

13-116293

**TITLE: THE ESTABLISHMENT OF THE CONSTITUTIONAL  
COURT IN RUSSIA and  
THE COMMUNIST PARTY CASE**

**AUTHOR: YURI FEOFANOV**

**THE NATIONAL COUNCIL  
FOR SOVIET AND EAST EUROPEAN  
RESEARCH**

1755 Massachusetts Avenue, N.W.  
Washington, D.C. 20036

PROJECT INFORMATION:\*

CONTRACTOR:	Lehigh University
PRINCIPAL INVESTIGATOR:	Donald D. Barry
COUNCIL CONTRACT NUMBER:	808-02
DATE:	December 14, 1993

COPYRIGHT INFORMATION

*Individual researchers retain the copyright on work products derived from research funded by Council Contract. The Council and the U.S. Government have the right to duplicate written reports and other materials submitted under Council Contract and to distribute such copies within the Council and U.S. Government for their own use, and to draw upon such reports and materials for their own studies; but the Council and U.S. Government do not have the right to distribute, or make such reports and materials available, outside the Council or U.S. Government without the written consent of the authors, except as may be required under the provisions of the Freedom of Information Act 5 U.S.C. 552, or other applicable law.*

---

\* *The work leading to this report was supported by contract funds provided by the National Council for Soviet and East European Research. The analysis and interpretations contained in the report are those of the author.*

### NCSEER NOTE

The author, until his recent heart attack Editor-in-Chief of the Journal Zakon and chief legal correspondent for Izvestia, presents this legal-political analysis of the Russian Constitutional Court and the Communist Party case as the first of an expected series on Russian political justice to the summer of 1994. He concludes that in the Party case the Court had neither the legislative norms nor the legal rules to recognize the crimes of the Party. Nonetheless, the Court proceeded, and its sessions more and more took on the character of a political demonstration than of a judicial proceeding. That is history. But his comment on that score may be very pertinent now. "Politics in contemporary Russia are so closely tied to law that the Court found itself unable to separate the two. . . . In times of discord, when one political force destroys another, when the battle of the proponents of the 'old' and the 'new' is a fight to the finish, and when the struggle for power reaches a revolutionary incandescence, jurisprudence typically falls under the influence of politics."

## CONTENTS

Introduction . . . . .	1
Castling Toward the Law . . . . .	1
The Party and the State . . . . .	3
Politics and Law . . . . .	6
Legal but Criminal? . . . . .	8
The President and Themis . . . . .	10
Egor Ligachev and Mikhail Gorbachev . . . . .	13
Verdict . . . . .	15

## **The Establishment of the Constitutional Court in Russia and the Communist Party Case**

by Yuri Feofanov

In 1991, after the August putsch had been put down, the Communist Party of the Soviet Union, which had ruled the country for three-quarters of a century, was suppressed. In 1993 it came back to life, re-established with the convening of a Party congress.

Between these two events was the year 1992, half of which was consumed by the "CPSU case" in the Constitutional Court. It was not a propitious year for the case. This year of economic reform, with the launching of private entrepreneurship and of the market, but also of incredible price escalation, made many people long for the recent past.

In the Communist Party case, Russian society seemed to expect two things from the Constitutional Court: a Russian Nuremberg process, with a resulting de-communicization (similar to the German de-nazification); and, at the same time, an affirmation of the principles of democracy and law. Alas, these were mutually-contradictory expectations. The Russian Constitutional Court did not possess the legal authority of the Nuremberg tribunal; to disregard the law and pursue the methods of the organization that it was trying, subjecting legality to the exclusive interests of political power, would mean to compromise the very idea of a law-based state.

During the proceedings the appalling crimes of the Party were again and again corroborated. At the same time it became clear that the Court possessed neither the legislative norms nor the legal rules for recognizing this fact. Thus the Court, in refusing to declare the criminal nature of the Party in the CPSU case, failed the hopes of the democratic public. But by that fact it affirmed that the establishment of a legal order in Russia was becoming a reality.

