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East European Constitutional Review

Volume 3, Number 3

Summer 1994

Volume 3, Number 4

Fall 1994

DEPARTMENTS

- 2 **Constitution Watch**
Country-by-country updates on constitutional politics in Eastern Europe and the ex-USSR.
- 26 **Special Reports**
Andrew Arato on the constitutional dilemmas of Hungary's disproportionate assembly; Stephen Holmes and Wiktor Osiatynski on the end of decommunization; Tanva Smith on the enforcement of basic rights in Russia.
- 86 **From the Center**
Conferences in Warsaw and Novosibirsk, two new legal journals on Eastern Europe, the Baltic Story, Russian Language Review and acknowledgement of support.

FEATURES

FOCUS: The Politics of Central Banking

- 48 **Introduction** *Dwight Semler*
- 53 **A Currency Board within a Central Bank:
Reflections on the Estonian Hybrid** *Sirm Kallas*
- 56 **Belarus: The National Bank as a Defender of Sovereignty** *Alexander Lukashuk*
- 60 **Monetary Policy and Central Banking in Russia** *Boris Fedorov*
- 66 **Constitutional Courts and Central Banks:
Suicide Prevention or Suicide Pact?** *Jon Elster*

ROUNDTABLE: Redesigning the Russian Court

- 72 **Introduction** *Lawrence Lessig*
- 74 **The Court Writes its own Law** *Alexander Blankenagel*
- 80 **Three Questions to the Authors of the Act** *Vladimir Chetvermin*
- 82 **A Second Edition of the Constitutional Court** *Sergy Pashin*

Country-by-country updates on constitutional politics in Eastern Europe

Constitution Watch

Albania

For a period of four or five months, up to the end of July this year, the Constitutional Commission did not meet. This period of quiescence, as well as other political factors, led the forces of the opposition to launch an extensive propaganda campaign against the governing Democratic Party (DP), which, according to opposition newspapers, was not showing the appropriate interest in the completion of the draft constitution and its presentation to Parliament. In a related development, the opposition submitted a motion earlier in the year directed against the prime minister, who is also chairman of the Constitutional Commission. They demanded explanations from him for the interruption of the Commission's work on the draft constitution and asked him to commit to a deadline for submitting the draft to Parliament. In contrast to a year ago, when the same issue was raised, the prime minister now made no promises as to when a draft would be presented to Parliament. He also claimed, notwithstanding the delay in presenting a draft constitution, that Albania could not really be said to be without a constitution. He pointed out that the existing constitutional laws, approved between April 1991 and March 1993, furnish a solid constitutional foundation on which the country can continue its path to the consolidation of democracy and a market economy. Naturally enough, his self-satisfied answers only inflamed critics of the ruling party.

In one of its July sessions, Parliament replaced a member of the Constitutional Commission with the secretary of the Democratic Party, Tritan Shehu, an anesthesiologist and former minister of health after the March 1992 elections. This replacement was interpreted by the opposition as a further maneuver by the DP to strengthen its position on the Commission. A few days after the switch, the Constitutional Commission held a short meeting in which a working group of several Commission members was established to resolve disagreements pertaining to the provisions regulating the Constitutional Court.

During 1994, a number of important and highly publicized trials took place, several of which are still before the

courts as *EECR* goes to press. These trials have attracted the attention of public opinion within and outside the country.

The twelve-year sentence of Fatos Nano, chairman of the Socialist Party (SP) and former prime minister (in 1991), was confirmed in July by the Court of Cassation. Last year Nano was stripped of his parliamentary immunity, arrested and charged with abuse of office. In April, the district court found him guilty of the theft of state property and the falsification of official documents, also ordering him to repay more than \$700,000. Later in the spring, a three-judge court of appeals affirmed his sentence, slightly reducing the amount he is required to repay. The sentence is now final. Each stage in the case was accompanied by an intense propaganda campaign on the part of the SP which naturally interpreted the judicial proceeding as a political show-trial. *Zeri i Popullit*, the SP newspaper, published many articles propounding Nano's innocence, and the SP leaders have also appealed to international organizations about the case. Many European organizations have expressed their concern, and the European Parliament has sent a letter to Albanian state organs urging a more moderate approach to the question.

Also of interest is a court decision that followed President Sali Berisha's pardon in early May of five persons punished under the much-criticized Albanian press law and related criminal laws because of offensive newspaper articles. At the time of the pardon, the judicial process had not been completed with respect to two of them, a reporter and editor of *Koha Jone*, the country's largest independent newspaper. As previously reported in the *EECR* (see *EECR Albania Update*, Vol. 3, No. 2, Spring 1994), in January a secret order of the minister of defense and a commentary on it were published without authorization. At the time of the pardon, this case was being appealed to the Court of Cassation. Despite the pardon, on May 31, 1994, the Court of Cassation reversed the convictions of the reporter and editor and found them not guilty, in a decision that mentioned the pardon only in passing. This decision has been the subject of much juridical discussion concerning, among other things, the question of whether the president of the

Republic can issue a pardon after a guilty verdict had been rendered but before the appeals process is complete.

Judicial proceedings against ex-President Ramiz Alia and almost all of the other former members of the Politburo of the Labor Party (the party in power under communism) have had and continue to have a broad echo. Initially, the principal accusations against them involved theft of state property, abuse of office and the violation of human rights. During their trial at the district court level, which began in May, these accusations were amended, leaving only abuse of office and human rights violations. During the judicial sessions, the lawyers for the defense attempted to prove that their past actions had been undertaken in full compliance with the legal requirements of the time. Notwithstanding their claims, in early July the District Court of Tirana found all of them guilty, meting out prison sentences ranging from three to nine years. Ramiz Alia himself was sentenced to nine years and was also ordered to return approximately \$12,000 to the state. Two of the defendants, for reasons of health, had their sentences suspended. All defendants have now appealed to the Tirana Court of Appeals.

Also receiving world-wide attention is the trial of five members of the leadership of the organization "Omonia," representing the country's Greek minority. Arrested several months ago, these five were charged with treason against the fatherland, espionage on behalf of the Greek police, and unlicensed possession of weapons. The case has further aggravated the already strained relations between Albania and Greece (which apparently nurses irredentist aspirations towards North Epirus). At the beginning of the proceedings, the prosecutor withdrew the charge of treason, leaving only espionage and possession of arms without a license. Two of the defendants have indirectly admitted meeting with agents of the Greek security forces, while another has admitted this directly. In comparison with some earlier trials, the prosecutor's office has worked with great care both in collecting evidence and in presenting legal arguments, but some aspects of the conduct of the trial have been criticized by neutral observers. On September 7, the five defendants were sentenced to six to eight years on espionage and weapons charges. Action has already been taken to appeal their cases. Greece has retaliated by expelling many Albanians working there, reportedly up to 50,000.

The past six months have seen the enactment of several significant pieces of legislation as well as an interesting decision of the Constitutional Court. A comprehensive law on industrial property (covering patent rights, trademarks and service marks, industrial designs and designations of origin) was approved in May, to be effective in July. Restructuring of both the private practice of law and the operations of notaries (who, in Albania as in many other civil law countries, must be trained jurists) was accomplished by laws which went into effect early in August. Both laws set up systems of organization and administration that are quite complex for a small

country and appear to open a door to central control. The government has indicated its intent to replace the sales tax with a value-added tax based on Western European models, but there is no indication yet as to when this will occur. A complete new civil code is under discussion by the legal commission of Parliament, and will reportedly be introduced in October. Similarly, a new criminal code is under discussion and is expected to be formally submitted to Parliament soon.

In a 5-4 decision, rendered at the beginning of June, the Constitutional Court overturned two articles of the law on the restitution of property to former owners passed in April 1993. The nullified articles had invalidated parts of certain privatization contracts entered into by the government since January 1991, taking the land from the new owners and returning it to former (pre-November 29, 1944) owners, while creating a compulsory joint ownership between the two. The Court grounded its decision on Albania's year-old charter of fundamental human rights and freedoms, finding the overturned part of Parliament's restitution law to be an infringement, among other things, of private property rights granted by the charter. This carefully reasoned decision is also notable as the first decision of the Constitutional Court accompanied by a published dissent.

Belarus

The country's first presidential elections took place in June and July of this year. On July 10, Alyaksandr Lukashenka, a state farm director, better known for his activities as head of the parliamentary commission on corruption, was elected the first president of Belarus.

A Belarusian presidency had been introduced for the first time in the new Constitution which went into effect on March 30, 1994. According to the relevant provisions, the president is deemed both head of state and head of the executive. Elections are valid only if more than 50 percent of the electorate participate. The president is elected directly by a simple majority.

The communist majority in the Supreme Soviet used the presidential elections as a pretext for not fulfilling their original pledge to hold early parliamentary elections in the spring of 1994. The "Party of Power" led by premier Vyachaslau Kebich tried to prolong its mandate. To a large degree, the electoral framework favored Kebich. According to the law, a candidate must either secure the support of seventy deputies or collect more than 100,000 voters' signatures in a period of two weeks. The campaign itself lasted one month.

Six out of two dozen contenders were registered as candidates. Prime Minister Kebich collected 260 deputies' signatures and 430,000 voters' signatures. Following him were the leader of the parliamentary opposition Zyanon Pazniak, MP Alyaksandr Lukashenka, former Speaker Stanislau Shushkevich, Belarus Communist Party Secretary Vasil

Novikau and leader of the Agrarian Union, Alyaksandr Dubko.

Kebich's team was unanimously accused of unfair play. Since most of the media in Belarus is state-owned, the prime minister enjoyed a glaring advantage in media coverage over rival candidates. Furthermore, the government stopped the publication of the republic's only independent weekly, *Swahoda* during the run-up to the election. Two liberal programs on the state radio, *Belaruskaya Maladzezhnaya* and *Krynitsa*, were shut down, and their producers fired. Kebich's opponents in the race experienced numerous difficulties in addressing a national audience.

Basing his campaign on a rapprochement between Belarus and Russia, Kebich was heavily favored by Moscow. On the eve of the elections, Russian President Boris Yeltsin met Kebich and pledged his support to the candidate; before the second round, Russian Premier Viktor Chernomyrdin visited Kebich in Minsk and signed a number of economic agreements. The Russian Orthodox Church exhorted the faithful to cast their ballots in favor of Kebich.

It is safe to say that, despite many abuses, the voting on June 23 was the freest poll in Belarus's sparse democratic history. Television bias favoring the prime minister backfired. The main issue for nearly all voters was an economy which, in the total absence of reforms, had lurched into a free-fall. In a classic protest vote, people fed up with the old guard rule snubbed the insider Kebich, who polled 17.4 percent, vastly preferring Alexander Lukashenka, who obtained 45.1 percent. The two front-runners were followed by Zyanon Paznyak with 12.9 percent, Stanislau Shushkevich with 9.9 percent, Aleksandr Dubko with 6 percent and Vasil Novikau with 4.6 percent.

On July 10, in the second round of voting, Lukashenka won by a landslide, polling 80.1 percent of the vote; Kebich ran even less well than in the first round, obtaining only 14.2 percent.

Ironically, Lukashenka is sometimes described as a younger version of Kebich. His climb to the top mirrors that of many other apparatchiks before him. He was an activist in the communist youth movement, a political commissar in the army, an ideological lecturer and, since 1987, a state farm manager. In 1990, he became an MP and headed the parliamentary faction "Communists for Democracy." Lukashenka was the only Belarusian deputy who voted against the dissolution of the USSR in 1991. His charming idols include Felix Dzerzhinsky, founder of the KGB, and Yuri Andropov, Gorbachev's predecessor and a former KGB chief.

Due to his extreme populism, Lukashenka is often referred to as the "Belarusian Zhirinovskiy." In fact, Zhirinovskiy's party hosted Lukashenka's press conference in the Russian Parliament during his visit to Moscow. He has acquired the reputation of a person with not very consistent views, capable of defending with great passion completely contradictory ideas. Lukashenka rose to fame as

head of Parliament's anti-corruption commission, threatening to expose the men in the government, "to send corrupt officials to the Himalayas," and "to give back to the people that which was taken away from them." His vehement criticism of the government gained him massive support from a people whose average monthly wage is less than 20 dollars, while monthly inflation, in the spring and summer of 1994, ran about 40 percent.

Lukashenka's manifesto included mutually inconsistent calls for closer ties to Moscow and a state-controlled economy. Obviously enough, his affection for Brezhnev-era economics (generous credits for agriculture and industry coupled with a freezing of prices in order to "end inflation") is hard to reconcile with his stated desire for a closer union with today's Russia which, comparatively speaking, is a hotbed of market economics.

Lukashenka was sworn in on July 20, 1994. The next day Parliament approved the president's nominations for the cabinet. Mikhail Chyhir, a former head of the Agrarian Bank, became prime minister, and a reform-minded deputy, Viktor Hanchar, became vice premier. At the same time, three key vice premiers from Kebich's cabinet retained their position. Alyaksandr Syanko, the Belarusian Ambassador to London, now heads the Ministry of Foreign Affairs and Vitaly Zakharenka became minister of the interior. The former minister of the interior, Uladzimir Yachorau, who was fired by Parliament this past January, chairs the KGB. Parliament rejected the president's proposal to appoint deputy Dmytro Bulahau, who was instrumental in Lukashenka's victory, to the position of chairman of the Constitutional Court. The president and Parliament have yet to agree on a candidate for this position. During the interim, Valerij Tikhinya holds the position of acting chairman of the Constitutional Court.

Lukashenka reaffirmed adherence to all international treaties and pledges to which Belarus is a part. He voiced his opposition to early parliamentary elections and called for a public accord. His first foreign visit was to Moscow where he met with Boris Yeltsin to seek financial assistance and discuss the formation of an economic union. Massive public support gives the new president a unique chance to start the painful reforms that Belarus so badly needs. Many doubt whether Lukashenka will rise to the task, however. What is more, his current popularity is emotional, not rational, and thus may not prove especially reliable.

Bulgaria

On May 11, the opposition Union of Democratic Forces (UDF) demanded a vote of no-confidence on the prime minister "for his inability to organize the activity and govern the Council of Ministers." The motion was based on the lack of either structural changes in the cabinet or a program by the government. On May 13,

Philip Dimitrov informed President Zhelyu Zhelev that the UDF would not participate in any cabinet during the current Parliament.

UDF held its Sixth National Conference on May 14-15. It decided that, if Parliament accepts the restructuring of the cabinet proposed by Prime Minister Berov, the parliamentary group of UDF would boycott the National Assembly. Stefan Savov, Chairman of the UDF parliamentary faction, was against this move, claiming that parliamentarism was the heart of democracy. The conference proclaimed that pre-term parliamentary elections were the only solution to the deepening political and economic crisis. It also decided that no persons linked to the former communist party (including those who had merely applied to become party members) should stand for MP and that the decision of the National Coordination Council should be binding for the parliamentary group.

The Movement for Rights and Freedoms (MRF) and the New Union for Democracy (NUD) declared on May 18 that they were withdrawing their support from the cabinet. On May 19, the government nevertheless survived a sixth vote of no-confidence (96 votes for the cabinet, 25 against). On May 20, however, structural changes proposed by the prime minister were rejected by the MPs, 116 to 108. (Philip Dimitrov commented that this was tantamount to an indirect vote of no-confidence, adding that, in case the government did not resign, it should be considered an usurper of power.)

Addressing the nation on May 21, President Zhelev appealed to parliamentary forces to reach an agreement on the preliminary elections. He warned the nation that the deepening political crisis might kill all trust in parliamentarism and democracy. He also suggested a "cabinet of national consensus." Both the Bulgarian Socialist Party (BSP) and the MRF refused to participate in the consultations for such an ad hoc arrangement, claiming that the country already had a government.

On May 23, Prime Minister Berov presented a proposal to the MRF, requesting an agreement among all parliamentary forces on a date for new elections at the end of October or the beginning of November. He suggested that a vote of confidence in the general policy of the cabinet be held in Parliament. He also stated that the government should be regarded as a "task cabinet" meant to fulfill its program by the autumn. He pled for help from the MPs who were supposed to pass the privatization program and the acts on the armed forces, bankruptcy, judicial system and the electoral system. On May 26, the cabinet won a vote of confidence, 125 in favor, 95 against.

Three draft amendments to the Constitution were presented to the Legislative Commission. (Two of them were presented by UDF MPs Luchesar Toshev and Vesselin Rashev, and the third was presented by Elisaveta Milenova of the BSP coalition.) All of these amendments stipulated that Parliament's term be prolonged during an interim cabinet.

According to the chairman of the Commission, Alexander Dzherov, the three drafts differed little from one another.

The conflict between the Democratic Party and the National Coordination Council of UDF regarding the parliamentary boycott grew deeper during the early summer. In an interview on June 13, Philip Dimitrov declared that there were no reasons for UDF to call off the parliamentary boycott. The National Coordination Council, however, decided at an extraordinary session that MPs should participate in the parliamentary discussions of the electoral law, the secret files, the state coat of arms and the judiciary system. A day later, UDF came out with a declaration that Parliament was violating the Constitution. It claimed that, after the UDF had started its boycott, the assembly had been constantly working even though it lacked the necessary quorum.

The National Coordination Council of UDF appealed, on June 21, to the other parliamentary forces to reject any new cabinet within the current Parliament. The same proposal was made in a radio interview by Yanaki Stoilov, vice chairman of the Supreme Council of BSP.

On June 22, the parliamentary group of UDF issued a declaration claiming that the parliamentary boycott actually favored BSP since it makes the adoption of laws by the pro-BSP majority easier. Zlatka Russeva announced after a meeting of the UDF parliamentary group that the group would insist on a joint meeting with the National Coordination Council for a reassessment of the boycott. A suggestion was made that the boycott should be aimed against the activity of the majority opposed to reforms. It should be carried out in plenary parliamentary sessions.

A new scandal arose inside the UDF when Stefan Savov appealed for the boycott to be brought to an end. The Democratic Party and the United Christian Democratic Center issued declarations against the UDF boycott on July 24. The membership of the Democratic Party in UDF was "frozen" with a decision of the National Coordination Council. In response, the parliamentary group of UDF issued a declaration on July 27 against the confrontation among various political forces in the coalition and demanded the resignation of the UDF leaders. On July 31, the Radical Democratic Party (RDP, led by Alexander Yordanov, chairman of the National Assembly) issued a declaration condemning the National Coordination Council of UDF for acting against the Democratic Party and against the Union and for using the parliamentary boycott as a means for revenge. It also accused the Council of using bolshevist methods.

On July 7, Minister of Defense Valentin Alexandrov insisted before the parliamentary Legislative Commission for more power to be transferred to him from the chief of the General Headquarters in the new "Act on the Armed Forces."

A memorandum of the Council of Europe was presented on June 9, stating that the independence of the courts had been endangered by the draft act on the judiciary. UDF representatives met with President Zhelev and requested a presidential

veto of the "Act on the Judicial System." But, on June 17, the act was adopted. It foresaw that all members of the Supreme Judicial Council should have accumulated five years of experience as practicing judges or prosecutors or investigation officers and not only as lawyers. That this provision had a political rationale is suggested by the fact that it deprives Ivan Grigorov and Ivan Tatarchev (both of whom were appointed during the brief period when the UDF controlled the majority in Parliament) of the opportunity to continue to be, respectively, chairman of the Supreme Court and Prosecutor General.

On July 4, President Zhelev used his weak veto power (Art. 101, para. 2 states that presidential vetoes can be overturned with the votes of 50 percent plus one in Parliament) and returned the act on the judicial system for a new hearing in Parliament. He based his objection mainly on Decision No. 3 of April 3, 1992, Constitutional Case No. 30/92. According to the president, the Court had ruled that Art. 130, para. 2 ("Eligible for election to the Supreme Judicial Council besides its *ex officio* members shall be practicing jurists of high professional and moral integrity with at least 15 years of professional experience") of the Constitution had exhaustively listed the requirements an elected member of the Supreme Judicial Council should meet and that no other requirements should be created short of amending the Constitution. The Court had ruled that the term "jurists" should comprise acting attorneys, too. Thus the president suggested that the refusal to count legal practice as an attorney toward the length of legal practice required by the act was unconstitutional. The president also suggested that the term of office of the elected members of the Council was set by Art. 130, para. 4 of the Constitution to be five years. He claimed that the mandate of the former Council as a collective body could not be terminated. (The act implicitly terminated it foreseeing in para. 11 of its "Transitional and Conclusive Texts" that members of the new Council could be elected within one month of its coming into force.)

The president also objected to Art. 22, para. 1, point 6 of the act. This provision foresaw that the mandate of an elected member could be terminated in case of "behavior that destroys the prestige of the judiciary or evidences systematic disregard of professional duties." He claimed that such cases might hinge on an entirely subjective assessment, thus creating an opportunity for political intrigues.

Zhelev also analyzed Art. 129, para. 3 of the Constitution, which stipulates that, after three years of practice, all judges, prosecutors and investigation officers should be irremovable. Paragraph 5 of its "Transitional and Conclusive Texts" foresees that these lawyers should become irremovable in case within three months of its establishment the Supreme Judicial Council would fail to rule that they did not possess the necessary professional qualities. Hence, the president claimed that para. 8 of the "Transitional and Conclusive Texts of the Act on Judicial System" (judges and prosecutors who do not meet the

requirements of the act are to be dismissed automatically with the act's coming into force) was illogical and unconstitutional.

On July 14, the president's veto of the "Act on the Judicial System" was overridden 129 to 78 in Parliament. The act was thereby adopted (OG, No. 59 of 1994). Deputies of UDF, the Union for Democracy and the Center for New Policy as well as some independent MPs voted against. The act was widely interpreted as giving the socialists a chance to attack judges, prosecutors and investigation officers suspected of sympathizing with the opposition. The act foresees that the Supreme Judicial Council should have twenty-five members who should be lawyers with high professional and moral qualities, having not less than fifteen years of legal practice of which not less than five years must have been served as judges, prosecutors, investigation officers or legal scientists with an academic rank. As mentioned, this provision was deliberately aimed against Chairman Grigorov and Prosecutor General Tatarchev. Eleven of the Council's members are to be elected by the judiciary and eleven by Parliament. The Chairmen of the Supreme Court of Cassation and of the Supreme Administrative Court (both courts are to be established by a separate act) and the Prosecutor General are to be non-elected members.

The "Act on the Judicial System" came into force on July 26. The minister of justice declared that the former Supreme Judicial Council thereby ceased to exist. Members of the Council, however, made an interesting declaration that the act would not affect the power of the chairman of the Supreme Court and the Prosecutor General since they had been appointed under the Constitution for a five-year term. On July 28, three cases connected with the "Act on the Judicial System" were filed with the Constitutional Court. The president and 60 UDF MPs demanded that the Court should declare certain texts of the act unconstitutional. The Prosecutor General requested only that the time for its coming into force be declared unconstitutional. On August 11 the Constitutional Court rejected the request of the prosecutor general that the term for coming into force of the "Act on Judicial Power" be declared unconstitutional. Six justices voted in favor of the claim and six of their colleagues were against it. The case resembled the Rights and Freedoms Movement (the Turkish minority party) case which fell one vote short of being declared unconstitutional. In a subsequent ruling, the Court declared that the removal of incumbent judges and members of the Supreme Judicial Council is unconstitutional. In defiance of the Court decision, the communist-dominated majority in Parliament has elected eleven new members to the Supreme Judicial Council, which indicates that the crisis surrounding the judicial system is far from over.

On May 28, Meehmed Hodja (leading member of MRF and chairman of the Parliamentary Human Rights Commission) proclaimed the formation of a new Party of Democratic Changes. He left MRF in protest against the policy of Ahmed Dogan. The mass media announced that, on

July 2, Achmed Dogan had attempted to rouse disobedience in the army at a meeting in Kurdzhali, on the grounds that speaking Bulgarian was to be mandatory in the military, thereby preventing Turks from using their language. On July 20, the Prosecutor General ordered a preliminary report on the alleged "army" appeal of Dogan of July 2. In an interview, Dogan declared that his parliamentary immunity was a question of national security.

On July 12, the majority of MPs refused to release Snezhana Borusharova of her duties as a vice chairman of the National Assembly. (She submitted her resignation when she was appointed Ambassador to the United States by President Zhelev.) Alexander Dzherov (chairman of the Legislative Commission) commented that this strange refusal was meant to hamper the entrance of the next UDF candidate onto the list in Parliament. On July 21, Prime Minister Berov in a meeting with representatives of the BSP parliamentary group declared that the change of the cabinet was a problem for Parliament. He therefore refused to discuss his promised resignation in September.

