weak centre and federal values have largely been minimized during Putin's era in the name of consolidating powers to the center. Federal practice in the Russian Federation may better be understood by studying Yeltsin and Putin's presidential terms separately.

Shaping and Experience of Federal Order under Yeltsin

Yeltsin made Russia a 'rainbow federal state' by providing heterogeneous status to the subjects of the federation in terms of rights they got through the treaties. Yeltsin needed support from the regional leaders to consolidate his position in the center in the initial days of his ascendancy, when he was engaged in a bitter struggle - first against the federal centre led by Gorbachev during the last years of the former Soviet Union and later against the post Soviet Russian parliament dominated by his opponents. To garner support from the republican and regional elites, he promised them 'as much sovereignty as you can swallow' (Sakwa, 2004: 131). Yeltsin even proposed allowing virtual independence to the autonomous regions and dividing the remaining Russian regions into six or seven independent territories (Harrison 2003).

It was becoming difficult to maintain the unity of the federation. Tatarstan had already declared its independence in 1990 and other regions were following its example. In those days the centre was growing weaker and weaker. Considering this reality, Pandey (2001) argues that if the diffusion of power from the centre to the subunits is not managed and channelised properly it may lead to 'Federal Collapse' as described by Graem P. Herd (1999).

The Federal Treaty was one of the attempts to settle the issue. The document, which was not signed by Tatarstan and Chechnya, accorded the republics a significant power and autonomy including the right to conduct independent foreign policy, economic policy, fiscal power, right to structure their own government etc. (Sakwa 2004: 59). The Treaty was taken as the part of the constitution. However article 4 and 8 of the constitution violates the norms of the Treaty.[1]

With the above constitutional status of the subjects of the Russian Federation, they began to make their own constitutions and started cutting down the taxes to be given to the federal government. Yeltsin signed a treaty with Tatarstan in 1994 which affirmed Tatarstan's right to have a constitution, tax system, foreign policy and foreign trade policy. These provisions contradict the constitutional declaration of a unified economic space. It shows that Yeltsin was unable to shape the federalism as per the provisions of the constitution. And he was compelled to make similar treaties with 46 subjects of the Russian Federation. This move further complicated the situation and added the ambiguity of the nature of the Russian federalism.

On the other hand Yeltsin attempted to control the regions by placing his own representatives as the executive heads in the regions but the regions challenged his right by announcing elections for the post of governors in 1994. In order to control the regions Yeltsin issued a decree which delayed the elections of the governors until 1996 (Chenoy 2001: 78). The regional heads tended to

[1]Article 4 of the Russian constitution reads- "The sovereignty of the Russian Federation shall apply to its entire territory; The Constitution of the Russian Federation and federal laws shall have supremacy throughout the entire territory of the Russian Federation; The Russian Federation shall ensure the integrity and inviolability of its territory. And article 8(1) says- Unity of economic space, free movement of goods, services and financial resources, support for competition and freedom of any economic activity shall be guaranteed in the Russian Federation. "

replicate Yeltsin's authoritarian style. Some heads of the republics took arbitrary and unconstitutional decisions. Yeltsin appointed his regional representatives in every subject of the federation to control the regions. They proved weak due to their dependence on the regions for financial or other supports and they even didn't have any clear idea about their powers and functions. Such ambiguity regarding division of powers created multiple power centers. Many of the envoys appointed by Yeltsin had strong ties with their regions, and they soon turned 'native', by representing the interests of those whom they were supposed to be controlling (Ross 2003). The process of appointing the representatives was not congruent as well. In many regions the governors were even granted the right to appoint their own presidential representatives or to approve presidential nominees. In some cases even high ranking members of regional elites were appointed as the presidential representatives. In Stavropol Krai the presidential representative simultaneously held the post of Deputy Governor of the region as well. It created of question of protocol what rank the presidential representatives hold. Some time Yeltsin had to bow to the will of the regional administration's demand of sacking his presidential representative (Ross 2003).