### I. Castling Toward the Law

The Communist Party case was initiated not by the democratic forces that won in August 1991 but by the Party itself, on the basis of its having been suppressed. A group of people's deputies of communist orientation brought suit. A long castling (as it would be called in chess) in the direction of the law was a clever move. It caught the democrats unaware, and they were

forced to make a counter move with a knight: they brought suit seeking to have the Communist Party itself declared unconstitutional. This immediately created a conflict. In the law on the Constitutional Court there is no provision for evaluating political and social organizations; this prerogative of the court was established in a hurriedly adopted (in April 1992) additional article of the Constitution--Article 165-1.<sup>1</sup> Naturally, at the first session of the Constitutional Court a dispute arose as to the legality of hearing a case from "the President's side." The question was asked: does a deputy or a group of deputies have the right to ask the court to make a legal evaluation of the activity of their political opponents? The court interpreted this gap in the law in favor of allowing the review of such petitions, a conclusion which I found questionable.

Immediately thereafter a controversy took place about who was to represent the CPSU side. The Court suggested that former Party leaders Gorbachev, Ivashko and Kuptsov undertake the task themselves. The first two refused. Representatives of the suppressed Party raised the question about suspending of suppression and calling a congress that could issue the authority for representation. The Court did not accept this. In the end, Valentin Kuptsov, who two weeks before the putsch had become a secretary of the Russian Communist Party, became the official representative along with former Party worker Viktor Zorkil'tsev. The "accusers" of the CPSU were Professor Mikhail Fedotov, people's deputy Sergei Shakhrai, and advokat Andrei Makarov. Both sides invited well-known lawyers as experts.

When the trial started, three verdicts seemed possible:

1. The President's edicts would be found legal, and the Party unconstitutional;
2. The edicts would be found unconstitutional and the Party legal;
3. The edicts would be found to have exceeded the President's authority, but the CPSU

was unconstitutional in any case.

Another variant was impossible: to find the edicts legal and the Party constitutional. No one anticipated that the court would reach a decision that differed from all of the predicted variants and that the duel would end up with the score 1-1, with the advantage to the Communists.

---

1. "The Constitutional Court of the Russian Federation will decide the constitutionality of . . . political parties and other public associations . . ."

Evidently this result was predetermined by the duality of the situation about which I spoke at the beginning: the obviousness of the illegality of the Party's acts and the impossibility, as they say in Russia, of "placing them under an article" (*podvesti pod stat'iu*) of the law. On the one hand the court was faced with the awful facts of the crimes of the Party, which had usurped power, had ruined the country, had eliminated the backbone of the people--the peasantry, had established the unequal persecution of the faithful, had made terror an instrument of power-holding, and had unleashed a whole series of adventurous military conflicts culminating in the ten years of war in Afghanistan. And on the other hand was the court's legal impotence in assessing these and other facts.

How can the unconstitutionality of the CPSU be asserted when the Party not only was mentioned in the Constitution but was accorded a leading role by the basic law? It would be necessary to declare unconstitutional the Constitution of 1977 and all Soviet constitutions. Would this mean declaring the state itself unconstitutional? Perhaps from the "pure law" point of view, this might be plausible: with the dismissal of the Constituent Assembly in 1918, power had been usurped by Lenin and his team. But the world community had long recognized the USSR as a legitimate state; the General Secretary (Gorbachev) had signed international documents, not masquerading as a state official, as Khrushchev and Stalin had done in their time.

History is a tricky matter. Can one raise the question of legitimacy, for instance, of the British monarchy? The present dynasty took the throne when the legal monarch was removed in the Glorious Revolution. It was preceded by a family that was crowned after the War of the Roses. Before that the country was run by a group from Normandy under William the Conqueror, who invaded the island and seized legal authority by force. The seizure of power by the Bolsheviks in 1917 and the dispersal of the Constituent Assembly in 1918--these were acts of crude force. But . . . history has covered over this shame.