The latest developments in Bulgarian politics portend a stormy political autumn. On September 2, Prime Minister Berov tendered his resignation to Parliament, claiming that his mandate is exhausted and that he is adhering to the terms of an informal agreement reached by various political actors (BSP, the president and the Council of Ministers) in May. In the last dramatic move, however, the Council of Ministers released General Petrov (an avowed BSP supporter) from his office as chairman of the General Staff. This initiative succeeded in decisively tipping the balance in the Ministry of Defense from military to civilian control. The resignation was accepted by Parliament on September 7. The Constitution dictates that one of two actions must subsequently be taken: either the current Parliament must form a new government or the president must dissolve Parliament and set a date for pre-term elections.

Czech Republic

Several developments in property law have taken place during the last quarter. "The Condominium Law," a special privatization provision, came into effect on May 1. This law

permits the owner of an apartment building to sell individual apartments while giving the tenant of each apartment the right of first refusal. On May 24 the Constitutional Court annulled some of the amendments to the "Act on the Ownership of Land and Other Agricultural Property" adopted by Parliament in June 1991. The eleven parliamentary deputies who submitted the petition requested that all the recent amendments be revoked, but the Court ruled that only five violated the Charter of Fundamental Rights and Freedoms. These five provisions had allowed the property rights of natural persons to be rescinded or restricted without

compensation. The *Justice Rapporteur* stated that the acquisition of property can be legally voided only if the property was renounced under duress.

Another property case led to the first dissenting opinion in the brief history of the Czech Constitutional Court. The case considered whether agreements between tenants and property owners concluded during the communist era against the will of the owners are now constitutionally protected. A post-revolution amendment to sec. 872 of the Civil Code transformed these agreements (originally called rights of use) into permanent lifetime leases valid under the new Civil Code. The majority approved the amendment, but Justice Vojtech Cepl insisted in his dissent that it contravened the right to property protected under Art. 11 of the Charter of Fundamental Rights and Freedoms, since a contract can be concluded only by the free will of both parties.

Justice Cepl defended the use of dissenting opinions in a newspaper interview on May 28, pointing out that the "Law on the Constitutional Court" provided for them and the practice is common in countries with functioning constitutional courts. He argued that minority views, preserved by dissenting opinions, may be valuable to future generations and may sometimes prove to have been more just. In contrast perhaps to some of his colleagues, he believes that such dissents will do no harm to the authority of the Court.

At a public session of one of its panels on July 7, the Constitutional Court rejected a similar constitutional complaint by two pensioners from Prague seeking the eviction of tenants from their house. The Plenum of the Court had already rejected a related claim by the same petitioners in March. The plaintiffs asserted that in 1988 the Local National Committee forced them to accept the tenants. They claimed that the use of their property without their consent violated several provisions of the Charter of Fundamental Rights and Freedoms.

The subject of property restitution has continued to fuel controversy during the last months. On May 19, President Vaclav Havel signed the "Act on the Restitution of Jewish Property" into law, brushing aside criticism that the law classifies citizens according to race. On July 12, the Constitutional Court annulled two provisions of the 1991 "Act on Extra-Judicial Rehabilitation." This act allowed persons to make claims for the return of property that had passed into the hands of the state as a result of certain specified laws enacted during the communist era. If such a person was already dead, various heirs or relatives could claim the property under this law. The owner or heir had to be a Czechoslovak citizen "who [had] permanent residence within the territory [of Czechoslovakia]," and the claim had to be submitted within six months of the day the law took effect (1 April 1991). Citing inconsistency with several constitutional provisions, in particular the equality of all citizens before the law regardless of status, the Court annulled the provision requiring permanent residence in the Czech Republic.

Exiled citizens now have six months from November 1, 1994 to claim their former property.

Minister of Justice Jiri Novak criticized this ruling on July 13, stating that the Court had exceeded its authority and infringed on the principle of legal certainty. Novak argued that the Court may only interpret the law, not create law by changing deadlines, and that setting deadlines is the prerogative of Parliament.

In contrast, President Havel announced on July 15 that he fully respected and welcomed the Court's decision on the "Act on Extra-judicial Rehabilitation." He stated that he was certain that the Court had not exceeded its powers, that it is an inseparable and valid part of the constitutional order, that it should not be subjected to political influences, and that its authority should be fully respected. Ivan Pilip, currently minister of education and head of the Christian Democratic Party (ChDP), also rejected Novak's criticisms, saying that it is unhealthy for the government to make political evaluations of court decisions, especially those of the Constitutional Court. The Club of Committed Independents called for Novak's resignation from the Ministry of Justice and suggested a vote of no-confidence on July 18 as a result of his criticism of the Constitutional Court. Zdenek Kessler, chairman of the Court, said that criticism of the Court's decision was premature, since the final written opinion of the Court had not yet been made public.

The Court has postponed a decision in another politically explosive case dealing with property restitution. On June 8, a Czech citizen from a Sudeten-German family submitted a petition to the Constitutional Court asking that the four decrees issued by President Edvard Benes in 1945 be declared unconstitutional. The petitioner requested restitution of his parents' property, which had been confiscated pursuant to Decree No. 108. As the "Act on Extra-judicial Rehabilitation" does not cover property confiscated before February 25, 1948, lower courts rejected his claim. The Benes decrees remain extremely sensitive and controversial, as they permitted Czechoslovakia to strip more than three million Czechoslovak citizens of German and Hungarian descent of their citizenship, confiscate their property, and expel them from the country. In this clear case, what is just will probably be determined by the holder of effective power. The Court announced that it would not decide the case until after its summer recess.

The debate over the future administrative map of the Republic also continued through the summer months. President Havel's May 1 speech from Lany called for the government to conclude the division of the Republic into small self-governing units in accordance with the Constitution. On June 6, the Civic Democratic Party (CDP) proposed that a new "Act on Higher Self-Governing Units" should grant autonomy to districts, currently the smallest territorial units. This reform would retain the present form and shape of territorial administration and make the district the basic unit of state administration. On June 27, Jan Kalvoda, head of the Civic Democratic Alliance, criticized

the CDP for putting off a final decision on the territorial structure of the country. Kalvoda claimed that this delay would prevent the country from taking many crucial steps this electoral term, such as social, educational, health, statistical and other policy reforms. The CDP wants to retain the current structure of 85 districts, while Kalvoda would prefer to base administration on regions. Kalvoda would like to create a total of 13 regions by adjusting the boundaries of the eight regions already in existence.

Elections for the Senate, called for in the Constitution, will not be held this year. On June 2, the Assembly of Deputies rejected a bill on Elections to Parliament (31 votes in favor, 101 against, 30 abstentions). The bill proposed that the initial senatorial elections would take place in 81 electoral districts with one senator elected from each. Subsequent elections would be held on a staggered basis, every two years in 27 districts, with one senatorial seat up for election in each district. Thus, only one-third of the Senate would be up for election at a time. Opposition to the bill from the largest party, the CDP, accounts for the large margin of defeat. The CDP asserted that, despite its opposition to the bill, it has always supported the creation of the Senate and criticized those proposing a constitutional amendment to delete all reference to the Senate from the Constitution. It has proposed an alternative modeled on the Australian electoral system, whereby voters must indicate their first, second and third preference for each seat. The controversy centers around which system is consistent with the principle of majority rule, which the Constitution calls for in elections to the Senate.

On June 10, Tomas Jezek, considered the father of privatization, resigned, under pressure from his office as chairman of the Fund of National Property, apparently because of conflict of interest with his position as chairman of the Parliamentary Budget Committee. Jezek told reporters that the Presidium asked for his resignation without giving a reason. He defended himself, asserting that he had made no mistakes during the privatization process.

On June 17, Minister of Justice Novak, discussed current problems of the judiciary, including the inadequacy of disciplinary procedures and the shortage of judges. Novak stated that there is not a wide enough range of disciplinary measures and that judicial misconduct has not been adequately censured. He also noted that there are currently 2002 judges, one-half of whom have less than two years of experience, when at least 2300 judges are needed. The shortage of judges is most serious in North and West Bohemia and in North Moravia.

Bohumira Kopečna, a prosecutor from Brno with no party affiliation, was nominated on May 4 to the office of Attorney General. The post was created to replace the office of State Prosecutor. It had been vacant since January 1, 1994, while there was controversy about whom should be appointed.

As of June 9, there were 720 applicants for refugee status staying at four refugee camps in the Czech Republic. Twelve

hundred persons have been granted this status since 1990. Klaus's cabinet recently adopted an integration program which allows refugees to leave the camps. A government spokesman stated that they were trying to place refugees in communities throughout the Czech Republic and help them integrate into society. The government has devoted 75 million crowns to the program.

On June 15 the government decided that the "Law on Professional Associations" would grant such associations independent authority to govern their respective professions. Their authority would include setting qualifications for the practice of a profession. On July 7, Parliament adopted the "Act on Intelligence Services and Security Information Services." The act provides that the activities of intelligence services, including the Security Information Services as well as the Office of Foreign Relations and Military Intelligence, will henceforth fall under the supervision of Parliament as well as the cabinet. The government proposal had opposed giving Parliament a supervisory role.

Estonia

The summer was dominated by ultimately successful efforts to secure the withdrawal of the last Russian troops from Estonian territory by August 31, the promised deadline. Although an agreement was finally reached, new attempts by Russia to outmaneuver Estonia in a territorial dispute suggest that this will be the next issue straining relations. In domestic affairs, a splintering of the center-right governing coalition foreshadowed increasing political jockeying in advance of parliamentary elections in spring 1995.

With only some 2500 Russian troops remaining in Estonia at the beginning of the summer, as the August deadline approached both sides had been expected to wage a diplomatic war of nerves over the final withdrawal terms. Unlike in Latvia, where more than 10,000 soldiers were left, the smaller contingent in Estonia meant that fewer technical obstacles remained to be resolved. Rather, the real disagreement centered on the future status of more than 10,000 retired and demobilized Soviet and Russian military officers in the country. Moscow demanded full residency rights as well as social benefits for the retirees in return for signing a final withdrawal agreement. The government, bristling at any conditions placed on the withdrawal of "illegally" stationed troops, claimed in addition that the military pensioners were a fifth column and a potential security risk for the small Baltic state. Representatives from Tallinn pointed to the large numbers of "retirees" who were in fact only in their 40s and 50s and who appeared to have been calculat- ingly demobilized by the Russian Army following independence. Finally, Estonia's "Aliens Law" (July 1993) allowed only retirees born before 1930 to apply for residency permits. All others were expected eventually to leave the country.

After months of aggressive rhetoric, why the Russians finally kept their promise to withdraw, courting a nationalist

backlash at home, is not perfectly clear. Some observers contend that commercial and banking interests within Russia, heavily involved in and dependent upon Estonia, exerted a moderating influence on Moscow's Baltic policy. In any case, as in other Baltic-Russian disputes, Western pressure also played a key role. Statements by the US and European governments made clear that the West expected Russian troops out by August 31. But the West also quietly urged Estonia to compromise. Finally, on July 25, during a hastily arranged summit meeting in Moscow between Boris Yeltsin and Estonian President Lennart Meri, the two leaders signed a final accord. In exchange for a public Russian commitment to the August 31 withdrawal date, Estonia agreed to allow all the military retirees to apply for residency in Estonia on the condition that each application be reviewed by a special Estonian commission.

The commission would include a representative from the Conference on Security and Cooperation in Europe (CSCE). Estonia would reserve the right to reject any applicant considered a threat to Estonian security. To sweeten the deal, the US also promised financial aid in the form of housing vouchers for retired military officers leaving Estonia for Russia. The Moscow accord, as well as a later agreement on the dismantlement of a Russian naval base at Paldiski allowed for the final withdrawal of troops to proceed normally. On September 1, President Meri solemnly declared the country free after more than a half century of foreign occupation.

In the wake of the departing troops, however, a new issue between Tallinn and Moscow was brewing. In June, Yeltsin ordered Russian troops to begin the unilateral demarcation of the Russian-Estonian border. Since regaining independence in 1991, Estonia has begun to raise the issue of some 2000 square kilometers of formerly Estonian territory annexed by Stalin in 1945. Although it is now considered by some in Estonia to be an unrealistic claim, the issue remains a political hot potato. Although territorial claims are more often settled by force than by law, the Constitution explicitly states that the country's borders are based on the 1920 Tartu Peace Treaty which includes the disputed territory as part of Estonia. Thus Russia's unilateral decision to try to make permanent the current border drew protests from the Estonian Foreign Ministry and President Meri. Although Russian border construction was proceeding slowly, the move appeared to have the effect of forcing the issue for Estonians. This dispute is certain to arouse controversy and perhaps stimulate changes to the Constitution.

The legal and political status of the ethnic Russian minority in Estonia (whose civil disabilities include a prohibition on owning land and an exclusion from holding any political office) was largely unchanged during the summer. The process of issuing 400,000 new residency permits to non-citizens (most of whom are Russian) was finally gearing up after the July deadline for applications was extended for another year. A law on issuing temporary travel documents for non-citizens

was also promulgated by President Meri in early July. The documents were meant to allow non-citizens, whose Soviet passports had expired and who are therefore now officially stateless, the chance to leave the country and return freely until alien passports are issued. In desperation, some of these non-citizens have declared Russian Federation citizenship in order to receive travel documents, adding to the 42,000 Russian citizens now registered in Estonia. In June, a Council of Europe mission visited Estonia to monitor progress on the residency permit issue, while the CSCE's observer mission to Estonia was also extended until the end of the year.

The completed Russian troop withdrawal itself has become an issue in domestic politics as the country prepared for scheduled parliamentary elections in March 1995. Following the government's final deal with Moscow, members of the nationalist opposition predictably denounced the agreement, but there was little they could do before the troops were gone. Still, the Russian departure was unlikely to improve the electoral fortunes of Mart Laar and his government. A steady decline in public support for Laar since 1993 even prompted an attempt in June by several anxious coalition members to replace him. Although in broad terms the Estonian economy has begun to recover from its post-Soviet crisis, memories of hardships still remain etched in the minds and daily lives of many voters, especially pensioners and low-income families. Proponents of a pre-electoral face-lift for the coalition have rallied around the parliamentary speaker Ulo Nugis. At a special conference of the main coalition party, Isamaa (Fatherland), Mart Laar bear back the challenge to his leadership, but only to see Isamaa break up thereafter. The Liberal Democrats were the first to quit the coalition and government, followed thereafter by several right-wing parties vowing to form their own nationalist bloc. By August, Laar's Isamaa faction was only half its original size, yet it continued to govern with its remaining allies among the moderates as well as the National Independence Party (NIP). In the end, however, the shake-up in the government only served to boost the chances of former Prime Minister Tiit Vahi, whose coalition party continued to lead in the opinion polls.

Hungary

Spring parliamentary elections gave the Socialists more than half the seats in Parliament and an opportunity to initiate and (within limits) supervise the framing of a new constitution. Even though they were not required to seek a coalition partner, the Socialists (HSP) quickly forged a comprehensive power-sharing agreement with the Alliance of Free Democrats (AFD) in the weeks following the election. (See the article by Andrew Arato in this issue.) In exchange for their partnership, the AFD received a veto over all presidential appointments, three ministries (Ministry of the Interior: Gábor Kunce, Ministry of Traffic and Telecommunications: Károly Lotz, and Ministry of Culture: Gábor Fodor) and a significant voice in policy making. Detailed

decision-making procedures aim to encourage broad, democratic deliberation and establish a variety of legislative hurdles.

The coalition partnership remains burdened by ideological differences and divergent versions of the past, but the two parties have jointly set forth an aggressive agenda for the coming session of Parliament. Most important, although in a somewhat disorganized fashion, they have begun the task of drafting a new constitution. Because today's provisional Constitution is widely accepted, many informed observers believe that the coalition will venture only minor innovations, sticking to the broad outlines of the current basic law. Some possible changes include an increase in the influence of Parliament over the actions and composition of the government; a more numerous, if not necessarily weaker, constitutional court; a new administrative judicial structure; and broader governmental decree powers. The 27-member drafting commission, which consists of party representatives and experts, will convene for the first time this fall.

On September 20, Parliament passed by a two-thirds majority, as required by the Constitution, the new Rules of the House. The Rules of the House currently in force were passed by the last communist Parliament (June 1989). Quickly recognizing the need for new and more adequate regulations, the assembly elected in 1990 amended the House Rules eight times. Moreover, the House Committee and Rules Committee of Parliament (one of the standing committees) came out with 80 resolutions on different aspects of the issue. Since 1990, numerous proposals and drafts have been drawn up and six-party conferences held. For its part, the new Socialist-Liberal coalition decided immediately to pass new house rules, laying down some general guidelines in the coalition agreement struck in July. Immediately after the coalition negotiations were brought to a close, and after a series of intra-coalition workshops (based on a draft summarizing the position of the parties in the last Parliament), six-party negotiations on the new house rules started in July. Finally, a draft of the proposed rules was introduced to Parliament and supported by five of the six parliamentary parties. In general, the opposition parties in the new Parliament were quite active and constructive in the process of drafting the rules.

Before its summer adjournment, Parliament modified an earlier law prohibiting mayors from sitting in the assembly. The office of mayor is now compatible with membership in Parliament. As expected, the new government also appointed new directors of state television and radio.

The Constitutional Court continues to struggle with one of the busiest dockets in the world. In one of its most widely publicized recent decisions, the Court held that the provisions of certain statutes restricting access to government archives unconstitutionally encroach on the "freedom of science" guaranteed by Art. 70.G of the Hungarian Constitution. (Case Number 34.1994 [VI.24]). Article 70.G reads, in its pertinent part, "[1] The Republic of Hungary respects and supports the freedom of science and art, the freedom of learning and of

teaching. [2] Only qualified scholars and scientists have the right to assess the value of scientific research."

The petitioner in this case sought access to the records of the Hungarian Workers Party (HWP) and the Hungarian Socialist Workers Party (HSWP). Several laws, one promulgated in 1971, prevented access to such documents. The petitioner asserted that Art. 70.G prohibited any limitation on access to public document collections and archives.

The Court disagreed. First, the Court determined that all citizens have the right to freedom of science if they are "scientific researchers." Freedom of scientific research is guaranteed to all researchers but the status of who is a scientific researcher is determined by the scientific community. The scientific community may determine who is a researcher but it may not discriminate among those determined to be researchers.

Secondly, the Court explained that scientific research may be restricted in certain cases to preserve privacy and state secrets. Any such limitations must, however, be consistent with the Constitution, Art. 8.2 which reads, "In the Republic of Hungary, the law contains rules on fundamental rights and obligations, but must not impose any limitations on the essential contents and meaning of fundamental rights." According to the Court, Art. 8.2 grants only to Parliament the power to enact laws that define the scope of fundamental rights. Consequently, several provisions of the decree on state and secret service regulation were held unconstitutional. But, the essential contents of rights are beyond Parliamentary restriction. The Court will look to Art. 70.G in connection with Art. 8.2 to determine what information shall be subject to public inspection and what information shall remain secret.

The opinion delivered by the Court was wide-ranging. Most interestingly, the Court actively pursued the issue of lustration and the special status of the research subjects. It acknowledged that data protection applies to legal persons, such as political parties. But the records of the HWP and the HSWP present a special case because the HWP and HSWP violated the constitutional prohibition on parties directly exercising political power (Art. 3 of the Constitution). The Court indicated that such issues would have to be addressed in another case.

Of economic import was the Court's decision to uphold the "Agricultural Land Act" despite the act's limits on land purchases and its blanket prohibition on purchases of farmland by foreigners and companies. At the heart of the Court's opinion was the finding that the acquisition of property, as opposed to private ownership itself, is not a basic constitutional right. The development of a "healthy land-possession structure," the Court also announced, is a legitimate and constitutional aim of an agricultural policy. As Chief Justice Solyom wrote, the government is not constitutionally required to utilize the least restrictive means possible to reach its legislative goal.

The Court found that individual purchase limits on farmland are appropriate for preventing "unhealthy" monopolistic

ownership of agricultural tracts. Similarly, blanket prohibitions on foreign sales are justified in light of the low prices Hungarian farmland fetches on the international market. Restriction on ownership by companies was deemed a legitimate method for preventing individuals from circumventing the limitation on personal ownership by founding several companies, each of which might abut a piece of land.

The Court explained that the constitutionality of the "Agricultural Land Act" is temporary. When the limitations in the act cease to advance the legitimate purpose of the act, they will be deemed an unconstitutional interference with the exercise of ownership rights.

Finally, the Court struck down Art. 232 of the Criminal Code (modified 1993) which criminalizes the defamation of public officials. Invoking an equal protection standard, the Court determined that the article was unconstitutional because it granted more protection from defamation to public officials than to private individuals. The Court explained that the Constitution assumes, on the contrary, that public officials must endure possible indignity in the interest of democratic deliberation. But they also explained that public officials may sue in their private capacity.

An important case pending before the Court is an action brought by the Hungarian Alliance of Judges asserting that the "Law on the Examination of Persons Holding Important Offices" unconstitutionally limits a judge's political activity.

Latvia

On May 9, with less than a month before local elections, the Saeima (Parliament) passed the "Law on Local Government." Because the electoral law for local governments was passed in January, many issues concerning local government had already been debated and decided. The councils had been downsized to create more efficient local bodies, the proportional system chosen, and the requirements for candidates laid down. After the law was adopted by Parliament, however, it was vetoed by President Guntis Ulmanis and returned to the assembly. This was the first presidential veto in Latvia since independence. The president objected to only one specific provision—the procedure for dismissing local government chairpersons. The law assigned this responsibility to the minister of state reforms. Ulmanis argued that "it is not acceptable that an elected state servant be dismissed by one minister's decision," suggesting that the cabinet be given this responsibility. The Saeima reopened deliberation on the law, leading to a new draft by Parliament's State Rule and Local Governments Committee. It incorporated the president's criticism that the power to dismiss should not rest exclusively with the minister of state reforms, but required the minister to appeal to the Court (not the cabinet) for approval, prior to the dismissal of a local government chairperson. With little time remaining before election day, Saeima members rejected the revised law and instead passed the original law for a second

time. According to the Constitution, when a law is twice adopted by Parliament, the president's veto is overridden.

On May 29, local elections were held as scheduled. From the lackluster participation (only 58.5 percent nationwide) and the relatively high proportion of invalid ballots (nearly 10 percent of the total ballots cast) can be inferred the general apathy and confusion of the voters. Political coalitions were formed at the local level, creating stark differences between party lists in different cities and regions. Locally based coalitions and the various new parties which emerged at the regional level were dissociated from their national ideological counterparts, thereby undermining party discipline. An uninterested, or overwhelmed, media helped make it difficult to differentiate between the parties, ultimately contributing to the many mistakes in filling out ballot cards and the meager level of electoral participation.

Because the last local elections were held in 1989, before Latvian independence, voters naturally turned against the incumbents. A general overview of the election outcome reveals a triumph for right-wing parties and a strong defeat of old-style communists. Because the law on citizenship was not passed until June, more than a third of the population was automatically excluded from participating in the elections.

Pressured by international organizations and the negotiations for Russian troop withdrawal (which was finally completed on August 31), the Saeima began deliberations on a new draft law on citizenship and naturalization in early June. The draft (see *EECR, Latvia Update*, Vol. 3, No. 2, Spring 1993) reflects a compromise between Latvia's desire to protect itself from its historically aggressive neighbor in the East, and its need to cooperate with its future allies in the West. On June 9, debates began between the leftist parties and the ruling Latvia's Way-Farmers' Union (LW-FU) coalition centered on the issue of quotas for the naturalization and, in particular, the issue of naturalization of children born in Latvia to non-citizens. Pro-Russian deputies argued for further liberalization of the law, including the automatic granting of citizenship to all children born in the country. Nationalist leaders, however, have always clung to a historical precedent—the citizenship law of 1919—in which citizenship is determined by blood, not by birthplace. The ruling coalition maintained its position, requiring that children born of non-citizens apply for naturalization. The annual naturalization quota of 0.1 percent of all Latvian citizens (about 2000 people per year) will not apply to these children, however. Latvian citizenship will also be restricted for people who fought against Latvian independence or its democratic parliamentary state, convicts who have spent a year or more in prison, foreign civil servants, Soviet military pensioners and former KGB or other foreign security service agents.