There was confusion regarding the powers, functions and status of the presidential representatives. Taking advantage of these circumstances, the regions started demanding statehood (Chenoy 2001: 79). Chechen war of independence was to a great extent the result of this situation. Due to lack of the clear division of power between federation and the regions, the separatist tendency was seen in some other regions as well. The budgetary matters reflected the asymmetry in federal relations. Donor regions were decreasing in the later years of 1990s. There were only 13 donor subjects in 1999 but rests of all were not recipients either (Sakwa 2004: 133). This also led to political instability in the federation.

Putin's 'Reform' of the Federal System

Putin, after becoming the President of the Russian Federation in the new millennium felt the need for a 'strong centre.' He initiated several steps to

recentralize power: the creation of seven new federal super-districts; reform of the Federation Council; the creation of a new State Council; the granting of new powers to the President to dismiss regional governors and dissolve regional assemblies; new rights for regional governors to dismiss municipal officials; and a major campaign to bring regional charters and republican constitutions in line with the Russian Constitution (Ross 2003). He attempted to stop tendency of violating the federal constitution. He got support from the regional leaders for it. For instance the opposition group in Tatarstan wrote to Putin mentioning that the Tatar constitution violated the federal constitution and laws (Sakwa 2004: 137). Putin appointed chief prosecutor in 2000 and gave the regions one month to synchronize their laws with the federal laws. The laws in as many as 60 regions were found to be contradicting federal laws (Martinez-Vazquez 2002).

The system of representation of the heads of the regional executives and legislatures in the Federal Council adopted in 1994 has been changed by Putin. Now, two representatives are to be sent to the Federal Council, one nominated by the regional executive branch and one by the legislature. However, the right of the Counciliary Commission to recall the members of the Federation Council has left them no better than puppets (Sakwa 2004: 147). Regional head of the executive can recall representative nominated by the executive but his decision can only be overridden by the two thirds of the members of the regional legislature. The State Council, of which members are regional leaders made Federation Council somewhat less influencial. Through this system of the State Commission, the regional leaders can have direct access to the president. This has added a unitary feature to the state in practice. In these various ways, the upper chamber which represents the interests of the regions has been rendered less effective.

Putin also assumed the right to dismiss the regional executives and dissolve the legislatures which is an open violation of the federal norms. The regional leaders have felt threatened by this power of the president. The regional executive, who violates federal laws or constitution more than once, can be subject to dismissal by the president. As compensation the regional leaders were also granted

a similar right with respect to lower-ranking authorities. The new law gives both chambers of the Federal Assembly, the general procurator and the regional legislatures the right to recommend that a Governor be removed. The formation of the seven administrative districts is another intervention in the regional autonomy. However the administrators themselves are not clear about their rights.

Putin's structure of federal districts is based on the existing military administrative districts. It is interesting to note that five of the seven PRs (Presidential Representatives) have military or security service background. This is a sign of the increasing role of the security services in the affairs of the state. Yeltsin had appointed them from the democratic movement of 1991. It may result in instability if the power seeker administrator and regional leaders work together to this direction. Petrove (2002) asserts that the shift of the centre of political gravity from the level of the regions to the level of the districts means reduced public control over authorities, a return to the old system of appointments instead of direct elections, an almost total severing of connections between the civil society and the state and an end to the elements of federalism in Russia. A nominated Presidential Representative over the elected head of the executive is itself an anti-federal norm and increased political economic resources available to enlarged territorial units may also increase the risk of separation. Administrative districts are becoming quasi republics. Only a competitive democratic environment could decrease such risk. If Russian politicians want to preserve the territorial integrity in the long run, they would have to find ways to move toward a truly democratic federal model, with competitive democratic process in all political spheres (Fillippov and Dolga Shvetsova 2005) which might lead to uneasy competitive atmosphere and thereby to instability.

In the area of fiscal relations, the centre has the upper hand. More than 80 percent of the tax revenues of the Russian regions come from taxes that must be divided between the center and the regions, and the tax split tends to vary each year. Fiscal relations between the center and the regions also continue to lack

transparency and remain based on informal financing channels and individual agreements (Tekoniemi 2001).