## 2. The Party and the State

The people accepted and supported the authority usurped by the Bolsheviks, the world community recognized it, and this criminal regime even became one of the founders of the UN. Connected with the activity of the CPSU was the creation of the ideology and practice of a

unique despotic power. In this system of anti-law, the tyranny of the state exceeded all bounds, it became "limitless" (bespredel)--a word particularly popular in Russia now. Usually the repressiveness of the Soviet regime is associated with the Cheka, the GPU, the NKVD, the KGB, organizations feared by the populace. But these were only the fighting detachments of the Party dictatorship. They are not unlike the oprichniki of Ivan the Terrible. The regime of that tsar was bloody and cruel both before and after the oprichnina; the monarch thereby carried out, as we would say now, genocide against his own people. But it would not occur to anyone to doubt the legitimacy of Ivan's rule.

Does this mean that the state has the right to commit crime? Is the legal authority responsible for terror, aggression, genocide? The Nuremberg tribunal answered these questions for the first time in history: a regime does not have such a right, its legitimacy does not save it from responsibility. And responsibility is not excluded by the appearance of "nationwide support," as was the case with the regimes of Hitler and Stalin.

One of the main questions before the Russian Constitutional Court was the relationship between the Party and the state. The defenders of the CPSU sought to show that the Party played only a leading role, and that all crimes were committed by "the organs." This was convincingly refuted. I will present just two documents that testify to the fact that the Party and the state in the USSR were fused into one appalling machine.

1. A coded message of January 10, 1939; it was sent to all obkom secretaries, republic Central Committee secretaries, and republic commissars of internal affairs:

"The CC ACP (b) [Central Committee of the All-Union Communist Party (Bolsheviks)] explains that the application of physical coercion by the NKVD was permitted in 1937 with the authorization of the CC ACP (b). The CC ACP (b) considers that physical coercion should be obligatorily applied in the future with regard to obvious and unrepentant enemies of the people, as a completely correct and expedient method"

2. And to remove doubt that this barbarian instruction came not only from the supreme leader and his grovelling followers, ten days later, January 20, 1939, this confirmation was sent:

"The CC ACP (b) announces that the application of methods of physical persuasion used by the NKVD was authorized from 1937 on the basis of the agreement of the Central Committees of the Communist Parties of all of the republics."

It is completely obvious that the Communist Party had seized the power of the state and had not just established a bloody regime in the state. It transformed the state into a kind of criminal-repressive mechanism in which crime was written into the norms by the legislator himself. Having in hand these and many other facts, could the Constitutional Court fail to evaluate them? By all human and heavenly canons it should not. But on strictly legal terms? This is an accursed problem for which there is no answer in the law.

The Nuremberg trials did not just rule that the major perpetrators of war crimes were to be sent to the gallows. They developed a special understanding of their role: the accused were living criminals, the court was in essence aggrieved mankind, and the tribunal was merely the embodiment of its will. But with all of this in mind, it is unlikely that anyone would venture to guess the verdict if the judges had been Germans.

The Communist Party had been considered "justified" in all of its criminal acts until its last days. The unanimous votes, the widespread approval of all of its crimes had become a norm of life. The Soviets guaranteed state totalitarianism, the kolkhozy became a form of serfdom; the trade unions were transformed into transmission belts for the Party to the masses. All institutions of the state, from the people's court to the army general staff, became simply Party structures, for even in military regulations there were norms subordinating the army to the Party. And all of this was seen as appropriate and normal.

Expert witness Professor Tumanov characterized the relations of the CPSU to the Soviet state as follows: "our state was merely a glove on the Party hand." And the rulers, who formed the upper levels of the apparatus, guided this hand. It was unimportant which sphere functionaries worked in--directly for the Party, in the Soviets, or in the economic or military apparatus--they were the same "glove" on a hand already dead, but the glove held the people by the throat, tenaciously and relentlessly. All of this needs to be judged. But a verdict of this kind will have to be rendered by the Court of History--the court that is most inoffensive to the Party authorities. The Constitutional Court, as I said, did not have the authority to become a Russian Nuremberg. Nonetheless, the Court proceeded. But its sessions more and more took on the character of a political demonstration than of a judicial proceeding.