The revised citizenship law was still not liberal enough to placate international organizations concerned about human rights violations in Latvia. The European Union stated that it would not admit Latvia, since it cannot tolerate a state that

leaves more than one-third of its residents stateless. For this reason, President Ulmanis vetoed the law, and returned it to the Saeima for still further deliberation. In his criticisms, the president noted that, while the law makes clear when people can apply for naturalization, it does not say when they can expect to receive citizenship. Also, he pointed out various contradictions in the law concerning citizenship requirements, which he hoped would be clarified in the next draft.

After another month of heated parliamentary debates, Latvian nationalist sentiments were cooled by the fear of losing a place in the West, and the citizenship law was amended. The newest draft, adopted on July 22, abandoned the most controversial provision of the Latvian citizenship law—setting quotas for naturalization. The Latvian National Independence Movement (LNIM) argued to the end that changing the law would betray Latvia and jeopardize state sovereignty. Ultimately, the fear of being left behind by the Council of Europe and NATO was greater than the fear of a fifth column or Russian re-occupation, and the new draft passed, 58 to 21. The amendment does discriminate against residents who were not born in Latvia, stipulating that they can become citizens only starting from the year 2000.

The amended law was met with mixed feelings. The Council of Europe praised Latvia's ability to abolish quotas, while Boris Yeltsin continued to criticize Latvia for creating second-class citizens by its discriminatory policies against residents who were not native born. The LNIM, which opposed the abolition of quotas, began to gather signatures for a national referendum to maintain the citizenship law in its earlier unamended incarnation.

While it is clear that the citizenship law was liberalized largely because of pressure from Western international organizations, the Latvian government has taken some steps of its own towards liberalization. The government has introduced a new national human rights program, establishing the Working Group on the Protection of the Rights of Individuals. Currently, Justice Egils Levits heads this initiative. Its primary concern focuses on educating the public on human rights issues and acting as a counselor for people who seek citizenship.

After five government ministers were suspended by Parliament for allegedly collaborating with the KGB, Foreign Minister Georgs Andrejevs publicly confessed on May 28 that he had voluntarily agreed to cooperate with the KGB. After his confession, he had no choice but to resign, for the electoral law prohibits former KGB associates from holding public office. On June 6, Andrejevs offered his resignation to the president and prime minister and requested a parliamentary annulment of his mandate.

At the end of June, the ruling coalition began to deteriorate when the Farmers' Union failed to approve the Latvia Way candidate (Lainis Kamaldins) for director of the Latvian Satversme (Constitution) Protection Bureau. This spat fueled feelings of betrayal in the LW. Not surprisingly, when the

"Law on Customs Rates" was adopted on June 22. LW deputies reciprocated by pushing through their own, more liberal customs rates. Having stymied one of the most-valued laws of the FU, the LW with this move precipitated the breakdown of the ruling coalition. The failure of the FU proposal for high customs rates prompted the resignations of FU ministers Janis Kinna (agriculture), Janis Ritenis (welfare) and Girts Luskins (environment and regional development). To settle the score, the FU subsequently called for the resignation of two LW ministers, Finance Minister Uldis Osis and Economics Minister Ojars Kehris. Finally, on July 11, The FU withdrew from the ruling coalition, leaving the LW with only 36 of the 100-seat Parliament. Although the LW maintained its dominant position, it could not hope to pass legislation with as much ease as it did before. Therefore, on July 14, Prime Minister Valdis Birkavs announced on Latvian television that he and his entire cabinet planned to resign.

Meanwhile, the Latvian National Independence Movement (LNIM), during its seventh annual congress, changed the ideological direction of its party from a pro-independence movement concerned primarily with the troop withdrawal, to a conservative party, dedicated to promoting the development of a free economy. With this step, the LNIM moved ideologically closer to the LW in its economic policy. Thus, after Birkavs's resignation, with hopes that the new cabinet be chosen on the basis of professional competence instead of party affiliation, Ulmanis appointed Andrejs Krastins, deputy party chairman of LNIM, to form the new government. Although forming a new grand coalition with the LNIM could be expected from the LW, their political ideologies have clashed in the past. LNIM remains staunchly nationalistic, while LW maintains a pragmatic center stance. The LNIM resisted LW's all-or-nothing proposition to form a coalition, and thus could not convince any LW member to join Krastins's list of nominees.

Krastins submitted his cabinet nominations to Parliament on August 18. The nominations reflected a commitment to right wing economic reforms and included members from conservative parties like the Fatherland and Freedom Party, the Christian Democrats Union, the Farmers Union and (not surprisingly) a majority from the newly revamped LNIM. The proposed cabinet also included several women, who, if confirmed, would have represented the first women to hold posts in the Latvian cabinet. Even with the deliberate distribution of ministries among several parties to increase chances for Saeima approval, the lack of LW nominees combined with the fact of LW majority position undermined Krastins's attempt at pushing through his candidates. That same day, the Saeima rejected Krastins's nominations 35 to 27, with 28 abstentions.

The LNIM nominations having failed, President Ulmanis returned to the LW and requested its assistance at creating a new government. Not having been able to form a coalition with the LNIM, LW looked to form a coalition with

the Political Association of Economics, an eight-member parliamentary faction, which might serve as an advocate for reconciliation between the LW and the FU. On August 29, Ulmanis confirmed Maris Gailis (LW) as his next candidate for the office of prime minister.

Lithuania

In the past quarter, the Slezevicius government has struggled with a nation-wide drought, hyperactive opposition parties in the Seimas (Parliament) and a lethargic president. Because the Lithuanian Democratic Labor Party (LDLP) commands a majority in the Seimas, opposition parties have found their legislative influence to be negligible. In an attempt to gain political control, they have now proposed a more drastic measure—namely pre-term elections to the Seimas. In May, the government was the target of a no-confidence motion. The motion was introduced by the Lithuanian Social Democratic Party (LDSP), which claimed that the government had neglected its election promises by allowing the continued decline of the economy.

The success of the motion was a long-shot. But, on June 10 (six days before voting took place), Prime Minister Adolfas Slezevicius preempted the opposition by nominating six new government ministers. By changing the government, he sought to undermine any justification for a no-confidence vote. But this attempt to stop this motion by unilaterally reorganizing the cabinet ultimately failed for two reasons. According to the Constitution (Art. 101), Slezevicius's nominations constituted a change of government and therefore required Seimas approval. Moreover, if the Seimas did not re-invest authority in the government, there would be automatic grounds for the latter's resignation and pre-term elections.

On the same day as the cabinet reshuffle (June 10), the "Law on Government" was passed. It created a new government ministry on the environment. It also split the Ministry of Education and Culture into separate ministries. Thus, due to the remarkable coincidence of the new "Law on Government," Slezevicius's attempt to reshuffle the cabinet did not constitute a change of government or precipitate a Seimas vote, since only five of 19 ministers were replaced.

Notwithstanding the constitutional problems, Slezevicius's attempt to reorganize the government did not persuade the opposition to withdraw its no-confidence motion. Even though the cabinet had been changed, the opposition argued, Slezevicius remained its head and thus the no-confidence vote was still justified. Finally, on June 16, the vote was held as scheduled, failing to pass by 20 votes. (The motion required 71 votes for passage).

The next attack on the LDLP was led by the Homeland Union (Conservatives of Lithuania). The HU(CL) collected more than 600,000 signatures calling for a referendum on the "unlawful" privatization process and on compensation for people's deteriorated savings. This referendum represents an

attempt to nullify the newly privatized state firms and land, which many believe was unjustly sold for nominal amounts to political officials and ex-Communist Party elites. Referendum designers want these properties returned to the state and then resold in a legal or "just" manner. Revenues from the sale of the properties would then be used to compensate the public for the savings they lost in the high inflation transition period. Due to the difficulties associated with introducing the lit, Prime Minister Gediminas Vagnorius had urged citizens not to spend their rubles but to save them, and thereby keep the rubles in Lithuanian banks until the lit could be introduced. Those who had obeyed Vagnorius's request basically lost their life savings as the value of the ruble continued to plummet. As an incentive to save, the Landsbergis regime promised to index the currency and compensate citizens after the lit was introduced. Throughout the 1992 campaigns, both Vytautas Landsbergis and Brazauskas promised to follow through with the compensation. When Vagnorius (HU[CL]) raised the issue in the Seimas, it was met with opposition on the grounds that the government could not afford the compensation initiative.

Unsure of their ability to persuade the public to oppose the referendum, the LDLP appealed to the IMF to release a statement condemning the initiative. The IMF complied with the request, although this move belied its stated policy of non-interference in internal politics. The Fund released a statement arguing that the proposed nation-wide compensation plan could cost up to 7.6 million lits (19 million dollars), approaching 70 percent of Lithuania's GDP. This additional debt, it was suggested, would only fuel inflation and thereby undermine the opposition's own aims.

In another seemingly defensive move, Parliament passed an amendment to the "Law On Referenda," restricting their use and the extent to which results translate into law if a referendum is passed. According to the amended law, referenda can be held only if they concern "the most vital issues" facing the nation. Also, referenda can only "determine the guidelines of legislation" and must be subsequently adopted in the Seimas to become law. A referendum on economic matters, in particular, can not be held until all of its possible consequences are examined and announced. The new law reduces the legal status of referenda, and therefore seems to be based on a questionable interpretation of Art. 71 of the Constitution. This article grants the same legal status to laws and acts adopted by referenda as it grants to laws adopted by the Seimas.

The referendum was scheduled for August 27. In an interview on Lithuanian television, President Brazauskas stated that the referendum was "purely political" and, due to the new law on referenda, would be of no use to the state. He also added that he would not participate in the vote. The majority of Lithuanians followed his lead and the referendum failed due to low voter turnout. Referenda require approval by at least half of the eligible voting population in order to pass. But this referendum only drew 37 percent participation. Of those

who did participate, only 31 percent supported the motion to compensate for lost savings and to reorganize privatization. The HU(CL) blamed the LDLP for the failure of the referendum, since they were not given enough time to introduce the issues to the public and argued that Brazauskas's non-participation was perceived by the public as a threat to workers. Moreover, they argued that the vote was scheduled at the height of the harvest and that the complicated ballot, which contained eight subdivisions, confused voters.

In May, debates began over the creation of an electoral law for municipal councils. One of the first drafts, offered by Parliament's Municipal Affairs Committee, called for a proportional electoral system, two-year office terms and prohibition of Seimas deputies from running for municipal council seats. The size of each council is to be determined by the relative size of the city. The Municipal Council of Vilnius will have the largest council (51 members), while the smallest cities will have 21 members.

The law came under fire from ethnic minorities since it allows only political parties and organizations to run for office. The Polish faction in Parliament argued that the stipulation would force Polish and Russian groups to form nationality-based political parties and thereby aggravate ethnic tensions and anti-minority sentiments. Such arguments, however, were dismissed by the Seimas, which broke off any further deliberation on the subject. Polish groups then held a protest rally and petitioned the president. Brazauskas expressed concern for their case, but stated that "Lithuania has not yet reached the level of democracy where all people, irrespective of their ethnic origin, can participate in state affairs." Later, he vetoed the draft law and returned it to the Seimas with two amendments. But the Seimas maintained its position, stipulating that political parties alone may run in local elections. Reluctant to take the heat from ethnic minority groups, but unable directly to resist the LDLP majority because of residual party nostalgia, Brazauskas exercised his prerogative (outlined in Art. 71) and refused to sign the law. Responsibility for promulgating the law then fell on the Parliament chairman, Česlovas Juršenas (LDLP), who signed it on August 11. Local elections are scheduled to be held sometime before the end of the year.

In a major assault on the judicial branch, during a special May 18 session, the Seimas passed a resolution calling for the resignation of Mindaugas Losys, Chief Justice of the Supreme Court. After two months of deliberations, ending in May, the Court was under fire for failing to convict known mafia kingpins for extortion and racketeering. Although the resolution was initiated by the Social Democratic Party (SDP), it was strongly supported by some LDLP members as well. MP Mindaugas Stakvilevicius (LDLP) held the president and government responsible for failing to convict any mafia leaders. During debate on the resolution, Aloyzas Sakalas (SDP) blamed the failed convictions on mafia infiltration of legal institutions and again called for pre-term parliamentary elections to halt "ram-

pant corruption." Corrupt or not, prosecutors were hobbled by the fact that only 11 of 32 subpoenaed witnesses showed up to testify. Reporting death threats, five participating witnesses retracted their original statements during the trial. Ultimately, the final resolution was tempered by the LDLP majority, which called only for Losys's resignation. Without undertaking impeachment procedures however, the Seimas cannot force Losys to step down (Art. 115).

Following Art. 73 of the Constitution, the Seimas passed a law establishing the office of ombudsperson. The "Law On Seimas Ombudsmen" states that the new office will investigate complaints filed by citizens against public officials who have abused their power. The office lacks the jurisdiction to investigate the office of the president, Seimas deputies, judges, procedural actions of prosecutors, investigators, interrogators, the prime minister, the government as a whole and local government institutions acting as collective bodies. Five ombudspersons will be appointed by the Seimas to four-year terms. Two will investigate complaints regarding local state officials, one will investigate the military and the remaining two will investigate local government bodies.

Poland

The Constitutional Commission continues to orchestrate the drafting of a definitive basic law to replace the provisional "Little Constitution." At present, seven drafts are on the table: the proposal of the Senate's Constitutional Commission of 1991 (heavily influenced by the Christian National Union [CNU]), Lech Walesa's most recent proposal, and the drafts submitted by the Confederation for an Independent Poland (CIP), the Polish Peasant Movement (PPM) with the Union of Labor (UL), the Freedom Union (FU) and the Union of the Democratic Left (UDL). Walesa's draft as well as the documents submitted by the FU and the UDL are all new proposals. The Senate Committee, the CIP and the PPM/UL presented their drafts prior to the formation of the sitting Constitutional Commission. (See *EECR*, Poland Update, Vol. 3, No. 2, Spring 1994, for a discussion of the controversy surrounding the re-submission of drafts filed during the last parliamentary term.)

Presentation of the drafts to the Constitutional Commission occurred on June 20-21 and drew attention to the most important constitutional issues on which the Commission would be obliged to deliberate. Unfortunately, perhaps due to the summer hiatus, only 14 of 56 Commission members bothered to attend the presentation ceremony. Absent a quorum, the Commission could not dispose of even the formalities and preliminary items of business. On September 5, 1994, the "Solidarity" labor union submitted its own draft, signed by nearly one million citizens, thus meeting the requirements for the citizens' constitutional initiative.

The Commission's standing rules provide for a broadly representative composition and an elaborate committee structure.

In addition to the expected institutional actors—the president, representatives of the Council of Ministers, and the Constitutional Tribunal—the Commission reserves seats for representatives of political parties that do not currently have members sitting in Parliament, nationwide trade unions, and churches and religious unions. This mix of Commission participants are then divided among many sub-committees that will attempt to outline, among other things, the structure and sources of Polish law, the grounds of the political and socio-economic system, the parameters of local self-government, and the rights and duties of citizens. Sub-committees are given the authority to call expert panels to assist them in meeting their sometimes quite formidable mandates. Perhaps the most politically significant and interesting of all the standing rules is the requirement that all Commission sessions be open to public scrutiny.

In June, the Commission selected five standing expert advisors, chaired by professor Kazimierz Działocha, a former Constitutional Court judge (one of the other four is Wiktor Osiatynski, co-director of the Chicago Center). At the September 8 meeting, the Commission formally accepted the citizens' draft submitted by the Solidarity leader, Marian Krzaklewski. Preliminary issues concerning the rules of constitution-making in the National Assembly were also discussed.

The National Assembly, consisting of the Sejm and the Senate, met on September 21-23. It adopted its rules and moved to the first reading of constitutional drafts, which began with the presentation of all drafts to the assembly. After two days of presentations and discussion, all seven drafts were preliminarily accepted by the National Assembly and sent back to the Constitutional Commission, which is supposed to prepare the October 21 constitutional debate in the Sejm about the consistencies and differences among the drafts. After the debate, the Commission is to prepare, on the basis of all seven projects, one unified draft to be submitted to the National Assembly for acceptance. The schedule announced by Alexander Kwasniewski, chairman of the Constitutional Commission, suggests that the second reading of the unified project could take place in December 1994.

After submitting the Solidarity draft on September 8, however, Marian Krzaklewski demanded that the Union's project be submitted to a national referendum as an alternative to the draft prepared by Parliament. This would require amendment of the constitutional law on the procedure for the preparation and adoption of the new constitution. Since Solidarity has no legislative initiative, its proposal must be adopted by the president, government, a group of 15 deputies, or the Senate. The submission of such an initiative will inevitably extend the entire process, even if it is eventually rejected as a violation of the principles of parliamentary democracy. On the other hand, the outright rejection of Krzaklewski's demand may lead the Solidarity Union to ask its members and followers to vote against the parliamentary project in the referendum on ratification. This call may be supported by the Roman Catholic Church which was not

only consulted by the Solidarity drafters, but also publicly endorsed the project and allowed Solidarity activists to collect signatures after masses at which some priests advertised the draft. Finally, the constitution-making process may be threatened by the presidential campaign which has already been launched by some candidates, including incumbent Walesa, even though the elections will not take place before the Fall of 1995.

President Walesa's ouster of Marek Markiewicz from the National Radio and Television chairmanship was followed by the president's appointment to the board and the chairmanship of Andrzej Zaorski, former chairman of the state-owned television, a confidant of Walesa and a foe of Markiewicz. Markiewicz's dismissal continues to generate constitutional controversy. (See *EECR, Poland Update*, Vol. 3, No. 2, Spring 1994.) This June, the Constitutional Tribunal entered the fray when it was petitioned by Ombudsman Tadeusz Zieliński at the behest of UL, PPM and UDL deputies, to render a valid interpretation of the "Law on Radio and Television." Walesa has justified his removal of Markiewicz with the odd claim that his power to appoint the chairman of radio and television also gave him the power to dismiss. Accordingly, the ombudsman asked the Tribunal to determine whether the power to appoint indeed implies the power to dismiss. Both the ombudsman and the public prosecutor believed that it did not, and the Tribunal agreed. The Tribunal found that the chairman's dismissal necessarily requires his removal from the National Radio and Television Council. While the terms of the chairman's dismissal are not clearly articulated in the "Law on Radio and Television," the grounds for termination of council membership are. Presidential dismissal is not included among these grounds (see "Law on Radio and Television," Art. 7.6). Thus, Walesa can appoint, but not dismiss.

This issue may well remain at the center of constitutional politics for weeks to come. The ombudsman maintains that all Constitutional Tribunal interpretations are binding from the date of the promulgation of the law in question, rather than from the date of the Tribunal's rendering of the valid interpretation. If the ombudsman is correct, Walesa's dismissal of Markiewicz is not binding. The Tribunal will most likely be forced to deal with this issue in the coming months as the ombudsman is determined to add it to the Tribunal's docket.

Local elections were held in June with the Union of the Democratic Left (UDL) and the Freedom Union (FU) emerging as the big winners. The currently valid "Electoral Laws on the Local Municipalities" provides for PR to be used in communes with over 15,000 inhabitants and for a plurality system in villages. Under this formula, the UDL ran well in the larger cities while it appears that the Polish Peasants Movement (PPM) won much of the village vote. The Union of Labor's (UL) pitiful showing was surprising to many in light of its success in the 1993 parliamentary elections. Since no party gained an absolute majority in local legislative bod-

ies, coalitions will be required everywhere for effective government. This gives the post-Solidarity parties the opportunity to strike a deal that may give them a pivotal voice in provincial politics. While no official report on the elections has been released as yet, it appears that turnout doubled (to roughly 35 percent of the eligible voters) since the last round of local elections.

Poland continues to search for a rapprochement between constitutionalism and Catholicism. In July, Parliament passed a resolution to postpone the ratification of a concordat with Rome until the passage of a new constitution. Opponents claim that a concordat would limit the rights of minorities and give special status to the Roman Catholic Church. The resolution to table was brought to the floor by deputies from UDL and UL. The adopted resolution establishes a committee to draft a statute on the ratification of the concordat. The committee must prepare a report on the concordat's legal consequences, in case a new constitution is passed and in light of Poland's relationship to other states. This must be done before December 13, 1995. Walesa, who observed the voting, was heard to say that there had been "enough communism," and that the concordat should not have been tabled. In September, the leaders of UDL and the Church softened their rhetoric and opened a way to the ratification of the concordat even before a new constitution is passed. On September 20, Bishop Tadeusz Pieronek, secretary of Poland's Conference of Bishops suggested that the government can add an appendix that presents its own interpretation of some provisions of the concordat.

In June, the Sejm passed an amendment to the Penal Code greatly liberalizing abortion rights. According to the amendment, during the first 12 weeks of pregnancy, a woman is entitled to an abortion if she is in a difficult economic or personal situation. This is to be determined by the woman herself. The only practical limitation placed on women is the requirement that they consult the opinion of a physician other than the gynecologist who will conduct the abortion. The purpose of the consultation is to evaluate the woman's health and to inform her about any risks connected with abortion. The act explicitly states that abortions may be conducted in private, consulting rooms. With this amendment, Poland's law on abortion will now differ little from the April 24, 1952 law on abortion.

The amendment also passed the Senate but, as expected, Walesa vetoed it. In early September, Parliament failed to muster the two-thirds majority needed to override the veto and a more restrictive law of January 1993 is still on the books (see *EECR, Poland Update*, Vol. 2, No. 1, Winter 1993).

Also in September, the Sejm passed a very restrictive law on state secrets. The bill offers a very broad and imprecise definition of the state and official secrets, which practically renders inoperative the very substance of the rights of information. Moreover, the bill provides for harsh punishment, including prison, not only for an official who leaks a secret but also for anyone who publishes or disseminates such information. A

group of influential editors of major magazines and broadcasting stations protested against the bill, arguing that a journalist should not be punished, especially if he or she acted in good faith and in the public interest. On September 21, Walesa criticized the law and announced that he will veto it if the Senate fails to modify the bill or the Sejm rejects the Senate's changes.

Romania

In the last several months, Romanian political life has been marked by a weakening of all political opposition.

With the exception of the Hungarian Democratic Federation of Romania (HDFR), the other members of the Democratic Convention of Romania (DCR) have had little success in formulating a unified and coherent strategy that would present the opposition as a viable alternative to the ruling Party of Social Democracy in Romania (PSDR). With public apathy reaching pre-1989 levels, the opposition has been trying in vain to recapture some momentum and keep itself in the spotlight with various parliamentary maneuvers.

One such maneuver began on June 20, when the DCR opposition alliance filed a motion of censure against the minority government of premier Nicolae Vacaroiu. The motion charged the government with corruption and blamed it for the worsening economic conditions. The Democratic Party-National Salvation Front (DP-NSF) decided to join the DCR in the motion of censure, as well as in the attempt to impeach President Ion Iliescu. However, the no-confidence motion was defeated by a vote of 227 to 208. (In order to pass, it would have required the backing of 242 deputies and senators.) As in the past, the nationalist Party of Romanian National Unity (PRNU), the extremist Greater Romania Party (GRP) and the communists of the Romanian Socialist Labor Party (RSLP) voted with the ruling PSDR to defeat the motion. This was the fifth no-confidence filed against premier Vacaroiu's minority government since it came to power in October 1992.

Another such maneuver was initiated on June 28 by the National Peasant Christian Democratic Party (NP-CDP) with the attempted impeachment of President Iliescu. The impeachment initiative was prompted by what the NP-CDP characterized as the president's attempt "to alter the course of justice and to violate the constitutional independence of the judiciary." This accusation is based on a speech that Iliescu delivered in May in the northwestern town of Satu Mare, during which he criticized recent court rulings that returned to their original owners, houses nationalized by the communist regime and called for a review of these rulings. Challenged by the opposition to explain his remarks, the president released a statement denying any constitutional wrongdoing and explaining that, in the absence of a law on property, the courts' decisions were illegal.

According to the Romanian Constitution, impeachment can be initiated only if at least one-third of the members of

both houses of Parliament vote in favor. After this hurdle is passed, the initiative is submitted to the Constitutional Court for a ruling on its legality. However, the Court's ruling is only consultative. In a special session, Parliament then debates and votes on the issue. If a simple majority votes for impeachment, the issue is put to a national referendum. The president is removed from office only following a decision by the voters. In any case, the Constitutional Court ruled unanimously that Iliescu's statements did not constitute the kind of grave violation of the Constitution that requires impeachment. Moreover, on July 7, Parliament rejected, by a vote of 242 to 166, the motion to impeach the president.