The South African Federal system

The Republic of South Africa has three spheres of governments- at national, provincial and local level. The constitution of South Africa says that all spheres of the government are distinctive, interdependent and interrelated.[2]

South Africa has been divided in nine provinces (see appendix 2). Against a history of conflictual relationship between the levels of the government in most of the modern federal states, the South African constitution promotes cooperation between the different levels of the government. All spheres of government must observe and adhere to the principles which have been provided in the constitution as the principles of co-operative government. Section 41 of the South African constitution under the heading of **'Principles of co-operative government and intergovernmental relations'** envisions the ideas of cooperative federalism. The constitution elucidates that all spheres of government and all organs of state within each sphere must preserve the peace, national unity and the indivisibility of the Republic; secure the well-being of the people of the Republic; implement effective, transparent, accountable and coherent government for the Republic as a whole; be loyal to the Constitution, the Republic, and its people; respect the constitutional status, institutions, powers and functions of government in the other spheres.

The constitution has forbidden the various spheres of government from assuming any power or function except those conferred on them by the Constitution and it has directed them to exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. The cooperative federalism involves cooperating with each other in mutual trust by fostering friendly relations;

[2] Section 40 of the 'Constitution of the Republic of South Africa, 1996' available at- http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN005172.pdf

assisting and supporting each other; informing each other and consulting on matters of common interest; co-coordinating their actions and legislation with each other; adhering to agreed procedures; and avoiding legal proceedings against each other. The constitution directs that the acts of parliament should establish or provide for structures and institutions to promote and facilitate intergovernmental relations and it must provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. The constitution opposes the idea of getting solution to intergovernmental disputes by means of court verdicts. So, it says that every reasonable effort must be made to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court. The constitution directs the courts as well to return the disputes back to the organs of state involved if there was not enough effort for settling dispute through non-judicial mechanisms.

There is distinctive power division between the province and the national government. **Schedule 5** of the constitution explicates the exclusive power of the provinces and the matters under **schedule 4** are the area of common competencies. But Murray 2001: 72) opines that the constitution gives provincial governments and in certain cases, the national government the power to intervene in areas reserved for municipalities to monitor developments, to give support, to promote municipality and finally and more boldly to see to the effective performance by municipalities of their functions. So the division of powers amongst the spheres does not stop with the allocation of specifically listed subjects but with reference to the capacity of different governments and their needs. However there is an explicit list of some of the concurrent jurisdictional areas which are: administration of indigenous forests; agriculture; animal control and diseases; consumer protection; cultural matters; disaster management; education at all levels, excluding tertiary education; environment; health services; housing; industrial promotion; language policy and the regulation of official languages; nature conservation, excluding national parks, national botanical gardens and marine resources; pollution control; population development; public transport; regional

planning and development; road traffic regulation; soil conservation; tourism; trade etc.

The matters of exclusive provincial legislative competence are: abattoirs; ambulance services; archives other than national archives; libraries other than national libraries; liquor licenses; museums other than national; provincial planning; provincial cultural matters; provincial recreation and amenities; provincial sport; provincial roads and traffic; veterinary services, excluding regulation of the profession etc.

The municipalities, as a sphere of the local government have been established in the whole of the territory of the South African Republic. The municipalities are of three categories: a municipality that has exclusive municipal executive and legislative authority in its area; a municipality that shares municipal executive and legislative authority in its area with a municipality of third category within whose area it falls; a municipality that has municipal executive and legislative authority in an area that includes more than one municipality.[3]

The executive and legislative authority of the municipalities is vested in its Municipal Council. The municipal councils are composed of elected members on the proportional basis and can be appointed ones. The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. The objectives of the local government are to provide democratic and accountable government for local communities; to ensure the provision of services to communities in a sustainable manner; to promote social and economic development; to promote a safe and healthy environment; and to encourage the involvement of communities and community organizations in the matters of local government.