### 3. Politics and Law

Politics in contemporary Russia are so closely tied to law that the Court found itself unable to separate the two. Perhaps it was unnecessary to make the separation. In times of discord, when one political force destroys another, when the battle of the proponents of the "old" and the "new" is a fight to the finish, and when the struggle for power reaches a revolutionary incandescence, jurisprudence typically falls under the influence of politics. Of course law never can reside completely in an ivory tower. The Chairman of the French Constitutional Council, R. Badinter, has said: "The main function of constitutional review is to permit the resolution of political questions by legal means."

Constitutional review is perhaps even more necessary in Russia than elsewhere, because in the course of its one thousand year history the deciding of state matters by legal means has been unknown. Soviet power on principal, even in its theoretical foundations, rejected law as an instrument of statehood. The perestroika of Gorbachev for the first time allowed the introduction of the term "law-based state" (*pravovoe gosudarstvo*). Until then the concept was considered a bourgeois heresy. Judicial power in the Soviet Union served either as the final link in the repressive mechanism or as an arbiter in the petty property disputes of those who were deprived of ownership (as is generally known, in the USSR the only property right available to citizens was of small items of personal property).

The perestroika-era discussions of a "law-based state" went no further than empty declarations. It never occurred to Gorbachev or anyone in his circle that judicial power should hold a co-equal position with the other branches, let alone be above them. The Russian Constitutional Court is, I would say, the accidental illegitimate child of our effort toward democracy. Its "legal" planned child was the Constitutional Supervision Committee, which passed into history with the USSR. According to the plan, Soviet law would take on the appearance of constitutional review without achieving its substance.

I attended almost all sessions of the Committee, interacted with lawyers on the Committee, and was well acquainted with its Chairman, Sergei Alekseev, the most prominent lawyer in Russia at present. The criticism of the Committee for its indecisiveness and half-way measures was to a considerable extent justified. But one must keep in mind that the law on constitutional supervision limited this "third power" in many ways, including by its very name.

The term "Court" was rejected. "This is not in our traditions," announced the speaker of the union parliament Anatolii Luk'ianov. The Constitutional Supervision Committee was hamstrung by cumbersome and unnecessary procedures; far from all appropriate acts were subject to its jurisdiction, etc.

But even though the Committee was seriously restricted in its authority, it adopted a number of decisions that irritated the authorities. It declared unconstitutional edicts of the USSR President and decrees of the government that, at the time, seemed quite daring. Laws of the Supreme Soviet and of the Congress of People's Deputies were, during the whole period of its existence, beyond its jurisdiction. The Committee on Constitutional Supervision disappeared soon after the August 1991 putsch.

The Russian Constitutional Court was created during the time of the Soviet regime, but by a "Yeltsinist" parliament. In the summer of 1991 the RSFSR Congress of People's Deputies was supposed to establish the Constitutional Court but unexpectedly suspended its work. It resumed work on the subject after the August putsch, but then it was, as they say, "another country." The post-August reformers did not fear the establishment of judicial power, even if, at its highest level, it was equivalent to them. The legislature accorded the Russian Constitutional Court the same authority in law that it would exercise in fact, not envisaging that legal rhetoric would be offset by arbitrariness. The Court received prerogatives that were uncommon in an autocratic state: to declare inconsistent with the Constitution any act of parliament or of the Congress, and any edict of the President, not to mention the acts of lower level institutions. And in the official hierarchical status in the state system the Constitutional Court occupied a similarly high place. The Chairman of the Constitutional Court came to be considered the person third in rank in the state.

Very early in its existence the Court was faced with the Communist Party case. Without particularly clear authority for reviewing the case, the Court nevertheless commenced with the hearing. And it quickly found itself in the midst of political discussions. The judges themselves, although they were wearing black robes for the first time in Russian history, often acted quite unjudicially and entered into the political fray. In the Communist Party case in particular a split developed within the Court. But more on that later.

## Legal but Criminal?

On the 7th of July 1992, after the defenders of the CPSU had acquainted themselves with the countersuit from the "president's side" and the procedural questions had been settled, the substantive review of the case began. It is not the purpose of this article to review the course of this long proceeding. I will limit myself to discussing several fragments of the case that, in my view, persuasively show the positions and arguments of the sides.