On July 29, Prime Minister Vacaroiu communicated to the media that the government apparatus would be streamlined in an effort to reduce the bureaucracy. The central government will undergo a 28 percent reduction in posts, reflecting the elimination of 21 state secretaries (positions equivalent to deputy ministers), together with about 2500 other jobs, primarily in the economics ministry. The industry ministry will be the most affected, losing seven state secretaries. The ministries of agriculture, transport, tourism, trade and environment, together with the beleaguered industry ministry, will be cut by 54 percent. The move is intended to "cut red tape" and "boost work efficiency," as well as prepare the administrative apparatus for "the development of market mechanisms." Only the defense and interior ministries will not be affected by the cuts.

In the area of party politics, on July 21, the Party of Civic Alliance (PCA) and the National Liberal Party (NLP) formed a civic-liberal alliance christened "the Liberals." The leaders of the two parties, Nicolae Manolescu and Mircea Ionescu-Quintus, praised the move as a step towards the unification of all liberal groups in Romania. The new alliance joined the DCR, the country's main opposition coalition.

In a related development, on August 3, a conference of DCR parties and grass-roots organizations met to discuss common strategies in the 1996 presidential and parliamentary elections. They reached agreement in several important areas, such as, the need to field a single, common candidate for president, to work out a common list of candidates for parliamentary elections—reflecting the hierarchy of the parties in the convention—and either to rotate or establish by consensus, the leadership of the country's organizations. Advanced by the NP-CDP, in the past, most of these proposals were opposed by the PCA, among others. The majority of the participants signed a protocol requiring that all members either sign the agreement or withdraw from the Convention by August 15. The PCA representative said that his party will decide later whether to sign or withdraw from the alliance.

In the legal field, on May 26, a Bucharest court sentenced two policemen to 15-year prison terms for torturing and murdering a suspect in their custody. Buoyed by the graphic details provided in the media, the incident gained national, and even regional notoriety, becoming a landmark case of

police brutality. Furthermore, the Romanian Supreme Court ruled illegal the registration of a new Romanian Communist Party. The appeal against the party was filed by a large number of political parties and organizations after it registered with the Bucharest City Court in May. The Court applied a law barring groups supporting totalitarian, extremist, fascist or communist ideologies. In another legal development, the office of the prosecutor general announced that 38 Romanians will face trial for attacks on Gypsies. They are accused of setting fire to 11 Gypsy homes on May 27, in the village of Răcea, after two Gypsies were detained on charges of killing a Romanian shepherd. This ruling is expected to alleviate concerns expressed by the UN Committee on Economic, Social and Cultural Rights, that the Romanian government allows discrimination against Gypsies.

On June 1, Parliament began debate on a controversial education bill. The Hungarian Democratic Federation of Romania (HDFR) objected to the bill's stipulation that the teaching of history, geography and civic education must be conducted in Romanian in all schools, including those of national minorities. However, the education minister, Liviu Maior, replied that the "separation" of teaching in Romanian and in minority languages "had only led to conflicts." Other parties objected to the bill as well. The GRP considered the bill too liberal, and called for the restoration of school uniforms.

On the issue of teaching religion in schools, the NP-CDP wants to make it compulsory rather than optional. Several other groups have also expressed dissatisfaction with various stipulations and the parliamentary debate is expected to be fierce. Another stormy debate began on June 14, this time over the property restoration bill. The opposition walked out of the session and declared that it would boycott future proceedings. Its main contention had to do with the provision that owners who had more than one house nationalized by the communists will get only one of them back and receive compensation for the rest. The opposition, which wants all confiscated property returned, said that the bill would in fact institute "a second nationalization." In the meantime, on June 17, President Iliescu signed into law a bill regulating the organization and functioning of radio and television stations which provides for parliamentary control over the programs. For months the bill had been hotly debated in Parliament and the delay in its passage prompted the head of the Free Radio and Television Union, Dumitru Iuga, to begin a 26-day hunger strike.

On June 29, the Romanian Senate released a long awaited report on the events of December 1989, compiled by the Romanian Intelligence Service (RIS). The release of the document follows the resignation of the chairman of the Senate's special commission charged with investigating the events. He resigned in protest against the uncooperative attitude of the authorities. The deadline for the release of the Senate's report was extended to December 5. The RIS report states that Soviet, Hungarian and Yugoslav agents were all involved in the events that led to the overthrow and execu-

tion of Nicolae Ceausescu. However, according to the report, the "moving force of the revolution" was the army, acting together with the anticommunist demonstrators. At that time, KGB operatives, disguised as tourists, were present in large numbers in Romania and the report names two Soviet correspondents in Bucharest as intelligence agents. But the report says that the KGB wanted only the overthrow of Ceausescu, without the collapse of the communist regime and, thus, few of its agents participated in the pre-revolutionary events. The report also charges that Hungarian intelligence trained Romanian defectors as its agents and one of them incited the disorder in Timisoara. The report claims that a Yugoslav diplomat in Timisoara acted as a courier for the revolutionaries.

Finally, in an interview with the daily, *Meridian*, the president of the Hungarian Democratic Federation of Romania, Bela Marko, reiterated his demands for territorial and other forms of autonomy for the Hungarian minority. The interview provoked a wave of protests from the government and opposition alike. The "special status" requested for areas with "compact Hungarian population" includes increased decision-making powers over education and culture and equal status for the Hungarian language. The HDFR president stated that he intends to ask Hungary to include these demands in the basic treaty now being negotiated between the two countries. A spokesman for the opposition National Peasant Christian Democratic Party equated these demands with the "drawing of new frontiers inside Romania."

Russia

If clear rules for political succession and the peaceful transfer of power are essential ingredients of constitutional government, then Russian politics remains frustratingly personalistic and preconstitutional. Almost all observers agree that current institutional arrangements are unlikely to survive if Boris Nikolaevich, whose health is not perfect, were suddenly to depart the scene. Revealing their distressing reliance on Yeltsin, some reformist politicians, such as Yegor Gaidar, have proposed nominating him as the sole candidate from all democratic parties, blocs and movements. "Russia now needs stability most of all," Gaidar explained, tacitly assuming that stability in Russia depends on the rule of a single irreplaceable man, not on a system of impersonal laws.

The unsurprising frailty of constitutional norms was also exposed this June, when Chairman of the Federation Council Vladimir Shumeiko proposed postponing elections for the president and local leaders for another two years, until 1998. (Art. 81.1 of the Constitution stipulates, on the contrary, that "The President of the Russian Federation is elected for four years.") Shumeiko argued that people are tired of elections and the political turmoil they involve. Many appointed members of the upper chamber are also reluctant to risk their comfortable seats in an unpredictable electoral campaign, where they

might have to answer embarrassing questions from resentful or anxious voters. Deputies in the State Duma might also agree to such a postponement, even in the absence of a constitutional amendment, if their own mandates too were extended from 1996 (as is required by Art. 7 of the Constitution's "Concluding and Provisional Provisions") until 1998. While the suggestion of unconstitutional self-perpetuation in office, on the part of both the president and the legislature, has provoked ironic commentary in the press, few observers would be shocked if something of the sort eventually occurs. Yeltsin has been vague on the postponement issue. But he has regretted his failure, so far, to identify a suitable and willing successor. So the public will not be wholly unprepared for a violation of the Constitution if executive and legislative terms are eventually prolonged.

May witnessed a series of delays over passage of the new federal constitutional law on the Constitutional Court. The Court itself had drafted the first version of the law and submitted it to the Duma in accord with its right of legislative initiative. (According to Art. 104 of the Constitution: "The right of legislative initiative is vested in the Constitutional Court of the Russian Federation" in all "matters under its jurisdiction.") How the Court could be entitled to initiate legislation, even while its activities were fully suspended by Yeltsin's *ukaz* of October 17, 1993, is unclear. On May 11, the Duma adopted at a first reading its own version of the law (340 in favor, with two against and five abstentions). Its amendments shortened the term of justices to 12 years (previously life tenure with a mandatory retirement age of 65) and added the Duma among the bodies able to nominate candidates to the Court. The act was then passed by the Duma on a second reading on June 24 and approved by the Federation Council on July 12. Yeltsin signed the act into law on July 21. Dropped was the Council's initial demand that justices be reelectable and that the chairman of the Court be chosen by the Council, rather than the Constitutional Court itself. The law establishes two chambers within the Court and substantially diminishes the authority of the chairman. Part I, Chap. I, Art. 4 of the law allows the Court to exercise its functions in the presence of three-fourths of its members (15 of 19), although it cannot officially elect a chairman until all the justices are in place (Part V, Transitional Provisions). Most observers expect the Federation Council, sometime early in October, to select two of Yeltsin's eventual nominees to bring the current 13 sitting justices up to the minimum requisite number. (For three different perspectives on the new Constitutional Court Act, see the Roundtable section in this issue.)

Article 54 of the Constitution stipulates that "All territorial subunits (*sub'ekty*) of the Russian Federation, in relation with the federal bodies of state power, are legally equal (*ravno-pravny*) among themselves." As is well-known, however, centrifugal pressures are great and, as a consequence, federation politics proceeds according to unwritten laws. Roughly speak-

ing, the status of each "subject" depends on its de facto bargaining power vis-a-vis the center. In early August, for instance, Russia and Bashkortostan signed a bilateral treaty defining the powers and the relationship between the two governments. Bashkortostan is the second territory to sign such a treaty with Russia, Tatarstan having been the first (see *EECR, Russia Update*, Vol. 3, No. 2, Spring 1994). The debatable legal basis for such special deals may perhaps be found in Art. 78.2 of the Constitution which states: "The federal organs of executive power, by agreement with the organs of executive power of the subjects of the Russian Federation can hand over to them the implementation of part of their powers provided that this does not conflict with the Constitution of the Russian Federation and federal laws."

Provoked by the treaty, constitutional or not, the neighboring middle Urals oblast of Perm determined that, in comparison with its immediate neighbors, it was not being treated fairly. On August 18, the deputies of the Perm assembly therefore suspended the region's participation in the Civil Accord Agreement, signed in April. The reason they gave was Perm's unfavorable status in the federation compared to Tatarstan and Bashkortostan. Perm pays more taxes and has less control over its own exports than do the other two.

The essential problem of Russian federalism is how to achieve decentralization without disintegration. The troubled relationship of the center to the regions came up in earlier August when representatives from 15 territories met with Sergey Filatov, the president's chief of staff, to discuss the problems of coordinating legislation among the federation members and between members and the center. Speaking about the meetings, Deputy Chairman of the Federation Council Valerian Viktorov noted that a massive process of elaborating and adopting regional charters and constitutions had recently started in the territories and that many of these documents flatly contradict the Basic Law. The main sources of controversy include budgetary allocations, subsidies, export licenses, taxes and the distribution of property.

By far the most dramatic developments involving center-periphery relations occurred in the North Caucasus, Republic of Chechnya. Here is where the constitutionally protected territorial integrity of the federation is being put most sorely to the test. Beginning in late July and continuing throughout August, there was a sharp intensification in the struggle for power there. President Yeltsin has taken a side in the conflict, making war seem ever more inevitable. Of course, since Chechnya declared its independence in 1991, relations between Chechnya and Russia have not been good. This more recent crisis has been fueled by the Russian perception that Chechnya has developed into a base of illegal activity—drug trafficking, money laundering and arms dealing. The Chechnya side (under President Dzhokhar Dudaev) sees Russia as attempting to destabilize Chechnya to the point of collapse, and thus return it to Russian rule. The situation is complicated by the fact that three groups claim to represent Chechnya.

President Dudaev holds Grozny, the capital of the Republic. Yagari Mamodayev heads the Chechen Government of National Trust, which is exiled in Moscow. Umar Avturkhanov is head of the Provisional Council, the power base of which is in the Nadterechny district. Avturkhanov's group is the main opposition group in the struggle with Dudaev.

Yeltsin's latest attack on crime came on June 14, with Presidential Decree No. 1226, "On Urgent Measures to Protect the Citizenry against Banditry and Organized Crime." The decree followed several bombings and assassinations in Moscow. It was welcomed by police and security forces, but condemned in the Duma and by the media. The decree gives law enforcement officials the power to hold criminal suspects for 30 days without charging them or allowing them to make bail. Individuals and companies suspected of illegal activity can be searched without warrants. Company records and bank accounts can also be reviewed without warrants and phone-tapping and other arbitrary methods of gathering evidence against criminal suspects are now permissible. Evidence gathered by such means can also be admitted as evidence in court proceedings. Virtually all parties in the Duma attacked the decree as unconstitutional.

The decree appears to violate the following constitutional provisions: Art. 23.1: "Each person has the right to inviolability of his private life [and] individual and family privacy"; Art. 23.2: "Each person has the right to privacy of correspondence, telephone conversations, and postal, telegraph and other communications. Limitation of this right is permitted only on the basis of a judicial decision."; and Art. 25: "Dwellings are inviolable. No one is entitled to enter a dwelling against the wishes of the persons residing there except in cases prescribed by federal law or on the basis of a judicial decision." The decree also violates 15.4 and 17.1, declaring the authority of international human rights standards.

(Article 22.2 of the Constitution states that "Arrest, taking into custody and keeping in custody are permitted only by judicial decision. An individual cannot be detained for a period of more than 48 hours without a judicial decision." But this article is not yet legally in force because the Constitution's "Concluding and Transitional Provisions" also stipulate that "The existing procedures for the arrest, holding in custody and detention of persons suspected of having committed a crime are retained until such time as the criminal procedure legislation of the Russian Federation is brought into line with the provisions of [Art. 22 of] the present Constitution." Under current law, no judicial or procurator's decision is needed to detain a person, and this will remain true until a new code of criminal procedure is adopted by the assembly.)

While the Duma objected to Decree No. 1226, it lacked the constitutional authority to overturn the decree, not to mention the political coherence to produce a law of its own. Later, at the end of the month, it did pass a "measure" (246 to six) calling on the president to withdraw his decree. The president refused, claiming that action on the matter was long

overdue. He conceded the decree had the potential to "infringe" on certain human rights but claimed the turbulent conditions necessitated such a move. (The absence of a functioning and respected Constitutional Court, able to review presidential decrees for their conformity with existing legislation, was sorely felt in this entire affair.)

The Kovalev Commission's report (see the article by Tanva Smith in this issue), while intended primarily to cover the general human rights situation in 1993 and the inadequacies of the legal system in protecting human rights, does touch upon this latest affair, stating that "the [anti-crime] decree, in and of itself, creates a real danger of arbitrary arrest, unfounded invasions into the privacy of citizens and other violations of constitutional rights and freedoms." In a public presentation, Sergei Kovalev himself, a prominent former Soviet dissident and member of the Duma, said that "the ukaz inescapably will bring about gross and massive violations of human rights . . . and in fact has already done so." He cited one case of a biologist at Moscow State University who was beaten up by the police, insulted, searched and told by the police that they were doing it on the basis of the decree.

On July 21, just as the storm of protest regarding the presidential anti-crime decree was dying down, the State Duma adopted at the first reading the draft federal constitutional law on the Office of the Commissioner of Human Rights (the ombudsman). According to the draft, the office is charged with promoting guarantees of state protection for human rights and freedoms, the restoration of violated rights and the modernization of legislation in accordance with international standards. The Duma retains the right to appoint and dismiss the commissioner who is to "possess knowledge in the field of human rights and enjoy social trust and authority." The commissioner is appointed for a five-year term with a limit of two terms. Neither a state of emergency nor dismissal of the State Duma has any effect on his activity. He cannot be arrested or charged with a crime without Duma approval cannot serve in any other elected capacity, and cannot be active in politics. Except for teaching or academic activity, he can earn no other outside income. The commissioner has the right to consider appeals against all state bodies except the Federal Assembly.

After the draft was approved at a first reading, it was then sent for comments to the Russian Federation subjects, Supreme Court, Constitutional Court, Superior Court of Arbitration, committees and commissions of the Duma, parliamentary groupings and the president. Comments were due back at the Duma by September 15 for consideration by the Duma committees on legislation and judicial-legal reform. The draft will now be reviewed by the Duma at a second reading, to be finally adopted as law or, if rejected, to be considered further at a third reading.

Kovalev himself was elected as the commissioner of human rights at the first sitting of the Duma as part of the package of selection of parliamentary committee and com-

mission chairmen. This election seemed somewhat premature, in light of Art. 103.e of the Constitution, which states that the State Duma "appoints and removes from office the commissioner for human rights, who operates in accordance with federal constitutional law," because such a law has not yet been adopted. Kovalev was apparently named partly as a political trade off in the process of selecting committee chairmen and partly to insure the preparation of a draft law on the human rights commissioner, something Kovalev and his colleagues had been working on since 1991. It is possible, but unlikely, that a different person could be elected commissioner when the law is finally adopted.

In the interim, in August, the president jump-started the ombudsman's office by decree, allocating financing for start-up staff and premises "until the adoption of the law." In whatever form the human rights commissioner's office finally takes, it is a unique step in the history of Russian law.

Before disbanding for summer vacation the Duma also managed in mid-July to adopt a media law, the "Law on Coverage of Activities of the Bodies of State Power by the State Media." Applying only to the state-owned media, the law requires the media to inform the public of any noteworthy event of the president, government or Parliament within 24 hours of the event's occurrence. In providing the information of an event, the media must refrain from commentary. In addition, the law provides for television access to all parliamentary leaders and factions, while deputies are given local access to television and radio. Finally, the law forbids exclusive ownership of any media by a state body. As a result, the government (cabinet of ministers) will have to sell *Rossiiskie Vesti* and *Rossiiskaya Gazeta*, its two newspapers. Rumors of an impending government crack-down on the unruly Moscow press circulated freely as summer came to an end.

Finally, on September 19, Yeltsin decreed that henceforth December 12 will be celebrated as a new national holiday, "Constitution Day," in memory of the (apparently fraudulent) ratification of the current Constitution.

Slovakia

The National Council (Parliament) met three times in plenary session from May 1 to July 31 in the course of which 26 acts were passed. Legislative activity focused on economic policy, social policy and ethnic issues, plus an amendment to the electoral law and a law on referenda. The main economic and political issue faced by the government was the state budget. In an attempt to balance the budget, Parliament passed a tax increase on selected products (wine, beer, alcohol, tobacco products and fuel) with only cursory debate. The budget was amended in May to increase resources for health care and education. In the same month, the new coalition government approved the second wave of voucher privatization, a measure the previous government never pro-

posed. Other new laws in the economic realm include one on the "bankruptcy" of state enterprises and a law protecting economic competition.

In the sphere of social policy, intensive three-way negotiations between the government, employers' associations and labor unions took place. Conflicts arose over the social fund, a special welfare fund which employers in each enterprise are supposed to provide to meet the social needs of employees. The political struggle concerns who will provide the funding and how much. A general agreement on the subject was signed by the former government just a few days before it was voted out of office by Parliament. This agreement accepts all of the social and economic demands of the labor unions and thus includes provisions that cannot possibly be fulfilled. Other new social legislation includes laws on income tax, social and health insurance, child-support allowances, pensions and unemployment.

The ethnic issues considered by the coalition government were the politically sensitive questions of street signs and women's surnames. These matters had to be resolved to fulfill the Republic's commitments as a member of the Council of Europe. Bills on these issues have appeared on the parliamentary agenda since May 1994. The bill on women's surnames passed without much controversy in May, meaning that married women of Hungarian ethnic origin will not be required to add the Slovak suffix "ova" to their last names. Political and legislative activities connected with the bill on road signs, however, provoked heated debate in June. The Coalition Council, a group of top representatives of the governing parties created after the naming of the coalition government in March to agree on legislative agendas and preliminary drafts of governmental bills, agreed on a draft. According to the gentlemen's agreement with the Hungarian parties, they are invited to meetings of the Coalition Council dealing with ethnic issues. Representatives of the Hungarian parliamentary parties participated in this meeting of the Coalition Council and supported the bill. During the parliamentary debate, however, some coalition party members, mainly representatives of the National Democratic Party New Alternative (a former faction of the Slovak National Party), proposed some amendments to the bill. These amendments would have retained the names of towns and villages in South Slovakia named after important Slovak national figures, rejecting any replacement by historical Hungarian names. This amendment was approved by a majority of MPs present, provoking a negative response by two Hungarian members of Coexistence who ultimately voted against the bill. The question was also debated in the mass media and was often interpreted as the first important failure of the coalition government.

Negotiations within the parliamentary parties (coalition and Hungarian) led to a new bill on street signs; leaders of the parliamentary factions asked their members to sign a commitment to vote for this bill. This combination of mutual concessions and party discipline worked fairly well and, in July, a bill

proposed by a group of MPs was finally passed. The new law requires bilingual road signs in towns and villages where at least 20 percent of the residents identify themselves as belonging to an ethnic minority.

The law on early elections launched an electoral campaign that has been already characterized by several distinct issues and political processes. First of all, the amendment to the existing electoral law did not bring any substantial change. Parliamentary debate focused on the method of distribution of the candidate lists. While the opposition argued that such lists should be delivered to private homes before the election, the coalition emphasized the danger of influencing voters.

Political parties have attempted to overcome debilitating political fragmentation by forming new coalitions to obtain seats in Parliament. The electoral law sets a five percent threshold for the entrance of a single party into Parliament. Coalitions of two or three parties need seven percent to gain a seat; coalitions of four or more parties or movements need ten percent of the vote. Currently, 64 political parties are registered and 21 lists of candidates have been submitted to the Election Commission.

A petition signed by more than 100,000 Hungarian citizens of Slovakia led to the creation of an electoral coalition called the Hungarian Bloc. It includes three Hungarian political parties: Coexistence, the Hungarian Christian Democratic Movement (HCDM) and the Hungarian Civic Party (HCP). Negotiations among the parties took several weeks, as Coexistence rejected some of the candidates proposed by HCP. Coexistence also objected to including the fourth Hungarian party, the Hungarian People's Party (HPP), arguing that it did not have sufficient popular support. Some slight disagreements remain among the three parties, related mainly to the greater ethnic demands of Coexistence. HCP and HCDM have displayed more moderate attitudes and even loyalty toward the current coalition government. Other political parties have formed their own coalitions, such as People's Bloc and the Romanies' Union, but their popular support is weak.

The main issues in the September 30-October 1 elections are the nationality question and economic reform, especially privatization. The current opposition, Movement for a Democratic Slovakia (MDS) and the Slovak National Party (SNP), emphasize that the present coalition government is not legitimate and that "they" betrayed the interests of the Slovak nation by making servile concessions to the demands of the Hungarian parties. The coalition parties have tried to implement several important social and economic laws, including increased child allowances and pensions, voucher privatization and a redistribution of resources aimed at supporting education and health care. So far, the political parties have presented only the bare outlines of their programs, but they have already begun campaigning in the mass media accusing their political opponents of corruption and intimating the existence of hidden scandals.

Slovenia

The political and constitutional situation in the country remains basically stable. No important changes

have occurred in the structure of political parties or in their coalitions. Between May and August, however, three ministers resigned after being sharply criticized by Parliament and the public for some of their activities, including involvement in several scandals (Minister for Internal Affairs Ivo Bizjak, Minister of Work, Family and Social Affairs Jozica Puhar and Minister of Justice Miha Kozinc). Thus, cabinet membership has changed since the first half of 1994. During this period, five ministers have already been replaced, which amounts to about a third of the total number of government ministers. These reshufflings did not have any important impact on the government's activities, however, with the exception of the replacement of Janez Jansa—former minister of defense—which raised the political temperature in Slovenia for several weeks due to Jansa's personal popularity among the citizenry.

On September 3, President of the National Assembly Herman Rigelnik resigned, and on September 16 Jozc Skoljc, one of the leading members of the Liberal Democratic Party, was elected as the new president of the Slovenian Parliament. On the same day, Minister of Foreign Affairs Lojze Peterle, the leader of Slovenian Christian Democrats, resigned in protest at the election of Skoljc. Christian Democrats opposed his election, arguing that it could endanger the political balance within the ruling coalition. The election of Skoljc would, according to the Christian Democrats, increase the influence of the middle-left or left oriented parties. However, it seems that the existence of the ruling coalition will not be threatened since the Christian Democrats will be given a chance to propose a candidate for foreign minister.