The local governments have competency on the matters of local concern like- beaches and amusement facilities; billboards and the display of

[3] Section 155 of the South African constitution.

advertisements in public places; cemeteries, funeral parlors and crematoria; cleansing; control of public nuisances; control of undertakings that sell liquor to the public; facilities for the accommodation and burial of animals; fencing and fences; licensing of dogs; licensing and control of undertakings that sell food to the public; local amenities; local sport facilities; markets; municipal abattoirs; municipal parks and recreation; municipal roads; noise pollution; ponds; public places; street trading; street lighting; traffic and parking. The constitutional duties of the national and provincial government is that they must, by legislative and other measures, support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

Unlike the Russian Federation, the residual powers are vested in the national government in South Africa. Devolution of more powers to the provinces was looked at with apprehension since that could lead to a situation where the national government's efforts to overcome the legacy of apartheid and to build a new national identity would be thwarted. Experiences in the Western Cape Province, during transition, where the ruling National Party attempted to manipulate municipal boundaries to exclude Black communities, and in Kwazulu-Natal, where the Inkatha Freedom Party government expressed its intention to establish a Zulu kingdom reinforced these fears (Levy and Chris Tapscott 2001: 5).

Although the constitution clearly specifies the exclusive and concurrent list of competence of provincial and national government, the autonomy of the provinces may be overridden when the province can not or does not fulfill an executive obligation in terms of national legislation or the constitution. Considering the aforementioned powers of the national sphere of the government and residual ones, South Africa seems a 'unitary state'. Even the constitution itself says that South Africa is 'one sovereign democratic state'. Parliament may legislate the matter in the exclusive provincial competence when it is necessary to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services;

or to prevent unreasonable actions taken by a province which is prejudicial to the interest of another province or to a country as a whole[4] (section 44.2).

However the provinces can adopt their own constitution. The National Party-led Western Cape and Inkatha Freedom Party led KwaZulu Natal have been fast in adopting their respective constitution but first attempt of KwaZulu- Natal to enact constitution was disrupted by the Constitutional Court in 1997. The draft constitution, which later approved by the legislature of KwaZulu- Natal had provided for strong federal proposition. The draft proposed the provinces as a kingdom with the retention of Zulu monarch without executive power. The kingdom also would have its own independent judiciary, constitutional court and militia (Pottie 1999: 24). This shows that the South African political system is not based on the principle of full-fledged federalism. Subsequent to the ruling of the Constitutional Court the provincial legislature dropped the demands that were not in accordance with the national constitution. In any case the provinces have enacted few pieces of legislations since the interim constitution was adopted in 1994.

It seems that the South African federalism has been influenced by the concept 'the danger lies in the extremes'. The African National Congress was not initially in favour of federalism but it was compelled to adopt federalism by the intense pressure of the National Party and the Inkatha Freedom Party. Later all the stakeholders of the South African politics agreed on the middle path that an over-powerful center prevents at inception the forging of one nation and over- powerful regions on the other hand can lead to disruption and the ultimate destruction of one nation. Multi-sphere system of federalism was accepted after a Confidential Report to the Political Parties in March 1993, prepared by a group of experts for the Consultative Business Movement.

The racial or regional division of provinces was not like in the cases of Nigeria and Ethiopia etc. However cultural differences are recognized in the

[4] Section 44.2 of the South African constitution.

constitution- in the Bill of Rights in Section 6 on National Languages, in Chapter 12 on **Traditional Leaders**, in which demands for setting up a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. Many of the provinces are ethnically diverse, with the result that much of South Africa's ethnic politics will be played out within the provincial sphere and in the local sphere of the government. So, the multi-sphere system of the South African government is largely suitable for managing the ethnic diversity by engaging ethnic leaders at various levels of the political system. In addition, the dispersal of political authority may well mean that some ethnic tensions may be managed at the provincial level, and thus not threaten national political stability (Simeon and Murray 2001: 91).