Two tendencies clearly developed in the case: the legal and the politico-publicistic. The majority of the experts were divided into two camps; in their adversary relationship they lost the quality of impartial specialists and became political opponents. But in presenting a large amount of factual information, both sides used a relatively small number of often-repeated arguments. The most important question for the expert was as follows: was the CPSU a political Party that directed the state or a super-Party structure that absorbed the state within itself? Perhaps the most honest and legally-sound presentation was that of Professor Sergei Bogoliubov. I quote from his statement and from questions put to him by Constitutional Court Chairman Zorkin: "Of course, there were both elements of a statified Party and a Partified state. The Party, occupying a position of power, did not permit other parties to exist and monopolized the administration of the state. One could say that in this state human rights were violated. But in assessing the constitutionality of the Party it is impossible not to see that the Party was accorded a place in the Constitution and therefore was constitutional. Many members of the Politburo were not Party functionaries, but held high state posts. And this was one of the factors in the achievement by the Party of state power, of the position that it occupied constitutionally.

V. Zorkin: Then what do you see as the difference between a parliamentary party and a non-parliamentary party?

S. Bogoliubov: It seems to me that this is close to the question of the constitutionality of a party and its unconstitutionality. That is, when a party carries out its activity and achieves state power by means of participation in elections, by capturing a majority in parliament, by achieving its leading role by parliamentary means, then conceptually it is parliamentary. That the ACP (b)—the CPSU never was during the whole time of its supremacy. But by 1991 the Communist Party had become a party of the parliamentary type.

V. Zorkin: Does this mean that during the period of the authoritarian-bureaucratic system there was no party of the parliamentary type?

S Bogoliubov: I think that the CPSU was a blend of elements of a party of the parliamentary type and elements of a totalitarian structure, but the first was purely nominal."

As is clear, Professor Bogoliubov took a cautious ambiguous position. Other "experts" were sharply polarized. The accusers of the CPSU showed that it had absorbed the state itself with all of its institutions, including legislative and judicial; that it was not a political organization but a criminal junta. The defenders of the Party showed that it was a social organization that was very influential, with the constitutional status of a leading force, but all the same a party that had created great power that had rallied the people around a noble idea; yes, it had committed enormous mistakes, but it was a political party, etc.

The argument more and more resembled an unstoppable carousel. It seems to me that the Court did not consider one factor that could have helped to escape from this vicious circle of political polemics. The Court did not consider the following legal issue: could the CPSU be viewed as a constitutional party, legitimized by time but still criminal? The "President's side" did not present the matter in this way: accept the fact that the CPSU was a political party, and the USSR was a state, and the Constitution was a constitution, adopted by a legally elected Supreme Soviet and approved by the people. Accept as a legal fact the special constitutional position of the CPSU as the leading force of society. All of this is according to the law, at least from the point of view of positive law, if not of natural law. And what follows from this? Does the designation as "the leading and directing force of society" give it any kind of legal rights and authority? I think not. Equally insignificant in a legal sense was its designation as the "nucleus of the political system," as it was described in Article 6 of the Brezhnev Constitution. Accept that this nucleus takes onto itself social powers, that it directs and leads by word, by slogan, by agitation. In the USSR Constitution there was not a single article that gave the CPSU the legal authority to send an army to other countries, to take charge of the state treasury, to sentence people to jail, to deprive them of citizenship, to name ministers, managers, and directors. But all this was done. The documents reviewed by the court testify to the fact that the Party exceeded its authority as outlined by the Constitution. For that reason

particularly, and not for any other reason, it set itself beyond the Constitution, beyond the law, even above the law.

Unwilling to look at the matter in this way, the Court focussed on the following thesis: the article of the Constitution on the leading role of the Party supposedly gave the latter the authority to do whatever it wanted. Having decided not to say "constitutional but criminal," the judges restricted their room for maneuver and the carousel of political discussion continued to turn. The Court found it impossible to get the parties to concentrate on legal matters, as they much preferred to focus on publicistic issues. In July, after several sessions that were more like public demonstrations than judicial proceedings, the Court announced a two-month break to acquaint itself with highly secret documents removed from the CPSU and KGB archives.