No important transformations have occurred in the field of constitutional regulations. The Constitutional Court has been occupied with evaluating the constitutionality of the decree on referendum districts enacted by the National Assembly. According to Art. 139 of the Constitution, a municipality may be established by law following a vote in favor of its establishment by referendum, conducted to ascertain the will of the people in the area affected—the territorial boundaries of a municipality shall be such as are prescribed by law. Thus, the decree on referendum districts divided Slovenia into several territorial areas in which the referenda were performed. In May, a referendum on establishing new municipalities was held. The system of new municipalities is the primary step towards reorganizing local government. Considering the appeals (especially in the case of the city of Koper), the Constitutional Court overturned Art. 13 and the first and the third paragraphs of Art. 14 of the "Law on Local Government," finding them incompatible with the constitutional concept of local government. (Art. 139 of the Constitution describes referenda as being consultative in nature, while Art. 14 of the "Law on Local Government" established a binding referendum.) While creating a new sys-

tem of local government, the National Assembly will have to take into consideration the law on establishing municipalities and the issues brought forward by the referendum, and will have to follow the constitutional concept defining the nature of a municipality as a community in which the citizens can pursue their interests and satisfy their needs.

The National Assembly continued its legislative activity in the following fields: criminal law, financial regulations, state administration and the judicial system. In May, a "Law on Social and Labor Courts" was passed, introducing an important novelty to the Slovenian judicial system. Formerly, disputes concerning the enforcement of rights within the social security system were settled by the so-called "Courts of Associated Labor." These courts were part of the workers' self-managing system, operating separately from the regular judicial system. According to the new regulations, the social and labor courts are to be integrated into the regular judicial system. Furthermore, the enacted provisions also offer an opportunity to revise or retry the proceedings held by the former courts over the past 19 years. Such regulations will undoubtedly increase legal security in the field of labor and social security.

On April 11, the *Official Gazette* published an invitation for nominations to the post of human rights ombudsperson. While there are still no official candidates, several names have been mentioned unofficially.

Not surprisingly, the Roman Catholic Church has now attained a very strong position in Slovenia, due to the fact that about 70 percent of population considers itself Roman Catholic. After the decay of the communist regime, a dialogue between the state and the Church has been reestablished due to mutual efforts by Prime Minister Janez Drnovsek and Archbishop Alojzij Suster. The Vatican has recently entered the negotiations. The mutual agreement, proposed by the Roman Catholic Church in Slovenia, is to be signed directly with the Vatican, not only with the local Catholic Church. Future agreements should solve, among other issues, questions regarding the legal status of the Church, the rights and obligations of the Church in the legal system, the role of the Church in public education, as well as the restitution of Church property confiscated by the state after WWII. The basic goal of these pacts is to interpret the constitutional provision requiring the separation of church and state (Art. 7 of the Constitution). Negotiations are expected to continue this fall.

Legislation concerning relations with international bodies and conventions has also been on the political agenda. The most important convention signed during the past few months was the so-called framework document of the Partnership for Peace. Slovenian Prime Minister Janez Drnovsek, signed the document on March 30, in the presence of NATO Secretary General Manfred Woerner at a meeting with the North Atlantic Council. Slovenia became the fourteenth country outside of the NATO member states to sign

the document, and the first country outside the North Atlantic Cooperation Council to do so.

In the beginning of April, Slovenia signed and ratified three Council of Europe Conventions:

The European Convention on Extradition and its two Protocols. This Convention provides for the extradition, between contracting states, of persons wanted for criminal prosecution or for sentencing. It excludes political or military offenses.

The European Convention on Information on Foreign Laws. The aim of this convention is to facilitate the exchange between the contracting parties of information concerning laws and procedures in civil and commercial fields as well as about judicial organization.

Two protocols amending the European Convention for the prevention of torture and inhuman or degrading treatment or punishment.

At its session on May 25, the government formulated a proposed law to ratify the Convention on the Protection of Human Rights. The law, which was ratified by Parliament on May 31, provides a mechanism by which citizens can appeal to the relevant authorities if they believe their rights have been violated. Ratification of the convention enables continuous monitoring of the compatibility of Slovenian legislation with the protection of human rights and basic freedoms.

Ukraine

The summer of 1994 was punctuated by a series of elections that produced no increase in certainty about the country's future. On June 26, in conjunction with the first round in the presidential contest, elections took place for the local councils (*raiy*) and their heads. Two weeks later, the second round in the presidential race saw the incumbent, Leonid Kravchuk, unexpectedly defeated by the former Prime Minister Leonid Kuchma. On July 24, there was a third round of parliamentary elections for the remaining 112 vacant seats, but only 20 deputies were declared elected under the complicated double majority provisions of the electoral law. Further runoffs and new elections for the balance of the parliamentary seats were held on August 7 and others were scheduled for sometime in November. The August elections filled 27 more seats in Verkhovna Rada (Parliament). Three deputies are Communist Party members, one is a member of the Peasant Party and the remaining 23 are independents. To date, a total of 393 deputies have been elected of 450. The largest cluster of seats belong to the Communist Party (91), while the Peasant Party has 21 seats and the Socialists 13. The remaining 216 deputies have no party affiliation. By the end of July, Ukraine had an ex-prime minister as its new president, another ex-prime minister resurrected from the Soviet era as the new prime minister and a new parliamentary speaker—all of them ex-communists and all, in the absence of a new constitution, ready to flex their muscles in yet another round of institutional power struggles, while simultaneously trying, or appearing

to try, to govern the country in the midst of its multiple crises.

Despite President Kravchuk's efforts at postponement, it was finally decided on June 2, by a parliamentary vote of 201 to 69, to go forward with the scheduled presidential elections. Altogether seven contenders stood for the presidency in the first round of voting. With a turnout of 68 percent, they obtained the following shares of the vote: Kravchuk, 37.7 percent; Kuchma, 31.3; Oleksandr Moroz, Socialist Party leader and new Speaker of Parliament, 13 percent; Volodymyr Lanovyi, economic reformer forced from the deputy premiership in 1992 and the only candidate with even a hint of a modern political campaigning style, 9.3 percent; Valerii Babych, a conservative businessman still imbued with Soviet patriotic values, 2.4; Ivan Plivushch, the lackluster outgoing parliamentary speaker, 1.3 and Minister of Education Petro Talanchuk, 0.5 percent. In the second round, Kravchuk continued to posture as the defender of Ukraine's national harmony and independence and to promise to launch an economic reform that would be relatively painless. For his part, Kuchma emphasized the incumbent's failed economic record and the need for closer ties with Russia to remedy the situation. Opinion polls at the time showed a link between the public's support for, or opposition to, independence and market reforms and support for the various candidates. It was therefore commonly assumed that first round votes for Lanovyi would go to Kravchuk, while those for Moroz would go to Kuchma, which would have given Kravchuk the edge in the second round. In fact, with a turnout of 71.6 percent, Kuchma attracted 52.2 percent of the votes on July 10, for a gain of 20.6 points, while Kravchuk's percentage advanced by only 7.4 to a total of 45.1 percent. The presidential election was a rejection of Kravchuk, rather than an ideological realignment in favor of Kuchma and his program.

There was a distinctly regional pattern to the electoral support of each of the two principals: Kravchuk's in the west, Kuchma's in the industrial east and south. Indeed, Kravchuk won 94.8 percent of the vote in Ternopil province, 94.5 in Ivano-Frankivsk and 92.8 in Lviv; Kuchma, on the other hand, took Crimea with 89.7 percent, Luhansk with 88 percent and Dnipropetrovsk with 79 percent. This result gave rise to speculation about an intractable split within the country between its Ukrainian and Russian components, and even to talk of a Yugoslav scenario. Yet there were less sinister reasons than latent ethnic conflict for the outcome. Kravchuk obtained the backing of the nationalist movement, Rukh, which decided not to field a candidate of its own but to support the incumbent as "the devil we know," and Rukh's strength is concentrated in the western provinces and in Kiev. The blatantly pro-Kravchuk, government-controlled Ukrainian television did not penetrate into the Russophone reaches of the country, and there are simply more voters in the east and the south than in the west.

In his first statements after being elected president, Kuchma was cautious and compromising. He played down the need to reorient Ukraine's economy toward a greater

reliance on Russia and sought to heal the east-west split. He spoke of Ukraine as a bridge between Russia and the West, of establishing links in all directions—to Russia, the CIS and the West—and of not wanting to resurrect the old Soviet Union. He advocated moderate economic reform, a position somewhat at odds with his own background as the one-time director of Ukraine's (and the world's) largest missile factory. Kuchma also emphasized his commitment to maintain the country's sovereignty, his intention to serve all regions of Ukraine and his commitment to national consolidation. He promised, however, to initiate legislative changes that would grant Russian the status of an official language while preserving Ukrainian as the state language. He also made plain his view of the country as primarily and naturally a component of Eurasia (not of Europe), as having a strategic role in the CIS, and as needing to normalize its relations with Russia, principally in the economic field. Characterizing himself as a pragmatist, Kuchma's style—earnest and dull—contrasts sharply with Kravchuk's vacuous pomposity.

The issue of constitutional reform, which had lain dormant hitherto, was touched upon by President Kuchma in his acceptance address when he spoke of the necessity of reviving the constitutional process. The October 1993 draft constitution was sidelined when Parliament and the president failed to agree on a method for its adoption. Its ratification was not included on the ballot. The draft provided, however, for a relatively weak president, no longer head of the executive branch, as hitherto, but coexisting with a relatively strong prime minister and Parliament. This arrangement is at odds with Kuchma's natural preference, now that he occupies the office, for a strong executive presidency. He also mentioned the desirability of strengthening and making more effective the administrative branch of government, a difficult task now that the presidential representatives or prefects, instituted by Kravchuk, have been dismissed after the recent election of the local councils and council heads.

The 20 new deputies elected to Parliament on July 24 did not significantly alter partisan alignments in the assembly (see *EECR, Ukraine Update*, Vol. 3, No. 2, Spring 1994), especially since 16 of them are not affiliated with any party. They brought the total of occupied places in the Verkhovna Rada to 354 of 450. Low voter turnout, due to civic apathy, invalidated the runoffs in all 18 Kiev constituencies, as well as in seven of ten in Crimea (local bosses had urged a boycott). Twelve more deputies were elected in a further runoff on July 31, all of them self-described independents except for a lone communist.

Earlier, on May 18, the communist-dominated Parliament had elected as speaker, Socialist Party leader Oleksandr Moroz, who then managed to install his supporters, Agrarian Party leader Oleksandr Tkachenko and Unity faction member Oleh Dyomin, as deputy speakers. Moroz has come out as categorically opposed to the privatization of land, a position which will present a serious obstacle to any economic reform plan. He also, paradoxically, believes in strengthened ties with

the new Russia. Already by the end of July, newspapers were headlining the growing duel between Moroz and Kuchma. Kuchma's party, the Interregional Bloc for Reforms, has a very tiny, 11-seat representation in Parliament. Hence, Kuchma will be forced to reckon with the dominant socialist-communist grouping. Owing to the relative absence of a presidential party, and the lack of any clear definition of powers, the potential for conflict between president and Parliament is even greater than under Kravchuk. Indicative of Parliament's anti-reform orientation was its passage on July 29 of a resolution suspending the process of privatization until September 15.

Between president and Parliament stands Prime Minister Vitalii Masol, nominated by President Kravchuk and approved by the Verkhovna Rada on June 16. Before the collapse of the USSR, Masol had served as deputy head of the state planning committee of Ukraine for seven years until 1979, when he was appointed its head and concurrently deputy premier (from June 1987 to October 1990), when student protests forced his resignation; he served as chairman of the Council of Ministers. Whether he was qualified to guide Ukraine's transition to democracy and the market was a moot point. In his acceptance speech, Masol stated his belief that the prime minister (not the president, as in the present Constitution) should head the executive branch of government, a position certain to collide with Kuchma's view of his own role. Masol has been renewing and crafting his cabinet by sweeping out the deadwood of the Kravchuk era and "refreshing" the ministries with more of the same from the old nomenklatura pool.

By mid-year, the "crisis" in relations between Kiev and Simferopol, capital of the autonomous territory of Crimea,

had been downgraded to a mere "situation." In what was viewed at the time as the most serious challenge to President Kravchuk's authority, Crimea's President Yurii Meshkov, backed by the vociferous Crimean Russian Society, issued several decrees subsequently nullified by Kravchuk. The deadline for the Crimean Parliament to withdraw its reinstatement of the 1992 Crimean Constitution passed without incident. Other threats from both sides failed to materialize. Talks between the two sides continued. Meanwhile, Meshkov began to lose support in his Parliament (becoming embroiled in the same sort of power struggle as had Kravchuk and Yeltsin earlier) and popularity among the public in Crimea, and was no longer able to effectively challenge Kiev. The drama nicely exemplifies the political posturing characteristic of Ukrainian politics today.

The Crimean executive-legislative dispute, triggered by Meshkov's "importing" cabinet appointees from Russia, came to a head on September 7, when the deputies reduced his powers to those of a ceremonial head of state. For good measure, they also upheld Sevastopol's council resolution of August 23 giving itself Russian city status, which had been rebuffed by Yeltsin. In turn, Meshkov suspended Parliament and locked the building, took over "full power," dissolved local councils and seized the television center. He also set December 9 as the deadline for a new constitution to be drafted and April 9, 1995, as the date for a referendum on it. After President Kuchma's urging of a "civilized solution" and offer to mediate, Meshkov lifted the blockade of Parliament, but the deputies still refused to withdraw their law and he, the suspension of the assembly.

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Disproportionality and the danger of "constitutional dictatorship"**Special Reports****Elections, Coalitions and Constitutionalism in Hungary***Andrew Arato*

For the second time in four years, Hungary's new system of public law has provided a framework for democratic elections, the emergence of viable parliamentary parties and the formation of a working government. But the shortcomings of this system have also been revealed by disturbingly skewed electoral results, by the difficulties involved in forming a coalition (one that, by classical standards, did not have to be formed) and by the constitutional challenges now facing the new government. These problems are all rooted in two features of the existing institutional arrangement: a 1989 electoral law that ensures disproportionality and, inherited from the old regime, an exclusively parliamentary procedure for amending the Constitution. The way these two rules interact turns out to be especially burdensome for the political system.

Hungarian electoral law institutes a "mixed" system. Out of 386 deputies, 176 are chosen in two-round (majority and then plurality), single-district elections, while up to 152 seats are filled in proportional votes in 20 regional constituencies, and at least 58 representatives are chosen from a national compensational list. Parties can qualify for the regional and national lists only if they obtain five percent of the vote from all the regional lists taken together. Thus 178 seats are distributed in individual races as opposed to 210 awarded to parties according to proportional representation and compensation. Theoretically, therefore, the level of dispro-

portionality produced by this system should lie about midway between a pure PR and a first-past-the-post or Westminster system. But, as Arend Lijphart noticed for the 1990 elections, the system is actually much closer to the Westminster end of the spectrum in its results, producing greater disproportionality in 1990 than any British election between 1974 and 1987. In 1990, the victorious Hungarian Democratic Forum (HDF) gained 42.5 percent of the parliamentary seats on the basis of 24.7 percent of the popular vote. This spring, the Hungarian Socialist Party (HSP) received 54 percent of the seats for 33 percent of the vote. Thus, compared to 1990, disproportionality increased somewhat along with the winner's share of the popular vote. All other parties, even the second place Alliance of Free Democrats (AFD) received a lower percentage of seats (18 percent) than of the popular vote (20 percent). In any case, vote-to-seat disproportionality was remarkably similar in 1990 and 1994, a 20 percent bonus going in each case to the strongest party.

The authors of the electoral compromise at the Round Table Talks assumed, however mistakenly, that they were following the German system with only minor modifications. Thus, such a high level of disproportionality should have already surprised them in 1990. At that time, it was tempting to ascribe the lopsided result to a bandwagon effect, to the pull naturally exerted by the first-round leader in the second round. And indeed, in 1990, the HDF

led in many fewer individual races after the first round than in the final vote. But in 1994 the HSP actually lost its first-round lead in 13 or so races. Thus, exaggerated disproportionality must have another cause.

The express aim of disproportionality, of course, is to enhance governability. Similarly, the threshold (originally four percent, but raised to five percent in 1993) was set to avoid fragmentation and limit the number of parties in Parliament. And the two-round individual races were designed to enable a relatively small number of parties to form a coalition. Together with the constructive vote of no-confidence, established through the HDF-AFD agreements of 1990, the new electoral law aimed to provide for an easy-to-establish and difficult-to-replace government. Such an arrangement, however, reveals severe liabilities when the government suffers a great and lasting loss of support, as happened in Hungary after 1991.

The problem begins with the Hungarian electoral system itself. Quite unlike what we can observe in pure Westminster systems, the list vote or popular vote for parties is not only a statistical but also a legally and politically significant fact. It is officially published and is used to determine which parties enter Parliament. And while the first-round popular vote represents almost a referendum on the parties, it is widely known that its results are massively distorted by the operation of the electoral system. Thus, the day after the elections, the losers begin to play up the difference between the popular vote and the parliamentary representation each party receives. The winners too act as if they were conscious of an embarrassing gap. Thus, in 1990, while the HDF did not forge a Grand Coalition with the liberals, as would have been popular, they did cobble together an "overly large" coalition whose three members had jointly received 42 percent of the popular vote. It also proceeded to make a political pact with the AFD, the main opposition party, to amend the Constitution. The 1994 winners, having received only 33 percent of the popular vote, acted in an analogous fashion. Before the second round, the HSP firmly indicated that, even if they received the absolute majority of seats, they

would seek a mathematically unnecessary coalition with the AFD, together with whom they eventually received 53 percent of the popular vote.

Notice that the HSP, representing the left of the political spectrum, sought to establish an alliance with a different ideological-political bloc, the liberals, while the earlier HDF-led coalition had drawn on only a single bloc, that of the conservative or national Christian right-wing parties. The incredible drop in popularity of the HDF a few months after the 1990 elections may have been due to this short-sighted choice of a narrowly right-wing coalition by a party that had won the elections by appealing to the center. The HSP was probably eager to avoid repeating the HDF's fatal mistake.

Broadening the governing coalition, in 1994 as in 1990, was not merely a political ploy. The winners of each election, whatever their words, disclosed through their actions that they were troubled by a merely procedural legitimacy and the potentially weak democratic basis of any government built upon the constitutionally minimum number of parliamentary votes. (I do not mean to suggest that coalition building in each case was exclusively driven by problems of democratic legitimation or that the legitimation problems of the historically tainted HSP are entirely a matter of the discrepancy between their percentage of popular votes and their percentage of parliamentary seats.)

Complex constitutional politics

Be this as it may, the legitimacy problems associated with disproportionality are greatly exacerbated when constitutional politics is involved. The Hungarian amending formula allows two-thirds of Parliament to revise the Constitution. In 1990, the overly large but ideologically narrow coalition built by the HDF controlled only 60 percent of the seats. In light of the large number of non-constitutional laws that, according to the amended Constitution of 1989, had to be passed by two-thirds of those present and voting, the national Christian coalition was too small. Additional partners were constantly needed, either to adopt such laws or to change their constitutionally anchored two-thirds status. This was the main reason why the HDF entered into a

political pact with the AFD, allowing Arpad Göncz to become president of the republic. Their agreement led to a second major round of constitutional revisions. Thus, along with the parties of the Round Table Talks of 1989, the HDF-AFD negotiators of April 1989 should be seen as the true framers of the present Hungarian Constitution. But it should be noted that these two parties, which studiously avoided consulting their own political or ideological allies before striking their deal, together, received only 46 percent of the popular vote. This 46 percent, however, gave them the necessary two-thirds parliamentary majority needed for amending the Constitution. They used this formally unimpeachable power to change the character of the regime dramatically from a parliamentary and largely consensus-type democracy to a *Kanzlerdemokratie* of the German variety, with important majoritarian elements. Not unexpectedly, though the validity of its consequences could not be legally contested, the pact was never recognized as fully legitimate by the other parliamentary parties. Indeed, the right wing of the HDF, to which the bulk of the party faithful adhered, viewed the pact as the original sin of the Antall government, and worked ceaselessly (and in part successfully) to whittle away the concessions which their party had made to the AFD. This state of affairs contributed to the softness of the Hungarian constitutional settlement, which was also exacerbated by the (unavoidable) activism of the Hungarian Constitutional Court. Thus, on the eve of the 1994 elections, virtually all parties recognized the need to frame a new constitution.

Into this constitutional setting, the results of the first 1994 electoral round crashed like a bombshell. Learning from their own experience, the right-wing parties now faced the following difficult situation. The socialists, whom they feared and against whom government-run television had conducted a scorchingly negative campaign, were on the verge of attaining an absolute parliamentary majority. But if they failed to gain more than 50 percent of the seats, they would be forced into a coalition with the AFD, gaining, in this way, the two-thirds majority needed to modify the Constitution and to pass or alter important two-thirds laws, such as the media

law, electoral law and law on local governments. The HSP led in most individual races but, in the bulk of these, the AFD proved a strong runner-up and was now urging voters from other parties to help avert a socialist landslide. To the strategists and the publicists of the right, all the way from Istvan Csurka to those on the margins of the liberal Alliance of Young Democrats (AYD, officially an electoral ally of the AFD), the greatest danger at this point appeared to be not an ordinary parliamentary majority for the socialists, but rather a two-thirds majority for the HSP and the AFD together. Only a crushing defeat for the AFD, they reasoned, could derail a socialist-liberal coalition. Thus, the main enemy on which the right began to concentrate its fire was the liberal center and not the left. In the hour of their own electoral debacle, more and more of the top right-wing politicians apparently hoped for a purely socialist government and even recommended voting socialist wherever a right-wing candidate was weak.

The hope of at least some conservative forces was for a weak, one-party socialist government with a built-in legitimacy deficit. But they appealed publicly and not altogether hypocritically to a diffuse fear of "constitutional dictatorship," implying that an HSP-AFD coalition controlling two-thirds of the seats would govern as it pleased, modify the Constitution by fiat, and even use its constitutionally authorized powers to abrogate democratic forms and establish some kind of quasi-authoritarian rule.

In the end, both an absolute parliamentary majority for the socialists (feared by AFD) and the formation of a coalition with support from over two-thirds of the deputies (feared by the right) came to pass. The HSP faced the choice of forming a government that was either too weak or too strong. Not surprisingly they chose the latter. The AFD leaders, on the other hand, were not prepared to disappoint overwhelming public expectations of a coalition repeatedly registered in various opinion polls, and expressed also by its own voters and the liberal intelligentsia. Neither party was willing to assume responsibility for the failure to forge a coalition, and thus one had to offer and the other had to accept negotiations. And when the

negotiations had begun, they were fated to succeed for the same reasons.

The supercoalition as a "constitutional dictator"

The most delicate issue facing the negotiators was that a parliamentary coalition controlling 72 percent of the seats would thereby automatically possess constituent powers. The AFD, in addition, had its own special problems. In an ordinary coalition, when no partner alone has the power to govern and when each partner's willing participation is necessary to procure the necessary votes, the threat to withdraw is usually sufficient to secure the interests of each party. Given the HSP's absolute majority, however, the AFD could not be protected in this conventional way. To deal with this problem, the leaders and experts of the AFD devised, and the HSP accepted, a complicated multi-layered system of guarantees, including a consensus requirement not only on all major governmental decisions and appointments, but also on legislation. In addition, the ministers and legislative proposals of each party are now sheltered from parliamentary attacks (interpellations, unfriendly amendments) by disgruntled factions and individuals from the other party. These arrangements, however, while published in detail, have a merely political status and are legally unenforceable, involving voluntary self-limitation on the part of the two coalition parties. But violations would no doubt be politically costly. To avoid such an outcome, the two parties have set up a Coordinating Council of the Coalition, with a strong consensus requirement (each party has one vote), dealing with all disputed questions touching on coalition arrangements.

If it works well, this system of guarantees could foster cooperation and produce effective two-party government. But it could also yield a parliamentary super-faction, a gigantic political machine reducing all opposition to insignificance. It is unclear what would remain of parliamentarianism in such a setting, where all major discussions would occur within the ruling parliamentary factions or in the various forums (governmental council, coalitional council, combined meeting of the factions) where the two parties alone are represented. Indeed, this

was one of the possibilities that right-wing publicists had in mind when they warned against the danger of "constitutional dictatorship." To deal with this not wholly implausible fear, the framers of the coalition agreement proposed a significant bolstering of the opposition. Instead of allocating parliamentary committees in proportion to the number of seats held by each party, the coalition partners, even before finalizing their own agreement, undertook negotiations with the remaining four parliamentary parties about committee representation. The result, which awarded the opposition over one-third of the seats on six important committees and parity, or near parity, in two others, was then incorporated into the coalition agreement. That agreement, and the governmental program based on it, also indicated the coalition's intention to seek a broader consensus on some particularly contentious fundamental legislation, in particular the media law.