The provinces have been given very limited rights in the field of finance. In this regard, the basic directives are set out in the Sections 214-216 of the constitution and in the Intergovernmental Fiscal Relations Act. There is a single collection of revenue from which each sphere of government is entitled to an equitable share. However while distributing a wide variety of criteria are taken into account, including the national interest and the needs of the national government. Formally, all revenue raised nationally provinces to perform their tasks, and the need to combat economic disparities within and among provinces (Simeon and Murray 2001: 74).

A Comparison

The federal systems in the two countries are quite different from each other. Russia adopts asymmetrical federal proposition and the South African system of federal scheme is symmetric. Constitutionally the residual powers are vested in the regional government in Russia but they come under the jurisdiction of the national government in South Africa. Moreover the Republic of South Africa emphasizes intergovernmental assistance adopting the principles of the co-operative federalism. In South Africa, the local level of governments i.e. - municipalities have been structured with vast responsibilities. The asymmetric

federalism as in Russia leaves ground for the competitive relations thereby creates the economic disparity which may lead to political instability. There are disparities among the regions of Russian Federation in industrial development and natural endowments which leads to high differences in gross regional product and thereby generates region-wise disparities in terms of per capita income. In 1998, the differences between highest (Tyumen oblast) and lowest (Ingushetia republic) GRP per capita was 18 fold, with ratios to the Russian mean GRP per capita ranging from 3.8 to 0.2 (Martinez-Vazquez, 2002). In this situation the wealthier units either demand more autonomy or they play de facto dominant role in national politics. Asymmetric treatment of what are supposed to be equal 'subjects of the federation' fast give rise to resentment, lack of solidarity and non-cooperative behavior among the regions. Such possibility of political instability which sometimes might result in state instability has been minimized in South Africa. Many regions violated or ignored federal legislations and defended the supremacy of their own constitution during transition in Russia. It was mainly due to the provision of asymmetry.

Representation of the constituent units in the upper chambers of the national legislatures is also varied in the two countries. Two persons from the Russian regions represent the federal units and they have one vote each but ten persons represent South Africa as a delegation with one vote. The regional representatives to the Federation Council are not guaranteed to represent the diversity of the region but in South Africa, the delegates can not be from the same party. With this provision of the constitution, there is more possibility to represent the people from different ethnicity. The parties in South Africa are somewhat based on race and ethnicity. The constitution directs that national legislation must ensure the participation of minority parties in both the permanent and special delegates' components of the delegation in a manner consistent with democracy.

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Conclusion

Constitution defines the boundary within which the individuals, institutions devised under (as per) it and the government exercise their rights and perform their duties. It is fundamental political principle of the state upon which governmental, institutional and people's powers are regulated. The constitution, either in the form of a single codified document or uncodified traditions jurisprudences, conventions, customs, judicial interpretation etc., spells out the system of governance and limitations on the sovereign power of an autonomous political entity. It is more a means than an ends of a political entity.

Nonetheless, the constitution today should ensure the participation of the people in politics, rule of law, limitation in the power of the person in authority, maximum of individual liberty etc. This concept has been called constitutionalism. So it can be said that the constitutions should operationalised in the light of ideal provided by constitutionalism.

There are various types of constitutions in the world in terms of system of government. The Constitution of the Russian Federation and that of the Republic of South Africa, drafted in 1990s, have adopted some ideas from the constitutions of the US, UK, France and Switzerland. The US constitution is remembered for presidential system of government and ideal separation of powers with checks and balances. The French constitution is known for the double executive in the system of government. Though the presidential powers are not exactly the same in the three countries, basic ideas of the Russian presidency has largely been derived from the US and French system of government. Likewise the constitution of the UK perfectly epitomizes and that of Switzerland largely represents the parliamentary system of the government. The South African constitution has been enriched by the norms of these aforementioned two documents. The co-operative federalism of the Confederation of Switzerland is, invariably, an inspiration for the South African Republic despite the provision of collegial executive in the Swiss constitution which is unique in the world.