#### 5. The President and Themis

In the midst of this recess President Yeltsin issued an edict that seemed specially designed to compromise the Constitutional Court. By this edict the members of the Court were awarded higher class levels (in the system of civil service rankings). Why did the head of the executive branch do this, especially at the time when the Court was reviewing the legality of his acts? I discussed this matter with Constitutional Court Judge Tamara Morshchakova, and she was simply shocked by the President's act. Was this a covert bribe? The press, even those publications distant from communist orientation, were sharply critical of this act, this "knockout edict." This was especially the case since the legislature had established for the courts a fully democratic procedure for awarding class levels: it is left in the hands of judicial collegia (similar to the way it is done in the Federal Republic of Germany).

The President was quickly accused of pressuring the Court. But I think that the matter was both simpler and more complicated. Boris Yeltsin acted in the spirit and style in which he was raised, that of the Party Central Committee. This mode of operation holds: we reward everyone and we punish everyone. Boris Yeltsin, now an opponent of the Communist Party, acted in its traditions.

But was it really the intention of the President to influence the Court's decision in the Party case? Is that how one acts if one wants to embark on "telephone law" or "directed

legality"? Such things are not done loudly and openly. It is true that the Party organs had a long tradition of giving direct orders to the courts, for instance in cases involving dissidents, or with entrepreneurs who were not acting "according to Marx"; and sentences were often written or approved in Party offices. But in such instances nothing was allowed to go beyond the walls of these offices—at least officially. And here Boris Yeltsin was saying something in an official text that, by the canons of "telephone law", is strictly prohibited. Where is the logic in this? Could it be that there were no ways to cover up his efforts to influence the Court? It just doesn't add up, unless one allows for one possibility: that there wasn't any conscious effort to pressure the Constitutional Court but that this was simply an example of the recently common stupidity of the President's circle of advisors. A similarly careless act put the President's banning of the CPSU on shaky legal ground and led to the petition by its supporters to the Constitutional Court. Boris Yeltsin put down the August uprising in the name of law. On the rostrum at the victorious session of the Supreme Soviet, the Russian President signed the edict banning the Communist Party as an accomplice in the putsch. The edict mentioned having the matter reviewed by a court, which would have been a prudent act. But this was not done. As was already indicated, it was the banned Party brought the case to court. The victor, in true bolshevist style, considered its edict to be indisputable law, and deemed judicial examination of it unnecessary. Unfortunately, *neither President Yeltsin nor any of the other democratic forces* learned anything from the half-year long proceeding in the CPSU case.

I will now make a slight digression to consider a case that the Constitutional Court examined immediately after the verdict in the Communist Party case, since it bears on the President's handling of basic legal issues. A group of people's deputies of the same communist orientation petitioned the Court with regard to the constitutionality of the edict of the President, "On measures to protect the constitutional order of the Russian Federation" of October 28 1992. This act specifically applied to the Front for National Salvation, an organization, in the words of the President's edict, "directed toward inflaming national discord and representing a real threat to the integrity of the Russian Federation and the independence of neighboring sovereign states." It is true that the program announcements of the NSF's organizational committee, which led to the creation of the NSF, were of a truly extremist character. The President also ordered this committee dispersed and instructed the law enforcement organs "to

take measures to prevent the creation and activity of this organization and its structures." This preemptive act was explained in the preamble of the edict by reference to the recent "increased activity of groups that, in order to achieve their extremist political objectives, are resorting to unconstitutional acts designed to provoke disorder and destabilization of the situation in society."

The members of the NSF spoke in favor of the restoration of the USSR, and called the members of the Belovezhskii<sup>2</sup> agreement "putschists", even though the agreement had been ratified by the Russian Supreme Soviet and therefore had the force of law. But the National Salvation Front had not registered as a social organization and so was not considered to exist legally. This didn't prevent the commencement of criminal proceedings against its founders, who were accused of calling for the violent overthrow of the regime. But the President banned what, in a legal sense, did not exist. It should be noted that before the Constitutional Court proceedings began in this case, the President rescinded the edict, making it "the case of the legal apparition", as a representative of the President put it. Nevertheless the case was heard.