Ordinary political problems associated with a deliberately enfeebled opposition are heightened in the constitution-making process. Theoretically, the new socialist-liberal coalition could unilaterally act under the inherited amending formula to change the Constitution along with the electoral law (a two-thirds law). By so doing, in theory at least, it could permanently undermine the political chances of today's already weak opposition. This is the second meaning of "constitutional dictatorship," one that should not be, and has not been, lightly dismissed. But, the Constitution cannot be simply left as it is. Both the electoral law and the Constitution's amending formula, for instance, present dangers to parliamentarianism and constitutional stability. And these are the rules whose unilateral alteration is likely to raise the greatest anxieties on the part of the opposition. Together, they can expose all future election winners to the charge (and perhaps the temptation) of "constitutional dictatorship." Thus, one of these rules, at the very least, and probably both, should be changed if they are to meet the requirements of constitutionalism.

In addition, the procedures for amending the Constitution must be changed in order to bring the period of transition to a legal close. Even Laszlo

Solvom, the president of the Constitutional Court, who strongly favors retaining the 1989-1990 constitutional document and developing it further mainly through judicial review, recognizes the need to create a new procedure for constitutional amendment in order to impede ceaseless parliamentary tinkering with the Constitution. What he may see less clearly is that one sitting Parliament lacks the democratic legitimacy necessary to stop future parliaments from constitutional politics merely through some tinkering of its own. The constitution-making process, in other words, must be opened up democratically so that it can be closed politically. Any lasting closure will require an extraordinary process of constitution making, involving the public at large, not merely the parliamentary deputies of the moment.

Admittedly, the new socialist-liberal coalition is not in a particularly favorable position for initiating a new and relatively definitive phase of constitution making. First of all, despite its 72 percent of the seats, its electoral base of 52 percent remains too narrow for it to establish, on its own, anything but a winner's constitution. Analyzing the Polish case, Wiktor Osiatynski correctly points out that, while a vote-to-seat translation formula that magnifies the strength of the winning parties is justified when it enhances governability, the disproportionate assembly it produces is wholly ill-suited to the needs of constitution making. A constitution ought not to be (or appear to be) the product and tool of a single government. It should be, as Osiatynski argues, acceptable to all leading political forces (see *EECR*, Special Report, Vol.3, No.2, Spring 1994).

Neither the HSP nor the AFD, moreover, is well-situated for sponsoring a new constitution. The legal forerunner of the HSP, for instance, unilaterally imposed a pseudo-constitution on the country, and the current socialists are palpably nervous about this historical precedent. They certainly want to avoid all appearance of sponsoring, and especially forcing through, yet another change of system. But the AFD, too, wishes to avoid any such appearance. Late between the two electoral rounds, the AFD leaders finally came up with a plausible answer to the charge of an incipient constitutional

dictatorship. They publicly maintained that, as one of the main architects of the new legal order, they should surely be seen as guardians of its essential structures. Unintentionally, this seemingly innocuous claim made it awkward for them to call vigorously for a wholly new constitution after the elections.

Even before the May vote, most parties agreed that the Constitution must be at the very least revised in order to deal with a whole range of problems. The changes discussed most frequently included a clarification of the role of the president, a slight reduction in the powers of the Constitutional Court and a redefinition of the authority of the public prosecutor. Finally, if the Constitutional Court was to continue building a strong tradition of constitutionalism, the democratic legitimacy of the constitutional document as a whole had to be shored up to avoid a recurrent conflict between democracy and constitutionalism. The socialist-liberal coalition, obviously enough, cannot run away from institutional defects merely because it now has the power to correct them all alone. Indeed, an important justification for building the coalition in the first place was that it would have the opportunity to bring the period of constitutional transition to a close by hammering out a coherent set of basic laws (a constitution, a media law, an electoral law) that would establish more securely the liberal and democratic character of the new system.

A fair and durable approach

This opportunity must be exploited wisely if its results are to be legitimate and stable. From the coalition agreement and the slightly different governmental program, one can extrapolate the following important points pertaining to the future of constitutional politics in Hungary:

1. The parties of the coalition intend to create a new constitution, but also to preserve the main features of the existing public law system.
2. A 27-member parliamentary committee will be formed to draft the new document, working under the minister of justice; the HSP will have ten (less than 50 percent), the AFD five, and the opposition

parties ten (more than 33 percent) of the seats.

3. The new constitution will be submitted to popular ratification of by the second half of 1995.

4. A wide-ranging professional and public discussion will take place.

5. Several areas for new constitutional regulation include (a) a constitutional guarantee of judicial independence by a National Judiciary Council to exercise the present prerogatives of the Ministry of Justice with respect to the courts; (b) the redefinition of the office of the public prosecutor; and (c) a reform of the structure of local government.

6. The functions of the Constitutional Court will be slightly trimmed, but only in accord with its own expressed desires.

7. A new constitutional amending formula will be proposed, requiring a second parliamentary session to ratify amendments made by the previous one.

8. Finally, outside the Constitution strictly conceived, a new electoral law will be proposed, abolishing the second electoral round, keeping a mixed system but taking the principle of proportionality into account.

These various proposals, I believe, can be interpreted in light of a set of higher principles that, in turn, can serve to orient the coalition when dealing with the unexpected but unavoidable difficulties of constitution making. It may be worthwhile, therefore, to articulate these principles as succinctly as possible:

The principle of consensus: although the socialist-liberal coalition could make a constitution alone, it has decided to include as many of the opposition parties in the process as possible. It is therefore willing to expose itself to the risk that some parties might use the process to denounce the coalition and repeat their charge of creeping dictatorship, even though it cannot make the whole process hostage to the politics of one or two opposition parties.

The principle of democracy: while the socialist-liberal coalition is not going to hand over the constitution-making process to a specially elected constitutional assembly, neither will the decision concerning the Constitution be restricted to the parliament it will regulate. The coalition will thus submit, in

line with the requirement of the law on referenda [1989, XVII, par 7], the redrafted Constitution to the risks of a popular referendum.

The principle of publicity: while the socialist-liberal coalition has the power and technical expertise to enact a new constitution rather quickly, it has committed itself to establishing a time frame that will allow for relevant publications, expert conferences and public discussions.

The principle of the veil of ignorance: in order to avoid making the Constitution hostage to normal politics, the Constitution will be submitted to popular ratification well before the next elections. Thus, the whole process has to conform to an orderly and timely schedule. Its conclusion must take place neither too early nor too late.

The principle of continuity: Gradualism and continuity, having characterized the entire process of change in Hungary, must now be upheld on both procedural and substantive levels. The existing amending formula must be used one more time to establish new procedures for making the new Constitution. As regards substance, the new Constitution makers, if they are to gain the support of at least one opposition party for the new document, would do well to preserve, so far as possible, the content and even the structure of the inherited Constitution. This should be possible because, while there is certainly a need for a new constituent process, the document itself requires serious redrafting only at certain points stressed in the current professional consensus.

A new Hungarian constitution is likely to be drafted and passed within the next year. But wherever significant departures from existing arrangements seem warranted, the socialist-liberal coalition should strive to secure maximum consensus across the political spectrum. This is certainly feasible, for example, when it comes to a partial reduction of the powers of the Constitutional Court, which will probably occur according to principles outlined by the Court itself. But where consensus is not possible and yet change is still highly desirable, the parties of the new ruling coalition would do well to adhere to the principles they defended while in opposition, when they were understandably more sensitive to

the needs of constitutionalism than they are today as members of a rather overwhelming parliamentary majority.

Only if these general principles, which I have distilled from the government's own public statements, are more or less followed will a general agreement be possible regarding the fundamental point: the closing of the constituent process through establishing a new amending procedure that will make future constitutional politics more democratic and yet constitutional change more difficult. The worst possible outcome

would be a substantially new constitution, imposed unilaterally by the socialist-liberal coalition and deliberately designed to be almost impossible to change. It seems more likely, however, that the new government will employ the proven method of negotiation among diverse forces rather than succumbing to the old European temptation of claiming unlimited constituent powers.

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The End of Decommunization

Stephen Holmes

On September 9, secret police Colonel Adam Pietruszka, jailed in 1985 for his involvement in the murder of Father Jerzy Popieluszko, was released from prison for good behavior. Far from being atypical, his parole emblemizes an unexpected but increasingly obvious tendency, visible throughout the postcommunist world, to close the books on the crimes of the past. A burning issue just two years ago, decommunization has now almost everywhere guttered to a quiet end. Far from being roasted on a spit, former communists have been elected to govern, ousting fiercely anticommunist cabinets, in Poland, Hungary, and Lithuania. Even in the Czech Republic, a partial counterexample, documented misbehavior has seriously affected the careers of a few hundred people at most; the less than comprehensive nature of job dismissals in the homeland of lustration is nicely illustrated by General Jiri Nekvasil, the current Chief of Staff of the Czech Armed Forces, who was a prominent figure in the pre-1989 establishment and may even have been linked to Soviet military intelligence.

In Bulgaria, the doddering Todor Zhivkov was sentenced to seven years for embezzlement, but he never served a day for reasons of health; while Georgy Atanasov, the one member of the former elite to be incarcerated, was pardoned last month. In late December 1993, the last two Romanian communist officials imprisoned for involvement in the December 1989 massacres were also released. A handful of embarrassing show trials have taken place in Tirana but even there, where retribution is traditionally considered sweeter than honey, "strikingly, Albanians are not interested in taking revenge

on those responsible for the previous era" (*Financial Times*, 12 September 1994, p. 3). The Russian coup plotters of 1991 got out of jail, even before the amnesty, and even ran for seats in the Duma. And so on. The only real exception to this trend is the former East Germany, where tens of thousands of petty informers have been fired from their jobs as school teachers and so on, an exception which supports the hypothesis that decommunization is not a process which a sovereign nation willingly inflicts upon itself. (Something similar could be said of denazification.)

Important differences are visible among the countries of the region, needless to say. But in most of them, the anticommunist impulse has petered out. A few party bosses have been rusticated and one or two criminal trials have taken place, but the dreaded witch hunts have completely failed to materialize. Many presumably guilty people walk free and some even accede to power. Since the rift between anti-communists and anti-anticommunists has been a major factor in postcommunist political life, this development represents a major political and psychological event. It also cries out for an explanation.

Two or three years ago, impressive international conferences were mounted on the moral and legal problems associated with disqualification from office, police dossiers, "truth commissions," and screening laws. How were former leaders and former collaborators to be handled? Could not a harsh criminal approach be replaced by milder non-criminal procedures? Worried liberals from the West, McCarthyism in mind, discoursed earnestly on the folly of score-settling and the wisdom of amnesties

and active forgetfulness. Local moderates urged compatriots to "draw a thick line," to quit rummaging around in the past, and to take up more creative and less prosecutorial tasks. The arguments against revisiting past villainies seemed powerful. The most pressing need in these societies was social reconciliation, not collective self-laceration. After all, how can a rule-of-law system be founded on the basis of victor's justice, applied to an arbitrary subset of the guilty, using evidence gathered by the communist secret police? The dossiers of the security services were unreliable and difficult to cross-check, the degree of collaboration of named individuals was exaggerated by boasting agents, and the files mentioned only the little fish, not the party bosses. But most importantly, all of these societies had a difficult future to build, and should not consume themselves in a futile and debilitating attempt to expiate the past.

While these arguments against decommunization sounded convincing, the case for decommunization was also strong. Only the victims had a right to forgive the wrongdoers. In the past, captured Gestapo files were regularly used to incriminate Nazi collaborators. Communism had systematically destroyed historical memory, and so a post-communist society had to remember in order to heal itself. The only way to begin a rule-of-law system was to bring guilty parties to account. Besides, a shake up of personnel was the fastest way to re-orient the regime toward Western values. Only the torturers and those who gave and followed shoot-to-kill orders should be imprisoned, but high party officials and collaborators with the security apparatus should be banned from important public office, at least for a time.

This controversy once seemed terribly important to people in a good position to judge. But even though it is still discussed desultorily in the East European press, and some laws are now on the books (see *EECR*, Hungary Update, Vol. 3, No. 2, Spring 1994), the whole issue has now died down. Not only have former elites, still wielding considerable influence, worked to stifle the decommunization process. But the public appetite for purges has proved vanishingly small. As a result, no heroic

effort to draw a "thick line" has been required. A few criminal prosecutions, as opposed to symbolic purifications on the basis of collective guilt, have taken place. (One example is the current trial of General Czesław Kiszczak, former minister of the interior, charged with ordering or permitting the shooting of the striking miners at the Wujek Coal Mine in December 1981.) But popular clamoring for revenge is nowhere to be heard. Thus, little electoral profit has been reaped by politicians playing the anticommunist card. For instance, Prime Minister Jan Olszewski's 1992 attempt to use secret police dossiers against Lech Walesa was a spectacular failure.

On the face of it, the lack of anticommunist animus is difficult to understand. The opportunists and stooges of the old regime turned a profit (sometimes handsome, sometimes paltry) off popular suffering. The party elite lived well by squeezing the people. They occupied relatively nice apartments, for example, while most people were crammed together in uncomfortable conditions, and so forth. Some shrewd commentators, such as the Czech writer Jan Urban, once explained that the pervasive culpability of most people under the old regime would inevitably spark a search for dirty people to blame. By quarantining a few, the majority of citizens would metaphorically cleanse themselves. It sounded logical, but if it happened to a limited extent in the Czech Republic, it occurred virtually nowhere else. Why not? Why have voters been sweeping former communists into office, rather than shunning and purging them? Why no inquisition in Eastern Europe?

This is a typical example, it seems to me, of a question *mal posée* (based perhaps on an unjustified expectation of irrational patterns of mass behavior in the postcommunist world). In fact, there are very good reasons why, contrary to most Western expectations, militant decommunization has failed to materialize. For one thing, these are societies largely bereft of zeal. Historical justice turns out to be a highly specialized concern, holding little interest for either those who look forward or those who look back. The former are devoted to making the most of the possibilities they have, while the latter, far from

wishing to right past wrongs, feel an unprecedented and only partly understood "nostalgia for stagnation" or a sense that life was, yes duller, but still "cozier" and more secure under the old regime. But the public disinterest in purges does not necessarily represent a flight into golden-age delusions or a turning away from reality. Arguably, at least, quiescence and inaction in this domain is rational, even commonsensical, or at least perfectly natural. We can hardly claim certainty at this early stage. But here are six perfectly respectable considerations that may have helped mute the politics of anticommunist resentment.

1. People are rightly of two minds about the moral question. Collective guilt is an incoherent idea and retroactive punishment is wrong. It is impossible to undo tragedy by legal means. How will symbolically stomping on a few perpetrators compensate the victims or make them whole? After 45 years of state socialism, moreover, many families had at least one member involved in some compromising activity. It would be unbelievably perverse, therefore, for most people to unload all guilt on some discrete and insular "other." Contrary to the irrational logic of scapegoating, a socially diffuse sense of complicity with the former system makes it almost impossible to galvanize citizens to "root out the reds."

2. The urgency of current problems pushes concern for temporally remote crimes off the front pages of the popular press. Ordinary citizens understandably care more about personal security and day-to-day survival, fighting the mafia and fixing the economy, than about historical justice. They have also lost patience with clumsy attempts, by politically bankrupt parties, to distract popular attention from practical problems with hollow promises of moral purity.

3. People understand that decommunization is basically an elite power game. Most Hungarians knew what was *really* at stake, for instance, when József Antall accused István Csúrkó and József Torgyán of having been informers. Lustration was a stick with which one group of would-be leaders was attempting to beat another. Popular skepticism about the politicization of morality, moreover, may be a sign not of amnesia but of indelible memory. After all, when the communists seized power after WWII, they cynically

used the charge of collaboration with the Germans to discredit and deport noncommunists, even executing opponents after trumping up fake charges. (The case of Nikola Petkov in Bulgaria is just one example among many.) Such tactics do not necessarily go over well when used a second time.

4. The older generation also knows, from bitter experience, what it takes to dislodge an entrenched social elite from its privileged perch. Only a terrorist state or perhaps a war could make a *tabula rasa* and exterminate the last germ of communism in these systems. And many people not only share a strong aversion to replicating the political style of the Stalin regime, with its paranoid purges of revisionists, deviationists and the enemy within, but also feel a stronger desire for normalcy than for retributive justice: "This is not what is done in normal countries and we are not going to do it here."

5. Those who exercised no important functions under the old regime believe, with some justification, that their country's ministries, bureaucracies, and factories desperately need the skills, contacts, and self-confidence of the old-regime elite and their educationally privileged children. Very few individuals with impeccably clean pasts or pedigrees are available to fill leading positions in the polity and economy. Moreover, seeing old elites (however despised) cling onto positions of political and economic influence may actually provide psychological reassurance to those who are disoriented by the devastating discontinuities in their lives.

6. Morally, the most disturbing lesson of the transition has been this: the way "justice" is defined depends wholly on who holds effective political power. Why has private property, considered "unjust" under the communists, suddenly become "just" under the new regime? The simplest and most obvious answer is that power has changed hands. Along the same lines, the current allocation of property rights in Bohemia, as everyone knows, is at least partly a product of brute force and ethnic cleansing, not of the voluntary transfer of legal title. *Raison d'état*, not justice, explains the Czech refusal to restitute the stolen property of the Sudeten-Germans and their descendants. Such an uninspiring moral

have been regaining influence and power. In what follows, I will stick to Poland in the hope that readers will be able to see to what degree the Polish experience fits other countries in the region.

In Poland, timing cast the darkest shadow over decommunization. It proved very difficult to begin the decommunization process in the fall of 1989, with a coalition government headed by Solidarity's Tadeusz Mazowiecki and featuring communist generals Czesław Kiszczak as minister of interior and Florian Siwicki as minister of defense (both under the tutelage of then President Wojciech Jaruzelski). A peaceful transition presupposed the drawing of a "thick line," as announced by Tadeusz Mazowiecki when forming this cabinet in September 1989. On the other hand, if a social desire for retributive justice or, more precisely, for the restoration of moral standards ever existed, it was during this early phase, precisely when opportunities for acting on such a desire were strictly limited. An even better opportunity occurred a few months later, in January 1990, when the Polish United Workers Party (PUWP) dissolved itself. By then however, the Mazowiecki government was much too preoccupied with the economic big bang to risk an internal conflict which might have undermined the country's shaky consensus on pro-capitalist reforms. As a matter of fact, no serious Polish politician demanded decommunization before the daily hardships of reforms began to undermine the legitimacy of the new leadership. Only then did the impulse for retribution appear.

Revolutions have often led, for understandable reasons, to political retribution, summary trials and collective responsibility. Second-generation leaders, in particular, have used arguments from justice in their push for power. The same happened in post-1989 Poland, where the first-generation Solidarity government drew a "thick line" that granted practical immunity to former communists. Soon, they also decided to resist the accession to power of other Solidarity activists, who happened not to belong to the internal circle of the first group. This short-sighted policy of exclusion backfired. Those left out gathered first around Lech Wałęsa, during the presidential election of 1990. When he too frustrated their expectations,

they initiated an aggressive decommunization policy with the famous resolution of Parliament and the random list of collaborators released by Antoni Macierewicz, then minister of internal affairs. (For details, see *EECR*, "Agent Wałęsa," Vol. 1, No. 2, Summer 1992.)

Thus, hunger for power was the principal motive of the radical decommunizers. A second factor had to do with differences in personal experience between the decommunizers, on the one hand, and, on the other hand, Jacek Kuron, Adam Michnik, Bronisław Geremek, Henryk Wujec, and other leaders of the group which played a dominant role in the Solidarity caucus in Parliament and in the government formed in 1989. A significant number of the latter had had, in their youth, a short episode of party membership followed by a longer experience of so-called "revisionism." Throughout the 1970s, they espoused the principles of the "true socialism," "democratic socialism" or "socialism with a human face," trying to combine central planning and party leadership with parliamentary democracy and human rights. Although Mazowiecki himself had never flirted with Marxism, he had had two experiences of cooperation with the communists. He was a young activist in the PAX Catholic movement which turned out to be an attempt to subordinate the Polish Church to Soviet interests. Later, in the 1960s, he was a member of the Sejm selected from the list of an independent Catholic group *Znak* which, in the eyes of the more radical opposition, provided legitimacy to the puppet Parliament. In short, for many members of the first-generation power elite after 1989, decommunization would have been a painful and fearsome experiment in soul searching.

Most of the decommunizers, by contrast, were never fellow travelers of the communists. They neither endorsed socialism nor tried to reform it. Although Antoni Macierewicz had begun his underground activity as a leftist follower of Che Guevara, he soon combined this radicalism with ideas drawn from Poland's precommunist nationalist tradition. His colleagues were not only skeptical toward revisionism, but have always treated socialism as an alien force imposed on Poland from abroad and one that must

them on the not-guilty side. As Tony Judt put it, "It is not for any real or imagined crimes that people feel a sort of shame at having lived in and under communisms, it is for their daily lies and infinite tiny compromises." (Tony Judt, "The Past is Another Country: Myth and Memory in Postwar Europe," *Daedalus*, Fall 1992, p.102.)

Confidants and secret police agents were useful in this regard. They could help draw the line. A small number of people could be declared guilty, while all the rest could feel vindicated in their moral standing. But Olszewski and Macierewicz went overboard. They located on the guilty side everyone who had ever talked with secret police. And who didn't? They tried to impose the standards of the underground as moral rules of conduct for the entire society. Anyone short of this was blameworthy. This righteous approach could not work, for one cannot expect that an entire nation will accept its own moral degradation. In short, all people who lived normal lives, who were neither villains nor heroes, were threatened by the specter of an overly radical process of lustration and decommunization. When they saw Walesa, the speaker of the Sejm, and a number of other uncontested leaders on the list of agents, most people turned their heads the other way and left the issue to the politicians. Subsequently, Parliament was not only unable to agree on the decommunization law (just as it was unable to agree on any other major political law), it became ever less interested in doing so. During the fall 1993 parliamentary campaign, the issue of decommunization played a negligible role.

Probably no more than one-fifth of the important political leaders in the 1991-1993 Parliament favored decommunization. They could count, at best, on the passive support of close to half of the population, which agreed, at one time or another, on the usefulness of lustrating secret agents. None of these leaders changed their minds. They simply lost power, influence and public visibility. Here I disagree with Holmes's claim that "the urgency of current problems pushes past crimes off the front pages of the popular press." Trials and debates in

parliamentary commissions on lustration laws are well covered in the Polish press, although they may cease to attract much attention from foreign correspondents. But, after their electoral failure, the decommunizers themselves are out of Parliament and out of sight. No one cares much anymore about what they have to say and very few people think that decommunization is possible now or in the near future.

None of the followers of the decommunizers voted for the post-Communist parties in the 1993 parliamentary elections. The supporters of the Union of the Democratic Left (UDL) were against lustration all along. The question that remains is how they won and why the others lost. But to understand recomunization many other factors, more important than the failure of decommunization, have to be taken into account.

Some former communists never left their positions in state administration. The new Solidarity elite was rather limited and, as noted, its leaders displayed some degree of distrust toward new names, coming from outside their own social circle. At the same time, old state officials, who lost their communist promoters, turned out to be extremely loyal toward their new masters. Every day it became more difficult to fire them, especially since the first Solidarity elite espoused the moral character of revolution. Besides, after a week or two, new ministers and directors did not deal any longer with anonymous communists but with real human beings who usually had wives and children to support.

Ironically, the post-Communist coalition, which acceded to power in 1993, did not have any such moral qualms. They purged whomever they could of the Solidarity governing elite and put their own buddies in positions of power and influence. The lower-level officials in the ministries, those with a wife and two children, have relearned how to serve their old masters with the same zeal with which they once served the temporary Solidarity elite.

All of the above does not answer the question raised by Stephen Holmes: Why did the post-Communists win? There is no simple answer to this question, which deserves a separate article. But in my view, the most compelling reasons were these:

1. The frustrated expectations of a great number of

people who hoped for faster change, combined with the real hardships of the transformation to a market economy, including fear of change, economic insecurity and unemployment.

2. The failure of the adaptive mechanisms that were created under communism. This phenomenon was especially important in Poland, where a large number of people learned to adapt to a planned economy, by wheeling and dealing, using state resources for private purposes or, in the case of industrial workers, by exerting political pressure via unions and the Communist Party. These mechanisms made life possible despite the shortcomings of the socialist economy. In 1989, a large number of people hoped that the negatives could be eliminated while the positives were retained. The transition to a market system threatened the benefits provided by the former system, making many people miss the old times.