The constitutions evolve or are enacted in a particular historical setting. The political and social contexts of the time determine the very nature of the constitutions. The constitutions of the Russian Federation and the South African Republic can not be exceptions. The October Manifesto of 1905 demonstrates the partial victory of the people over the Tsars that's why people were granted some rights in Russia. Other constitutions thereafter were enacted under the communist domination. Therefore they envisaged Russia as an ideological state. Likewise the South Africa Act, 1909 legitimized the dominance of the British over the Afrikaners and when the British rule weakened, the new constitution was drafted with the provision of a ' republic'. So, as the political balance changes the effect of this can be seen on the constitution. In short constitutions are framed in favour of decisive or victorious powers in the backdrop their making.

The nature of the existing Russian and South African constitutions should also be evaluated on the basis of background circumstances in which they were enacted. The Russian constitution was drafted in the backdrop of the president-parliament struggle. The President was victorious. So, the constitution was enacted allotting enormous power to the President. On the other side the South African constitution was drafted in the background of a popular movement. The people had a long struggle against segregation and foe democratic rights. So, the constitution reflects these aspirations of the people.

The executive, legislature and judiciary are the main pillars of the government. The independence and interdependence of these three organs of the government embodies the idea of rule of law, ensures the fundamental rights of the people and thus epitomizes the notion of the constitutionalism.

An assessment of the three major branches of the Russian political system clearly shows that the executive, particularly the President, wields enormous powers. The presidency is at the helm of the national affairs. Unlike in the US system of presidential government, the Russian president exercises more legislative powers by which the legislative body of the state seems to have

deflated. In Russia, there is less chance of developing party-system in its full strength. Lack of the nascent party system is harmful for the democracy and it may sometimes lead to the state instability. The judiciary has not been given the status of the guarantor of the constitution. It is not regarded beyond political influence since many court decisions have been labelled as 'telephone law'. This helps increase people's indignation towards the entire political system.

In South Africa the President can not be separated from the council of ministers as it is basically a parliamentary system of government. The President acts both as the head of the state and the head of the government. The head of the government (President in South Africa's case, otherwise the Prime Minister) has to take the parliament into confidence in a parliamentary system. But the head of the government also has some prerogatives like dissolution of the popular house. This right of the South African President is limited. This provision of the constitution tilts the balance against the President. Since the judiciary of South African Republic is the guarantor of the constitution and has the right to judicial review, the guidelines and verdicts of the judiciary are supplement the existing laws to some extent. It equally helps democracy develop by safeguarding the rights of each branch of the government and the liberties of the people. But judicial supremacy may also lead to status quo.

Amongst the three major organs of the government in Russia the legislature and judiciary are rather weak in their respective area of jurisdiction. So, in Russia, the influence of the legislature needs to be increased, not only for a balance the powers among the major branches of the government but also for the emergence of viable democracy. In South Africa, the President should not be bound by the parliament for petty reasons.

The constitutions of the Russian Federation and South African Republic are the product of the decade of 90s. They both adopted the federal system of government. The history of the Russian federal experience can be illustrated in two points after dissolution of the Soviet- the era of loosening grip over regions; and

the era of consolidating power by the centre. The first period can be counted till 1998 and thereafter second period till present day. The Russian asymmetric federalism during first period was not viable for the country as it invited state instability and there was a chaos and threat to the integrity of the state. During the second period, the federal features and norms have been minimized. The President's right to dismiss and dissolve the regional executives and legislature and the imposition of Presidential Representatives over the elected heads of the regional executives are the perfect example of this. The asymmetric nature of the federalism had played some part in past instability of the Russian state and possibly it will keep threatening if the economic situation exacerbates (like the situation in Russia just after disintegration of the Soviet). The constitution has paid no attention in representing the ethnic group in the upper house of the Federal Assembly as Russia is a multi-national country. It could be possible and helpful for maintaining state stability. The asymmetric federalism, as in Russia, leaves scope for uneasy competition among the constituent units which could lead to instability in the state.