How should one assess this move of the Constitutional Court? If the edict was rescinded, why review it? From a purely legal standpoint, a court verdict regarding a edict that no longer existed was justified. The head of state exceeded his authority in banning a political movement. Declaring this act illegal, the Constitutional Court said: an agent of state authority is first and foremost responsible for the acts it adopts and for its actions; statements about the "essence of the case", the "tension of the moment" or "state necessity" neither remove from it the responsibility for observing the law nor justify the exceeding of authority. For Russia this generally-accepted norm requires continuous confirmation.

But this more than legally justified decision deepened the political split on the Constitutional Court itself, which had been evident at the time of the verdict in the Communist Party case. Judge Ernst Ametistov and Anatolii Kononov issued "separate opinions". At the court proceeding itself the presiding judge, Valery Zorkin, prevented all attempts by Judge Kononov to explain the details of the program of the National Salvation Front in order to

---

2. The retreat near Minsk where the USSR was declared dissolved and the Commonwealth of Independent States was founded in December 1991.

demonstrate their semi-fascist character. He insistently focussed the judges only on the character of the edict itself, which was without doubt legally insupportable and had been rescinded by the President. The "antipresidential" line of Valery Zorkin was also soon to be demonstrated from the rostrum of the Congress of People's Deputies, but this matter is beyond the scope of this article.

#### 5. Egor Ligachev and Mikhail Gorbachev

In September, when the Court resumed its sessions, Chairman Valery Zorkin announced that the Court would no longer tolerate political demonstrations in the courtroom. He further stated that only lawyers would appear as experts before the court and that they would be required to limit themselves to legal matters. As it turned out, however, these statements had no effect. The debate continued to the end in the same way.

"After the campaign against the Party the campaign against the Soviets will begin"--said the defenders of the CPSU. Yes, answered their opponents, if the country continues its movement toward democracy, the question of the continued existence of the Soviets as a form of government will become unavoidable. Nazi totalitarianism found its state form in "Führerism". Communist Party totalitarianism was masked more carefully under the power of the Soviets, as if it personified the rule of the people.

But the question of the Soviets, which the Party "pulled on its hand" like a glove, was avoided by the Court. It arose in 1993 at the constitutional assembly in President Yeltsin's statement of alternatives: "either democracy or Soviets." Of course if the Constitutional Court had not avoided this question, the process of democratization would have followed a clearer course. But what happened, happened.

When I heard the speeches of the defenders of the discredited communist doctrine, I thought at the time: what are these people trying to achieve? A return to the past? Satisfaction of their pride? I heard, but I was not alone in not believing, particularly after the chilling documents and the facts of the full moral degradation of the Party leadership came to light. No-one believed, except one person--Egor Ligachev. His two-day testimony before the Court convinced me of the sincerity of the convictions of this man and of his unquestionable

personal honesty. And this was horrible. This fanatic had been in power--second in command in the government.

As a witness Egor Ligachev took the stand as if he were at a Party congress. Words about a mighty power; about the Party that guided the people to the victory over fascism; about democratic centralism as the pinnacle of democracy; about perestroika, which was initiated by the Central Committee; about the magnetic force of the CPSU, which, although presently repressed, was striving so valiantly to re-establish and rehabilitate itself.

"The general line" of most witnesses for the CPSU was consistent: the Party had acted correctly, although some mistakes had been made. They said the same thing in almost the same words. Why did the testimony of Ligachev seem, to me at least, unlike all of the others? The line taken by most witnesses was as follows: under Stalin, Khrushchev, Brezhnev, the Party truly ran everything, substituting for the state organs, but at the moment an edict was issued the situation changed, and for that reason there could be no talk of unconstitutionality. Egor Ligachev did not endorse this scheme. He had an honest position: the Party managed the state in all respects, and did so correctly, and now it is necessary to return all of these functions to the hands of the Party, to re-establish the USSR and the leading role in it of the CPSU.