3. The strategy chosen by the post-Communist leadership in early 1990, after the dissolution of the PUWP. There were two options. Solidarity-attached Tadeusz Fiszbach wanted to create a new party, based on moral resurrection, which would include neither the older "nomenklatura" nor the newer capitalist class comprised of former communists. In his party, there was room only for a handful of party reformers who did not join the Solidarity unions. Aleksander Kwasniewski, by contrast, tried to recreate the loose coalition of all groups of former communists, including the apparatchiks and local party establishment. They were deeply demoralized after 1989 but Kwasniewski's tactics helped them recover. With growing frustrations and a split between the people who benefited and those who lost from economic reforms, the post-Communist UDL could count on a stable electorate, including former communist elites and their families (at least 15 percent of the population), and the disillusioned segment of the population.

4. As a result, by 1993, paradoxically, the post-Communist parties were better prepared for democratic electoral competition than the post-Solidarity parties which had prepared the transition to democracy. The post-Communist UDL could recreate its local level organizational structure with relative ease; the Polish Peasant Movement (PPM), an heir

to the communist-allied United Peasant Party, retained its local structures all along. By contrast, the post-Solidarity parties emerged "from the top" and did not succeed in organizing effective local structures by the time of the 1993 elections.

5. Moreover, the post-Communist UDL and PPM have, by now, clearly become coalitions of interest groups. In the case of UDL, these were the procommunist labor unions, very powerful teachers' unions, various groups of new businessmen with origins in the nomenklatura, workers in state enterprises and in the public sector. In the case of the PPM, its constituents were traditional political, social and economic elites, controlling the supply and demand in villages and small towns. By contrast, the post-Solidarity parties have become ideological parties, espousing the "pure ideas" of liberalism, the social teachings of the Catholic Church, religious fundamentalism, "real socialism" or nationalism. Under democracy, voters turned out to be more attracted by programs that mention their tangible and everyday interests than by abstract ideologies.

6. Splits in the post-Solidarity camp, otherwise desirable from the point of view of the creation of a pluralist democracy. The fragmentation of Solidarity's successor parties was combined with a lack of realism which, most importantly, permitted the larger post-Solidarity parties to enter into an alliance with UDL and PPM over the introduction of a new electoral law in 1993. The law provided for proportional representation, electoral thresholds and even more disproportionate rewards for the winners in re-distributing the votes cast for parties which fell below the thresholds. In spite of this law, the post-Solidarity parties were unable to form effective coalitions, while post-Communists did so from the very beginning. As a result, the UDL received 20.5 percent of the popular vote and 37.2 percent of the seats, while the PPM, with 15.4 percent of the vote, received 28.7 percent of the seats.

We can now see a bit better, why 36 percent of the Poles voted for the post-Communist parties. They did so, primarily, because they were communists or members of their families, because they profited from communism and from postcommu-

nism, because they have become new capitalists who want to have their own people in power to help them fight competition, because they were sorry to have lost their old adaptive mechanisms, because they were disillusioned, because they were poor, because they were displaced and for many other reasons. If we add up all of the reasons, 35 percent is not too high a number.

The combined right-wing parties, many of which supported decommunization, received approximately 30 percent of the votes, split among many warring factions. As a result, they have two seats in a Senate controlled by the post-Communist coalition.

This may change in the future. Although nothing will eliminate the UDL and PPM from the next parliament, the right will most probably return to the Sejm and the Senate. Will they be willing and

able to reintroduce the issue of decommunization? I doubt it. Even if the post-Solidarity forces win, they may learn from Pawlak how to use the spoils system and how to change the government and administration swiftly. But it is unlikely that they could find broad social support for radical decommunization. It seems to me that, while there still exists in Eastern Europe a danger of emotional and radical politics, in both nationalist and fundamentalist versions, decommunization will not become a major form of a backlash, at least in Poland.

It may also turn out that the failure of decommunization and resistance to the retributive phase of the revolution—with its predictable violence, injustice and destructiveness—will be praised, in the future, as one of the most important successes of the postcommunist transformation.

A summary and analysis of the Kovalev report**The Violation of Basic Rights in the Russian Federation***Tanya Smith*

On July 5, the President's Commission on Human Rights sent Boris Yeltsin the first annual Report on the Observance of Human Rights. This document, covering 1993 and produced under the authority of the commission according to Presidential Decree No. 1798 of November 1, 1993, was unprecedented. Never before has an official Russian government report been so critical of the country's human rights record. The report was nearly classified as a secret document but, after some controversy, was eventually published. Whether a precedent has now been set is still uncertain. In any case, the Commission is already working on the 1994 report.

Not so many years ago, publication of such a document in the USSR would have landed the author in jail, as happened to the Commission's Chairman Sergei Kovalev in the 1970s. But the report is intended to show not how far improvements have come since those days, but how far there is to go, focusing on a limited number of serious problems and practical proposals for their remedy. In fact the report provides a fairly comprehensive overview of the areas where law and legal practice need to be changed in order to be brought into line with existing reform legislation, the new Constitution and international human rights standards.

The report's analyses of the causes of rights violations, as well as its proposals for solutions, are sometimes superficial, particularly when it comes to labor law and refugees, both new and unfamiliar issues. A tendency to forget that some Soviet rights no longer exist, such as the absolute right to a job and housing, can also be detected. These flaws can be attributed to remnants of the old Soviet mentality,

where rights were often declarations, leaving a residual confusion about the difference between rights and aspirations. Moreover, Russia has not yet clearly delineated what rights should be carried forward from the Soviet era and how they can be made to co-exist with a market economy.

The rights covered in the report include only a few selected areas: immigration, freedom of movement, the penitentiary system, the armed services, labor, the 1993 state of emergency in Moscow and the establishment of a system of governmental and non-governmental rights protection.

Rights of refugees and forced migrants

As the report states, "with the collapse of the USSR, there has been an increase in the flow of migration on the territory of the Russian Federation, due to the worsening internal political situations in the newly formed governments and likewise, to the discriminatory policies of several of these governments in relation to the Russian and the Russophone population. Moreover, forced migration has also begun within the boundaries of the Russian Federation." These factors, along with an increase of "migrants from countries of the far abroad," has resulted in serious problems due to the country's economic and legal deficiencies, including a chronic shortage of social assistance, housing, and vocational training. The highest concentrations of refugees and forced migrants are apparently found in the central and Volga regions where they range from .5 to .8 percent of the population. (It should be said, however, that the statistics published in the report are perhaps less than perfectly reliable.)

The situation for refugees looks better on paper than in reality. The laws on refugees and forced

migrants were adopted in 1993 in accordance with the international standards. Russia is obligated to honor as a member state of the Convention on Refugees. But the necessary institutions and financial support to carry them out was lacking. For example, one year and a half after the laws were adopted, in mid-September 1994, the Russian government finally passed a resolution to set up border controls and national procedures on how to apply for refugee status. Except for the Baltic states, there is still virtually no border control at the ostensible ports of entry into Russia from the neighboring former Soviet republics. The legal process could therefore be derailed by lack of manpower and funds.

The report harshly criticizes the city of Moscow, and in particular Mayor Yury Luzhkov, for further complicating the situation by promulgating local regulations "prohibiting the City Migration Service from registering applications for recognition from arriving refugees and forced migrants." These regulations, often copied by other cities, violate national legislation, the Constitution and the international obligations of the Russian Federation. The situation became markedly worse, as documented in the report, after the institution of the state of emergency in Moscow in October 1993. Refugees were sought out by the police and forcibly deported, frequently to dangerous locations, directly in violation of the international customary and conventional law principle of non-refoulement.

The section on refugees and forced migrants repeatedly touches on the theme of racial discrimination. Discrimination is primarily directed against "undesirables" from the Caucasus and Central Asia. While illegal, such deportations are politically sanctioned and the police apparently feel free to continue to harass people with dark skin (often called "blacks" in Russian). Regional laws that are clearly discriminatory include the "Temporary migration control on the territory of the Kostroma region for citizens of the republics of the Caucasus," requiring registration of people of Caucasian nationalities to register with the police and pay fees. Such laws are similar to practices promulgated in Moscow and described in the commission's report. Violators of the Kostroma law, passed by the regional Kostroma

Duma on June 26, are to be deported from the region. The justification given for this law was the "complex criminal situation." It was passed, perhaps not coincidentally, 12 days after the publication of the president's notorious anti-crime decree. The law not only covered Caucasian people from other republics, but also those from the Caucasus region within Russian territory.

Among the report's recommendations in the area of refugees and forced migrants is an "examination" of legal acts related to refugees and the "policies regulating their application for refugee status." The report urges that laws and regulations of the Russian and Moscow governments limiting the rights of refugees in Moscow be revoked and an urgent order be given to the Ministries of Internal Affairs and Justice to develop a system of registration in accord with the law on movement for Russian citizens. Further recommendations include creating a reasonable procedure for refugees and forced migrants to receive Russian citizenship and for the Federal Migration Service to bring their work into line with the law. Finally, the Ministry of Finance and the Duma are urged to take detailed steps to improve the situation, including repairing deficiencies in legislation and treaties with former Soviet republics on refugee issues.

Freedom of movement and freedom to choose where to live

This section, not unlike the previous one, directly attacks the "anti-constitutional position of the Moscow Government which decisively refuses to act on this issue in accord with the Constitution and the 'Law on Freedom of Movement and Choice of Place of Residence.'" Not only Moscow, but other regions too are said to be violating freedom of movement by continuing to use the Soviet-era *propiska* system for registration of residence as a control on movement. New, however, are the daily fees for visitors from other former Soviet republics. All these actions violate Russian legislation and the Constitution, not to mention international law to which Russia has subscribed.

The *propiska* system developed not only for social control, but also for economic control, to pre-

vent too many people from moving into Moscow and Leningrad where there would then not be enough housing. The lengths people went to get around the propiska system were legendary. There have been several attempts to abolish it, starting with the decision by the short-lived Supreme Soviet Committee on Constitutional Review that the propiska violated international human rights norms.

While the 1993 legislation on the propiska system, which changed the function of the propiska from controlling movements to simply registering them, requires the further promulgation of regulations, this has not yet been done. Nevertheless, as the report goes on to say, the Constitution, enacted subsequently, offers a wider right, allowing not only citizens, but all who are legally in Russia to move freely and live where they wish. Article 18 of the Constitution states that Art. 27 ("Each person who is legally present on the territory of the Russian Federation has the right freely to travel and choose his place of residence") requires no enabling act to come into force. The commissioners' frustration at the Soviet style reliance on enabling regulations is tangible in their repeated explanation of the hierarchy of laws. Restating twice Art. 18 of the Constitution ("Human and civil rights are directly in force"), they explain that no further acts are needed to implement Art. 27, which is, in any case, "not a sub-legislative regulation."

The report's recommendations in this area are that all subjects of the Federation should abolish discriminatory regulations limiting the right of movement for citizens and also prohibit the exacting of fees that violate the constitutional rights of citizens. The report also proposes that the Ministry of Internal Affairs produce rules that simultaneously ensure the rights of citizens and foreigners to register the location of their residence while allowing them their constitutionally protected freedom of movement.

Rights in the penitentiary system

This is the complex and chilling section of the report. Most critical, according to the General Procuracy, too, are the inhumane conditions in pre-trial detention cells, where there is not only a lack of food and sleeping space, but also insufficient oxygen due to overcrowding. This situation

is "threatening to go out of control and will have extremely grave consequences."

These pre-trial detention facilities are where people "whose guilt has not been determined are held in conditions worse than those reserved for convicted criminals." More than 76 percent of these facilities are overcrowded, many holding three to four times the number of prisoners considered the "sanitary norm." In some jails, there is less than one square meter per prisoner. Statistics show rapid growth in the detention facility population and this trend is predicted to continue. Not surprisingly, given problems such as violent conflicts among prisoners, the suicide rate has increased. With overloaded courts and an inadequate number of judges, pre-trial detention, even after the case is handed over to the courts and the investigation is completed, can last months and "even years," not being limited by law. Pre-trial detention during the investigation itself is limited to one and a half years. The report states, astonishingly, that this law was violated in 28,988 cases last year.

Pre-trial detention is materially inhumane. But physical abuse by police during investigation is also commonplace, often with the complicity of the procuracy, as frequently reported in the Russian press (three separate articles on the subject appeared in *Izvestiya* during August 1994). After noting that "Violence and special means are used against violators of jail rules," the report then goes on to detail several cases, including one of a detainee who died of severe bodily harm caused by "the use of special means."

Implementation of Art. 22.2 of the Constitution guaranteeing judicial control of arrest and detention ("An individual cannot be detained for a period of more than 48 hours without a judicial decision"), is unfortunately "postponed until adoption of a new code of criminal procedure" according to the transitional regulations of the Constitution. There was a large number of "illegal, unfounded detentions" in 1993, cases where people were detained and released before charges were filed, when it was "finally" determined that not enough evidence or basis existed for holding the person. According to the report, the law of May 23, 1992, on judicial control of arrest, for use in cases where a suspect has been charged, is "not yet a source of pressure on the system." Of the approxi-

mately 370,000 cases in which charges were brought, 59,286 people challenged their arrest and 10,434 of these (17.6 percent) were successful.

Dangerous epidemics rage among the convict population. Tuberculosis occurs 17 times more often in prison than in the general population. In places such as the Orenburg regional prison, medicine and supplies for TB patients are 100 times below recommended levels. Supplies are so limited that testing in Orenburg has only been done on 62 percent of the prison population. Only part of the TB infected prisoners are kept in separate camps, while 4.5 percent of the prison population is already known to have tuberculosis.

Recommendations for the penitentiary system include the following "necessary and urgent measures." A comprehensive overhaul of the laws regulating the penitentiary system, including the law on pre-trial detention; sufficient financial support in particular to upgrade the facilities used for pre-trial detention; effective judicial control of arrest and detention; access to legal assistance for the arrested and detained; creation of an independent medical and psychological service in the penitentiary system; establishment of conditions for public monitoring of the penitentiary system; a strict legislative framework limiting pre-trial detention, before and after charges are lodged and the case is handed over to the court; special norms about criminal responsibility for torture and other forms of harsh and inhumane treatment of detainees and prisoners; compensation and financial incentives for prison personnel.

Rights in the armed services

This section focuses on deficiencies in the development of the law and the continuing problem of protections for life, health and dignity in the armed services. The report criticizes the army for "continuing to live by old laws and traditions." Statistics showing the number of deaths and severe traumas experienced in the armed services in non-combat situations were reportedly one of the principal reasons for the government's reluctance to publish the report. Further statistics on deaths, trauma and suicide, the report states, remain official secrets.

Still lacking are mechanisms for implementing two laws on the military introduced in 1993. The

failure of the government to prepare other pertinent legal acts is blamed on the difficulty of "implementing fundamental rights and freedoms in military conditions." While the report advocates a "right to work" and is critical of its weak legal protection for the armed services, the basis of this perceived right is unclear. The Constitution has been changed to say that there is a "right to work in conditions" of cleanliness and safety and that there should be "defense from unemployment" (Art. 37); but it does not actually assert a right to work. Evgeny Zaisev, the commission staff member responsible for the coordination of the writing of the report, said that this aspect of the report itself is based on a residual Soviet mentality, and not on law.

Following the adoption of the April 27, 1993 "Law on Complaints to the Court on Acts and Decisions Violating Rights and Freedoms of Citizens," complaints to the courts from service people are "sharply" increasing. Seventy-nine percent of the cases examined in military courts in 1993 were decided in favor of the applicant. The vast majority of complaints, 95.2 percent, are from officers, while only 4.7 percent came from the ranks. This is blamed on ordinary soldiers' restricted movements and "other conditions." Seventy-seven percent of the cases heard concerned housing and other forms of material compensation, while 9.2 percent of complaints were protests at being fired from the service.

The lack of implementing legislation has rendered almost nugatory the constitutional provision for alternative civil service for conscientious objectors. In the past, different judges have decided cases differently. Some recognize that the constitutional provision has authority, while others do not.

Recommendations in this area include carrying out military reforms and bringing relevant legislation into line with international standards, declassifying information about deaths and trauma in the military, and taking measures to ensure the independence of military justice.

Labor rights

The report is critical of the increasing number of violations of workers' rights and a decline in the monitoring of their observance. Major transforma-

tions in the economy are compelling the labor force to change. Products from a vast number of mammoth factories are no longer in demand, and subsidies have dried up. Reluctance to implement wide-scale lay-offs is due to the Soviet belief that there should be no unemployment as well as to the economic inability to come up with necessary severance pay. Violations here include the widespread tendency to give employees extended "vacations" with no guarantee that they will get their job back. Another common practice is failure to pay employees "on time." In fact, this often means that they are not paid at all.

There is also an immeasurable degree of "hidden unemployment." But the report concentrates its fire on the lack of any practical means to defend the rights of those who are actually dismissed. Any type of arbitrary discrimination may be involved in selective lay-offs. In the statistics on actual unemployment, the report notes, there appears to be a prevalence of discrimination against women in dismissals. The report states that 70 percent of all unemployed in 1993 were women.

Another central issue is the increasing percentage of the work force employed in the private economy and the continued validity of the Soviet-era labor code, created for a state-owned economy. Forty percent of all jobs are now in the private economy, where labor rights are virtually unprotected. Existing laws are often inapplicable and, where they do apply, people reportedly do not make complaints for "fear of losing their job."

One reason the inherited labor code is largely irrelevant to the private economy is that it requires unions to play a pervasive role in labor issues, while unions are nonexistent or nonactive in the private economy. The previous role of labor unions was largely a formality (decisions were made at the party level), but unions were and still are required by law to be involved in most areas of labor relations. Considering the fictional role labor unions played in the past, rubber stamping party decisions, the report's complaint about lack of labor union participation in lay-offs strikes a false note. The real legal problem seems to be the current lack of any clear and realistic definition of

unions and their power, something that needs to be part of any new labor code.

Recommendations in this area include the adoption of pertinent legislation and strengthening the monitoring of the enforcement of labor rights.

Rights violations during October 1993

The report documents "a massive" number of rights violations during the state of emergency declared by the president in October, 1993. The violations ranged from large-scale random beatings, unnecessary use of fire arms, closures of newspapers, deportations to places of likely endangerment (refoulement), illegal arrests and racial discrimination by the authorities in connection with these abuses. The police detained, without sufficient cause, more than 3500 people during this period.

The subsequent amnesty declared by the new Parliament and the apparent unwillingness of the courts to prosecute clear abuses "leaves unprotected the rights of victims." Special rules were even introduced by the Moscow and St. Petersburg governments to prolong some of the conditions of the state of emergency after it had been lifted. This was done under the pretext of controlling criminality, but in fact these special regulations have been used to "purge" the cities of undesirable nationalities. The Human Rights Commission's official request in February 1994 to the General Procurator to decide the legality of such regulations, duplicated in other cities across Russia, went unanswered.

According to the report, another negative result of the unchecked lawlessness of the October events was Presidential Decree No. 1226 of June 14, 1994 "On Urgent Measures for the protection of the population from banditism and other forms of organized criminality." Although this decree falls outside of the time period covered by the 1993 report, the Commission saw the decree's grave violations of the Constitution and legislation as a continuation of the October tendency towards disrespect for the law at the highest level. The report condemns the "lack of necessary guarantees for human rights such as judicial supervision over the Ministry of Internal Affairs (police) and the counter-intelligence services." The decree allows for 30-day detention without accusa-

tion or bail, searches, including investigation of the bank accounts of suspected members of organized crime syndicates, as well as the bank accounts of their relatives and others living with them, and the judicial admissibility of evidence collected by means of telephone taps. These measures violate at least seven articles of the Code of Criminal Procedure on Preventative Measures, not to mention Art. 90 of the Constitution, which prohibits presidential decrees from contradicting either the Constitution or existing federal legislation. (After the decree was announced, the Duma confirmed that judges should continue to apply existing legislation.)

Statistics are hard to come by, but press reports suggest that the police are frequently using the decree to detain people under the 30 day provision. One Moscow journalist wrote (disparagingly) that judges were not accepting evidence collected under the provisions of the decree. Vice Minister of Justice Evgeny Sidorenko explained to *EECR* that, in his view, judges should recognize the Constitution and federal legislation as taking legal precedence over the decree. But the police apparently continue to use the decree, the constitutional hierarchy of laws notwithstanding.

In response to the October 1993 state of emergency, the report recommends the following: to amend the law on states of emergency to prevent abuses of power and to bring the law into conformity with international standards; to evaluate the legality of existing legal normative acts related to the observance of human rights; and to strengthen the procurator's power to investigate police and military abuses of power during states of emergency. This recommendation to "strengthen" the powers of the procuracy in this case sits oddly with the next section of the report which urges a lessening of the powers of the procurators, particularly their power to review the legality of actions and normative acts.

Organizations for the protection of rights

Finally, the report reviews the major institutions of governmental and non-governmental human rights protection, referring as usual to international law standards, as if they provide the controlling standard

of legitimacy. In this case, the report emphasizes the need to institute a separation of powers as well as a national body for monitoring and promoting human rights. (The description of the latter sounds remarkably like the office of the human rights commissioner, i.e., of Sergei Kovalev himself.)

The report is predictably critical of the length of time it has taken to reinstitute the Constitutional Court. The procuracy, too, is reviewed very briefly. The new Constitution is said to have an "undefined" approach to the procuracy. The procuracy's "future authority" to review the legality of actions and laws is not clear.

Court dockets are said to be distressingly overcrowded, as shown by the high percentage of cases heard, in violation of the law, past the time period stipulated for review (16 percent in criminal and 13 percent in civil law cases). The report laments the infrequent use of the 1993 "Law on Complaints to the Courts for Acts and Decisions Violating Rights and Freedoms of Citizens." The tendency of "citizens not to turn to courts for the protection of their rights" is due, among other things, to costs and ineffectiveness as well as to "legal illiteracy and the low prestige of the court system."

An important problem vexing Russian lawyers is how to apply constitutional norms directly in the courts to defend human rights. The Soviet constitutions contained many rights unenforced in normal practice because of the lack of implementing legislation. Courts are still reluctant to use Art. 18 of the Constitution, which mandates that the constitutional rights of citizens are self-implementing. The "timidness" of judges is also apparent in their reticence to recognize the decisions of the Constitutional Court, since it is new and for Russian a nontraditional institution.

While the report has been widely distributed, public reaction has been muted so far. But that is perhaps to be expected in a country with such a poor human rights record, where, as the chairman of the commission said during the July 30 public presentation of the report, there are "no simple solutions to complex problems."

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Focus: The Politics of Central Banking

Introduction

Dwight Semler

While not a constitutional issue in the traditional sense, the independence of central banks in postcommunist societies raises a host of questions of fundamental importance to the creation of a stable separation of powers. The following symposium should, among other things, help us understand the fate of basic Western institutions, untested from their original context in relatively affluent and politically robust societies, and transported in the suitcases of Western advisors into largely insolvent and administratively weak states. The laws on the central banks of Eastern Europe establish relatively independent monetary institutions, but it remains to be seen whether these new institutions can withstand the force of present and growing internal political pressures and the international monetary regime.

The first central banks originated from banks of issue, founded because of an urgent need by governments for credit and domestic control over monetary matters. Wars and revolutions of independence create financial turmoil for governments and the founding of central banks has commonly followed on the heels of such events. Financial chaos or severe shortages of

money nearly always precede their establishment. Because central banks are founded in times of financial anxiety, governments have needed to inject their central banks with legitimacy, without which the public refuses the proposed new currency or monetary arrangement. In order to convince the public that the currency is tamper-proof, central banks have been created with limited, but legally protected, independent status. The *appearance* of independence was crucial both for reaching an agreement among political forces on what the central bank would be and as a way of persuading the public that its currency was sound, it was backed with precious metal and it would not be devalued by the government. And, though public creations, the vast majority of central banks were established with private ownership, either in whole or in part, again, to engender confidence. What "special powers" they possessed, were limited usually to issuing currency, much later to monitoring and even later still, to defining and controlling monetary affairs.

Giving central banks the appearance of independence has proved an effective way to create pub-

lic confidence. Once the Bank of England—formed to cover the debts of the reckless-spending William III—began to issue *private* bills, rather than kingly ones, the currency was accepted by the public. The First Bank of the United States was established to supply the government with desperately needed credit. During the revolutionary war, fiduciary currency so rapidly deteriorated in value that the public's trust was destroyed, but once the first bank was founded (holding more than a third of the nation's specie reserves) public confidence was restored.