South Africa is quasi- federal state. Its strong point is the provision measures to maintain stability and reduce confrontation among the units. Mutual understanding in resolving issues between the center and the provinces makes federal cooperation easy. Three tiered of the governments in South Africa, with their exclusive functional areas helped a lot in managing the minorities engaging them in different spheres of the government. The electoral system has played eminent part in it as well. The representation of the ethnic groups in the upper house of the national parliament is possible as the constitution has, overtly, said that as far as possible there should be representation of the minority group in the National Council of provinces. But the power of the national government to encroach upon the jurisdictional areas of the provinces and that of the provincial government to encroach on the areas of municipal competences is making governmental system as a 'unitary' state.

Appendix 1

Article 65 of the Russian Constitution

1. The Russian Federation shall consist of the subjects of the Federation: Republic of Adygeya (Adygeya), Republic of Altai, Republic of Bashkortostan, Republic of Buryatia, Republic of Dagestan, Ingush Republic, Kabardin-Balkar Republic, Republic of Kalmykia -- Khalmg Tangch, Karachayevo-Cherkess Republic, Republic of Karelia, Republic of Komi, Republic of Mari El, Republic of Mordovia, Republic of Sakha (Yakutia), Republic of North Ossetia,' Republic of Tatarstan (Tatarstan), Republic of Tuva, Udmurt Republic, Republic of Khakasia, Chechen Republic, Chuvash Republic -- Chavash Republics; Altai Territory, Krasnodar Territory, Krasnoyarsk Territory, Maritime Territory, Stavropol Territory, Khabarovsk Territory; Amur Region, Arkhangelsk Region, Astrakhan Region, Belgorod Region, Bryansk Region, Vladimir Region, Volgograd Region, Vologda Region, Voronezh Region, Ivanovo Region, Irkutsk Region, Kaliningrad Region, Kaluga Region, Kamchatka Region, Kemerovo Region, Kirov Region, Kostroma Region, Kurgan Region, Kursk Region, Leningrad Region, Lipetsk Region, Magadan Region, Moscow Region, Murmansk Region, Nizhny Novgorod Region, Novgorod Region, Novosibirsk Region, Omsk Region, Orenburg Region, Oryol Region, Penza Region, Perm Region, Pskov Region, Rostov Region, Ryazan Region, Samara Region, Saratov Region, Sakhalin Region, Sverdlovsk Region, Smolensk Region, Tambov Region, Tver Region, Tomsk Region, Tula Region, Tyumen Region, Ulyanovsk Region, Chelyabinsk Region, Chita Region, Yaroslavl Region; Moscow, St. Petersburg -- federal cities; Jewish Autonomous Region; Aginsky Buryat Autonomous Area, Komi-Permyak Autonomous Area, Koryak Autonomous Area, Nenets Autonomous Area, Taimyr (Dolgan-Nenets) Autonomous Area, Ust-Ordynsky Buryat Autonomous Area, Khanty-Mansi Autonomous Area, Chukchi Autonomous Area, Evenk Autonomous Area, Yamal-Nenets Autonomous Area.

2. Accession to the Russian Federation and formation of a new subject of the Russian Federation within it shall be carried out as envisaged by the federal constitutional law.

Appendix 2

Article 103 of the South African Constitution

1. The Republic has the following provinces:
   a Eastern Cape
   b. Free State
   c. Gauteng
   d. KwaZulu-Natal
   e. Limpopo
   f. Mpumalanga
   g. Northern Cape
   h. North West
   i. Western Cape.

2. The geographical areas of the respective provinces comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A.

3. a. Whenever the geographical area of a province is re-determined by an amendment to the Constitution, an Act of Parliament may provide for measures to regulate, within a reasonable time, the legal, practical and any other consequences of the re-determination.

b. An Act of Parliament envisaged in paragraph (a) may be enacted and implemented before such amendment to the Constitution takes effect, but any provincial functions, assets, rights, obligations, duties or liabilities may only be transferred in terms of that Act after that amendment to the Constitution takes effect.".

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