"I don't know the 'new thinking' of Gorbachev, I only know Party thinking," said Ligachev. "Therefore I was removed from the leadership." He considered the anti-democratic distortions of the regime absolutely normal, designed specifically to serve the welfare of the people and society. Did he consider it normal that the Party even ran the judicial system? "And how could it be otherwise," answered Egor Ligachev. "The Party has its own proven team--nomenklatura--about 22 thousand people; this is the backbone of the state."

It would be difficult to come up with more persuasive evidence in the months of testimony from the President's side: the Party stretched the state over its hand like a glove.

Egor Ligachev was a true comrade-in-arms of Mikhail Gorbachev. He played a nearly decisive role in Gorbachev's being named General Secretary. And now, as a witness in the Constitutional Court, he sincerely said: "Gorbachev . . . He was the biggest mistake in the selection and placing of personnel, my fatal mistake . . ."

On the 7th of October Mikhail Gorbachev was supposed to appear in court. But he announced categorically that he would not appear, because the proceedings "were of a political character." In human terms one can understand Gorbachev. And one can understand him as a product of the Party apparatus, where disrespect for the court traditionally reigned. Still . . . the proclaimer of the law-based state announced in a letter published in Komsomolskaia pravda: "As a citizen of Russia I revere the law and the constitution of the country . . . But I will not come to a court that bears the character of a political mob." Court Chairman Valery Zorkin stated that citizen Gorbachev insulted the court with his firm refusal to appear and give testimony as a witness. The whole affair ended indecisively. But it was a black mark on the complex process of creating a law-based state. Gorbachev remains Gorbachev, the state has changed little, and our legal consciousness remains frozen in time, i.e., when the Party was in power: the court is an institution that need not be taken seriously.

Nevertheless, I was not sure that the Constitutional Court had such a compelling need for witness Gorbachev. The court could, with some justification, see itself in Gorbachev's place: this person did so much for the country and yet both the left and the right want to trample on him. Thank God that the court did not rush to some kind of extreme measures with regard to Gorbachev. In life there are situations when the law should consider the circumstances and yield to them: "He who is only just is cruel."

## 6. Verdict

The proceedings in the Communist Party case began on 6 July, and the court handed down its decision on 30 November. In all there were 52 court sessions, at which a total of 46 witnesses appeared and 16 experts gave testimony on legal matters. The newspaper articles, television interviews, opinions and predictions on the case were too numerous to count. The President's side presented dozens of documents testifying to the crimes of the Party. One question remained constant: can one put a political party, an ideology, a history, on trial? Nuremberg also tried an ideology, party, and organization. In a number of countries allegedly disruptive political parties have been suppressed, but these parties did not run the countries in question.

Deposed monarchs have been tried and beheaded. And these acts in world history have always stirred up arguments among lawyers, if only because the acts that were being judged in court were committed under the laws of other regimes. The crimes of the Hitlerites were monstrous, they truly shook the world, and the international tribunal that considered the acts of the Nazi criminals tried to operate strictly within the framework of law. Up to the present, however, lawyers have not been in full agreement about the competence of the Nuremberg tribunal. Were its sentences just? Unquestionably. Were they indisputably legal? There is no single answer.

The verdict of the Russian Constitutional Court in the Communist Party case was rendered in a country rent by passions. The prohibition of the high organizational structure of the CPSU and the Russian Communist Party was declared constitutional. The primary territorial Party organizations were found legal and given the right to carry out activity in conformance with the law. That part of the property that the Party appropriated from the government was subject to appropriation; but the property that belonged exclusively to the Party was not subject to confiscation. To whom this property belongs will be decided by the courts.

On the basic question, which was officially referred to as "accompanying"--the constitutionality of the CPSU--the Court dismissed the case on the basis that in August 1991 the CPSU in fact ceased to exist, while the Statute of the Russian Communist Party had not been registered and so that Party vanished without being legitimized.

The trial, which had stretched out over four and a half months, was finished at the time when the previously covert controversy between the president and parliament spilled over into open hostility and led to the crisis of power. Society emerged from this crisis through the referendum of 25 April 1993 and through the constitutional assembly, which can by legal means eliminate the last traces of the Communist regime.

Soon after the case was decided, the Communists held a unity-restoring congress in which the inciters of the August putsch were treated like heroes.