The French example is even more pertinent. Faced with the huge debts of Louis XIV, the Regent left John Law to establish the Banque Royal as a bank of issue. Law was truly a man ahead of his time. He oversaw the release of paper currency to pay royal debts, but he did so in the complete absence of any specie reserves. This was one of the first illustrations of the novel idea that money has no intrinsic value. The scheme worked marvelously well for a while. Law was hailed a great man of finance, until the public caught on. When it did, the paper money, and it really was only paper, was withdrawn. Law failed to recognize that fiduciary money assumes the credibility of the authority that issues it. Later, when the Bank of France was established and in the face of an understandably distrustful public, paper currency was conservatively issued, always backed by precious metal. So limited and careful were its currency issues, that the bank did not even experience shortages in the face of high Napoleonic debts. The bank's zealotry won public trust. The need to engender exactly this sort of trust cannot be understated in the case of the East European central banks. Whether the capacity to do so exists in every country, is another question.

Explicit to the creation of central banks is the fact that the bank's notes were given the legal status of an exclusive tender on the state's territory. A medium of exchange was established along with which came responsibilities. True, most of the moneys of states had a conventional value (backed by precious metals). But, even with the beginning of modern states, money had fiduciary characteristics. Because it was a claim against the authority that issued it—something John Law should have consid-

ered more seriously—confidence in the state's money was directly tied to confidence (or lack thereof) in the state which issued it. Russia is learning this lesson today in the most painful way. (The difficulty in selling state bonds in Eastern Europe demonstrates the public's genuine lack of confidence in government.) The legitimacy of money and the legitimacy of the state are inextricably tied. These themes and the crucial need to build public trust are stressed below in Siim Kallas's discussion of the Estonian central bank.

The fate of central banks is not necessarily inscribed in their origins and foundings. Both in form and function, modern central banks are different creatures than the first banks of issue, many of which evolved or collapsed and were recreated into state central banks. In his contribution to this symposium, Jon Elster emphasizes the "self-binding" nature of their creation, that is, the attempt to remove or diminish political influence over banks. The act of creating independent central banks is binding, but most were made independent only after scandals, money mismanagement and ruinous inflation. Self-binding seems to come, if it comes at all, only after a long and painful learning process. The Federal Reserve represents the *third* attempt by the US to establish a central bank. The much praised German bank is a distant descendant of the Prussian Bank, and the Reichsbank (a bank fully dependent on the government), which was destroyed by Hitler, leading to the allies-created Bank Deutscher Länder, before finally becoming the Bundesbank in 1957. Developing independent central banks has been an exceptionally onerous and slow process.

Controlling money, so long as it was anchored in precious metal and at a time when exchange rates were fixed, left the role of the central bank, in setting monetary policy, very limited. Monetary policy was largely straightforward. Only over time, with the development of complex markets and the increased role of government spending as a portion of gross domestic product, do central banks emerge as the definitive framers of monetary policy. Moreover, their role and potential power, as well as the recognition of their importance by the public, have all grown

with the global suspension of the gold standard and the collapse of the Bretton Woods system of pegged exchange rates. Today, the nominal quantity of money, and, of course, its proper management, is of crucial importance. It is little wonder that the role of central banks, their independence in particular, has again emerged as a burning political issue.

There is now a powerful trend to make central banks more independent. But if we look at individual central banks in market democracies we find that monetary policy often accommodates fiscal policy. Even the more independent banks have at times followed the "Political Business Cycle"—tightening the supply of money after elections and loosening the supply before elections.

Additionally, there is a revolving administrative door. Economists and bankers move routinely from the central bank to the ministries of finance or economics, and from positions of economic advice giving into government. It may be possible to demonstrate positive correlations between central bank independence and low inflation but it is equally possible to show that central banks, contrary to Elster's concern, almost never intentionally establish monetary policies that are antagonistic towards their governments. They are nearly all charged with maintaining price stability, and many are restricted in their lending to government, but they are also nearly all charged with developing policies that accommodate fiscal policy. Monetary policy is not formed in a vacuum, nor should it be.

But if this is the case, the question arises: Why is it necessary for governments to maintain their central bank's statutory independence? And, why has independence become fashionable? Several reasons are worth considering.

Global economic circumstances have radically changed, making it impossible for states to isolate themselves from international economic pressures. Because of a general collapse of international trade barriers, currency markets trade on average more than one trillion dollars a day. This has also dramatically increased the velocity of money transfers, making them much more difficult to control. Only central banks with the tools and authority to navigate such unregulated markets are

equipped to survive. Those pushing for more independent banks are well aware of these pressures. Making central banks more independent now is an act of self-preservation in the face of dangerous, volatile and potentially punishing markets.

Equally important, the increased international movement of goods and services, and the example of the successful Asian economies, has seriously eroded the traditional belief that a tradeoff must be made between inflation and unemployment—the Phillips curve. Of course in the short term there is a tradeoff, but the length of the "short term" has significantly shrunk. There are plenty of economic policy makers who believe a tradeoff still exists in the long term and, so long as they do, the economies they administer will continue to yield marginal performance at best, reinforcing their mistake. But the informed central banks, which have accepted a vertical Phillips curve, are increasingly less likely to see their task as solely a fight with inflation at the cost of rising unemployment.

Bank independence is also susceptible to regional explanations. For European states wishing to join the European Monetary Union (EMU), there is little choice but to make their banks powerful enforcers of strict monetary policy, according to EMU guidelines. (To become members, the East European central banks will also have to conform.) For the Latin states, newly independent banks have come only after decades of high inflation and the realization that badly needed foreign capital will now only be attracted by a demonstration of good money management. For the Asian central banks, which, from a comparative perspective, are not very independent, the issue of autonomy is largely irrelevant because the states function with unified economic agendas, under very little if any democratic pressure. The central bankers and economic policy makers of Eastern Europe do not have the Asian luxury of functioning in such a pressure-free, undemocratic environment.

The nature of monetary policy is now highly complex, far beyond the pale of daily legislative guidance. The most that cumbersome legislatures can do is review past central bank performance and offer criticisms. Even if guidance were administra-

tively possible the conduct of monetary policy is so sophisticated that most legislators lack the required technical expertise. Most important, monetary policy has been left out, or pushed out, of the deliberative political process because it is a political liability. Law makers do not want to be politically responsible for monetary policy. And so long as it is in the hands of a central bank, legislators have a very convenient scapegoat when facing an electorate angry over economic conditions. Although one might have thought that a good legislative monetary policy would result in a political payoff, in fact its benefits are too subtle and far too diffusely spread over the electorate to be converted into a political dividend by any one politician. So the real consequence of controlling monetary policy is negative. Bad legislative monetary policy can be instantly punished on election day, while sound policy is seldom democratically rewarded. The risk is far too great, therefore, for legislators to take charge of their monetary policies and scape-goating is far too convenient. This is even more the case now that international barriers to finance capital have eroded, while a variety of financial instruments have proliferated. The modern monetary scene has never been more knotty. Though the recent trend to increase the independence of various Western central banks can be seen as a conversion to self-binding, it must also be seen as an act by legislators to duck responsibility over an increasingly complex and potentially messy economic reality. Perhaps postcommunist legislators and executives will come to imitate this form of strategic shirking, even while calling it "self-restraint."

Communist governments had a version of central banks only in name. All had monobank systems. The key function of the state bank was administrative accounting. The bank was an extension of the finance ministry and both, remarkably, always seemed to have sufficient funds to carry out the central economic plan. As an indication of how banking would develop in the communist world, in 1926, Felix Dzerzhinsky, commissar for Internal Affairs and chairman of the Supreme Council of the National Economy, was informed by the finance minister that bank lending slated for various development projects was certain to result in

inflation. To this warning, Dzerzhinsky responded: "When there is a shortage of resources for investment projects and it is said that investment should therefore be reduced, I resist these notions as fundamentally incorrect." Bolshevik orthodoxy was that finance would place no constraint on development. Money would not be a medium of exchange, rather, it would function as a unit of account.

With the collapse of communism, all of the new governments faced the challenge of restoring their moneys as a medium of exchange. The new governments faced explosive inflationary pressures because the supply of money had increased in excess of goods and services. In addition, all of them inherited huge budget deficits from the last communist governments. External debts for Russia, Poland and Hungary were nearly unserviceable. Romania was debt free but had devastated its economy in the process. In a sense, its credit needs were equal to that of the large debtor states since it had nothing on which to build in the absence of capital. In the face of such tremendous pressures and challenges, it is remarkable that the new central banks were granted any sort of independence from their creators.

The first postcommunist governments enjoyed a brief moment of political unity, but enough in some cases to organize the shock of freed prices to the public. Poland was quick in this regard (as were Estonia and the Czech Republic) and has reaped the benefits ever since. And the power of international institutional pressures to bring government budgets into line with financial abilities should also be taken into account. Nearly all of the central banks broke from the most economically irrational of communist traditions, namely, direct crediting to their governments. Jon Elster's self-binding principle is clearly at work here. But it remains to be seen whether, over time, the new central banks can maintain their autonomy and still manage aggregate money and credit. Here lies the crossroad where politics and law meet economics.

Though the East European central banks are legally independent from government instructions, they nevertheless remain, in practice, vulnerable to government pressure. For one thing, they have emerged in situations where the rule of law is still

quite fragile. Moreover, if the history of Western central banking is any indicator, several will repeatedly fail before they finally succeed. When unemployment rises, and it certainly will in Eastern Europe, legislators will not be interested in the fact that unemployment is structural and not the result of sound monetary policy. The legal autonomy of the new central banks will probably be less important than their ability to satisfactorily coordinate monetary policy with wider fiscal policy goals in the face of intense political pressure. The evidence to date, on this front, is far from promising.

For instance, the first head of the National Bank of Poland, Grzegorz Wojtowicz was driven from office accused of issuing more than five trillion zloties in unsecured credit guarantees. His replacement, Hanna Gronkiewicz-Waltz, faced a heated confirmation process and now confronts overt parliamentary pressure caused by the bank's tight money policy. The president of the Hungarian bank, Gvorgy Suranyi, was sacked by Prime Minister Antall for being too independent-minded. The banking sector is one of the real weak points in the ambitious Czech reform program. Until August of this year, the Czech National Bank somehow managed to remain silent before the international banking community about the fact that the fifth largest private bank in the country, Agrobanka, had been insolvent since last year.

The National Bank of Estonia is hailed as a genuine example of disciplined central banking and it is. But the currency board system with its pegged exchange rate (a system Lithuania has now also adopted) has not seen the promised end of double-digit inflation. Moreover, the Estonian system is praised for its simplicity and transparency—genuine confidence builders for the public. Recently it was discovered that not all of the withdrawn Russian ruble notes were accounted for during the transition to the kroon. Excess rubles were sold and went unreported in state budgets and central bank reports. This scandal may cost Prime Minister Mart Laar his job, but it also tarnishes what seemed to be, until now, a spotless bank.

The Central Bank of Russia has been branded the worst central bank in history. Nearly every warn-

ing usually offered by experts in the field has befallen the Russian bank, according to Boris Fedorov. Foreign critics sometimes forget that the Russian bank was a key player in the collapse of the Soviet Union. The authority of the Central Bank of Russia was enlarged before the Soviet Union collapsed. With its new authority, the bank withheld urgently need foreign earnings from the Soviet banking system, denying the latter its lifeblood. And later the bank followed Yegor Gaidar's stabilization program. But, the bank's tight credit policy flew in the face of the Supreme Soviet (which, at the time, had statutory control over the central bank), bent on preserving the state's industrial sector. The head of the bank, Georgy Matyukin, was forced to resign in favor of Viktor Gerashchenko, who not only printed money to preserve collapsing state firms, but also held to the vision that the ruble zone (an implicit preservation of the Soviet Union) could be maintained. Gerashchenko's design, until it ended last year, sent every former Soviet republic (except Kyrgyzstan, Russia and the Balts) into the ravages of hyperinflation. As Alexander Lukashuk shows in the Belarus case, the central banks of the former Soviet republics (except the Balts) have had to fight for their independence on two fronts, against the Central Bank of Russia and against their own governments.

After the dissolution of the Supreme Soviet, the Russian central bank came under the authority of President Yeltsin but, even before this, the bank was generally defiant, even of Supreme Soviet directives. Ironically, the Russian bank's behavior bespeaks a central bank whose independence is probably too great. Although for now the bank has achieved a rapprochement with the Chernomyrdin government, it is certain to continue to be a political football as well as a player.

Though the Russian bank is an extreme case, all of the Eastern European banks are to some degree facing similar problems and pressures. Controlling the money supply in the teeth of credit-hungry governments, monitoring the new private banks and guarding foreign reserves (not to mention a host of other tasks) is a tall order for a new and politically vulnerable institution.

A Currency Board within a Central Bank: Reflections on the Estonian Hybrid

Siim Kallas

In 1987, four Estonian social scientists put forward a proposal for Estonian economic autonomy, the so-called Economic Self Management Program for Estonia (termed the IME, an acronym which means "miracle" in Estonian). Aimed at securing Estonia's economic independence, the program stressed the need for an independent monetary system. With the onset of perestroika, economic reform could be discussed openly. But in practice, so long as Estonia was part of the Soviet Union, the economic and political obstacles to the introduction of its own currency were insurmountable. The so-called "proposal of four" was the first time that a currency, independent from the ruble, had been discussed under Soviet rule, and the discussion caused considerable anxiety at the highest political levels. Preparations for the introduction of the Estonian kroon, nevertheless got under way—and proceeded more seriously after Estonia regained political independence in August 1991.

The introduction of the kroon had been strongly supported in Estonia, both for economic and political reasons. The expectations of the people were high and serious. It is not an exaggeration to say that almost magical, efficiency-enhancing properties were attached to a sovereign currency by the public.

For the reform designers, the most important component of the reform was that the future currency had to be a serious one, similar to the Finnish markka, the German mark, and other well-regulated world currencies. It was never to be a weak piece of paper; and the idea of a hard currency had broad popular support. The fact that Parliament adopted the currency reform with near unanimity demonstrated its wide appeal.

Difficult choices had to be made in order to create a real, convertible currency. The main question was whether to postpone the monetary reform for

as long as possible in order to have more time to prepare or to proceed as soon as technically possible. The first option risked losing the public support that existed and the readiness of most people to suffer for a good cause. It was decided therefore to carry out the reform as soon as possible. Ours was a very simple monetary reform. We chose it in order to assure the Estonian people that paper issued by the Bank of Estonia was solidly backed and to build trust in political and administrative authorities.

Estonia's new currency system

Monetary reform was implemented on June 20, 1992. In introducing the kroon, Estonia basically adopted a currency board system. In practice, the idea was to return to a modified version of a gold standard. A currency board is probably the most simple, credible and pressure-resistant way to introduce a national currency in underdeveloped monetary conditions. It is an arrangement whereby the introduction of the currency is the responsibility of a currency board, an independent monetary authority either distinct from the central bank or at least separate from the central bank's other activities. The currency board undertakes to convert all the national currency offered to it at a fixed rate into a chosen reserve currency. The domestic currency in circulation is fully backed by the foreign reserve currency and can only change in value according to changes in the foreign exchange reserves.

The aim of the currency board is to achieve currency convertibility with a fixed exchange rate and thereby stabilize the economy by bringing about structural change and integrating the country into the world economy as quickly as possible. As the currency board is a binding technical arrangement, which is not associated with any economic or polit-

ical discretionary power, it ensures adherence to the fixed exchange rate. Political pressures, to which a conventional central bank is often exposed, cannot affect a currency board. For the same reason, inflationary financing (lending to the government through the central bank) cannot occur.

In order to truly maintain the currency board's integrity, it was also decided that no general discretionary lending by the central bank to commercial banks could take place. In addition, as a matter of policy, the central bank could not engage in open market operations, administrative guidance, or the sterilization of foreign currency inflows. Interest rate levels and the yield curve are therefore, genuinely market-determined.

If the Estonian government needs financing, it must borrow from the commercial banking system. The government can only run budget deficits if it is able to finance them in open money markets. In a country like Estonia, lacking well-developed markets and where the government might attempt deficit financing, a currency board and a balanced budget are mutually reinforcing.

It is said that a currency board system borrows its credibility from the chosen foreign reserve currency. But it does subject possible economic policies to stringent constraints. The great advantage of the currency board system is that it is simple to operate and does not require experts. This is particularly important in former socialist countries, where mechanisms of the market are often poorly understood. A currency board must be credible first and foremost, so that the market will show confidence in the monetary authority's ability to exchange currency at a fixed rate.

The currency board model for postcommunist countries is open to different kinds of criticisms. It may be judged as too harsh a solution for an economy in the process of a major economic transformation, because the only way to increase the supply of money is by attracting foreign exchange into the country, either through exports or capital investment. When inflationary financing is impossible and the exchange rate is not flexible, other factors—domestic prices and wages—must adjust. Softening the adjustment by printing money is made impossi-

ble. The strains may well put the political sustainability of the currency board to a severe test.

The legal foundation—conspicuous simplicity

In May 1992, the Estonian Parliament passed three laws: the currency law, the law on backing the Estonian kroon and the foreign exchange law. These laws established the principles of the currency system. As they make the running of the Estonian currency board the task of the central bank, which also retains the ability to conduct monetary policies, the Estonian case has been characterized as a currency board hybrid.

According to the laws, the kroon, pegged to the German mark at the rate of eight kroons to one German mark (8 EEK=1 DM), is fully backed by gold and foreign exchange. The Bank of Estonia can change the amount of notes and coins in circulation only to the extent that there are changes in gold and foreign exchange reserves. The Bank of Estonia undertakes to convert all kroons offered into German marks. This arrangement is conspicuous for its simplicity and transparency to the public.

The exchange rate of the kroon (8 EEK=1 DM) is allowed to fluctuate within a three percent margin. This rate was based on the market rate between the ruble and the German mark, at the kroon's introduction.

The core of Estonia's foreign exchange reserves, crucial for the establishment of the kroon, consists of the gold reserves, which the country had deposited in Western central banks (the Bank of England, Swedish banks, and the Bank for International Settlements) before 1940. After Estonia regained its independence, Western countries returned these reserves to Estonia in the form of gold (totaling about 11.3 tons) and foreign exchange. In an effort to maintain transparency, the Bank of Estonia is required by law to publish monthly information on the gold and foreign exchange reserves, and the amount of notes and coins in circulation.

Implementation of the currency reform

Technically, the currency reform has been a notable success. Any reform whereby the entire amount of notes and coins in circulation is changed

at one time requires very complex practical arrangements. To carry out the exchange, a large number of volunteer workers assisted at conversion points in different parts of the country. In order to minimize the possibility for misunderstandings and abuses, the rules and arrangements were kept as unambiguous as possible.

The withdrawal of the ruble and their replacement with the new currency was carried out during three consecutive days. Each resident had the right to exchange up to 1500 rubles at the rate of ten rubles to one kroon. (A "resident" was defined in the "Foreign Currency Statutes," approved by the Board of the Bank of Estonia on March 30, 1993, as "an individual living permanently in Estonia" and as "an individual with an Estonian residence permit, with a duration of at least one year.") Cash rubles exceeding this amount could be exchanged until July 1 at the rate of 50 rubles to one kroon. The financial obligations and claims outstanding at the time of the reform were stated to be valid and were denominated in kroons at the rate of ten rubles to one kroon. Ruble savings held in banks were converted into kroons at the same rate. Precautions were also taken to prevent the risk of rubles flowing into Estonia from other ruble zone countries. Therefore, deposits of more than 50,000 rubles made by individuals after May 1, and deposits of one million rubles or more, made by corporate entities after May 19, were blocked until their origins were ascertained.

In carrying out the currency reform there was also the risk that large sums of rubles for conversion might flow into the country from Russia. This danger was avoided by restricting the amount of cash that each inhabitant could exchange and by separately investigating all unusually large transfers made between bank accounts before the conversion.

Foreign currency accounts held by enterprises or individuals remained valid and foreign currencies in such accounts could be used until the end of 1992. The accounts were, however, closed to new foreign currency entries, which had to be converted into kroons. Since March 1, 1993, Estonian firms

have again been allowed to open settlement accounts in foreign currencies in authorized Estonian banks.

In total, about 2.2 billion cash rubles were converted into kroons. The amount was roughly equal to the estimated amount of rubles in circulation in Estonia at that time. (No accurate data were available for any single region within the ruble zone.) Only small sums were converted during the second stage of the conversion.

The economy after reform

Estonia coupled the introduction of the kroon with a very tight fiscal policy and a liberal and outward-oriented economic policy. The currency reform succeeded rather well in achieving goals besides the technical ones.

Both the public and the leading politicians have accepted the necessity for the government to operate with a balanced budget. The continued stability of the kroon has caused many changes for the better in the economy. And the kroon's stable exchange rate has boosted entrepreneurs' confidence. In addition, people's ability to earn and use money has created a new motivation to work. The availability of consumer goods has increased considerably under the influence of ongoing economic reforms. The government is attempting to restructure Estonia's economy to make it more closely resemble those of Western industrial countries.

Since the currency reform, significant amounts of foreign exchange have flowed to the Bank of Estonia. On July 16, 1992, the central bank published its balance sheet for the first time. It showed foreign exchange reserves of 1165.2 million EEK (145.65 million DM). By January 1, 1994, the reserves had increased to 5237.3 million EEK (654.65 million DM). Relative to the adopted currency board principle, the kroon is actually overbacked.

Criticism of Estonia's currency reform has come mainly from the managers of the old socialist, state-owned industrial sector. The level at which the kroon's exchange rate was fixed aroused criticism. It was argued that the undervaluation of the kroon makes imports too expensive, with the result

that a large part of production becomes unprofitable. It should be noted, however, that this criticism has not been leveled at the currency board system as such.

Some concluding remarks

One of the most important lessons that may be drawn from the Estonian monetary reform seems to be that money is indeed not only money, but also a crucial national symbol. Were it not for the sake of maintaining the value of the kroon, it is highly improbable that Estonians would have accepted as stoically as they did the policies of a balanced budget. There are three often cited criteria for a currency board: the monetary base must be fully backed by foreign reserves, the currency must be fully convertible and the exchange rate

fixed. By definition, it could be argued, Estonia does not present the case of a pure currency board. The kroon exchange rate is not fixed, but pegged. Theoretically, the rate could be changed—even if that would require a special legislative decision by the Estonian Parliament. But, on the other hand, it seems impossible to find a pure currency board anywhere. For achieving a stable and well-functioning financial system is obviously more important than putting pure theoretical models into practice.

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Belarus: The National Bank as a Defender of Sovereignty

Alexander Lukashuk

Two weeks after the new Constitution was put into effect, the first constitutional crisis in Belarus erupted. The crisis centered on the monetary union with Russia and the status of the National Bank of Belarus (NBB). For the past year, the government has been forcefully lobbying to close the agreement on a monetary merger with Russia. Government officials viewed such a union as a solution to the country's worsening economic crisis. Then, Prime Minister Vyachaslau Kebich declared the union with Russia "the goal of his life."

Opponents of the monetary union feared it would once again relegate Belarus to the inferior economic status it had had in the Tsarist and Soviet periods—that of Russia's "northwestern province." In April, the public controversy over the issue reached its culmination. The parliamentary opposition accused Prime Minister Kebich of violating the new Constitution and demanded a criminal investigation. A group of parliamentarians appealed to the United Nations while the prime

minister, in turn, accused the National Bank of treason. All of this occurred after the prime ministers of Belarus and Russia signed the long awaited currency agreement on April 12.

The agreement stipulated that the merger would take place in two stages. The first stage was to have begun on May 1, with the lifting of trade and customs barriers between the two countries. (To date, Russia has yet to lift its customs duties, while Belarus lifted its duties in April.) Russia would also retain its right to operate military bases in Belarus, freely transport gas and oil through the republic and move people and goods.

The second stage, which was to have begun sometime in the summer, would have required approval of the Belarusian and Russian parliaments. During this stage, citizens of Belarus would be allowed to turn in a certain sum of Belarusian rubles for Russian rubles at a one-to-one exchange rate. By August 1994, the market exchange rate had jumped to one Russian ruble to 13 Belarusian

rubles. Following the currency swap, the Central Bank of Russia would have sole right to issue currency and conduct monetary policy. The National Bank of Belarus would become, in effect, a branch of the Central Bank of Russia.

As it turned out, the Belarusian Parliament did not ratify the agreement and Prime Minister Kebich suggested the question be put to a national referendum during the June 23 presidential elections. At the time, public opinion polls indicated strong support for union with Russia. Just as Alexis de Tocqueville explained in a somewhat similar situation in America: "Do you suppose that the people could understand the reason for their opinion amid the pitfalls of such a difficult question about which men of experience hesitate?"

In the case of Belarus, however, there were few grounds for hesitation. The second stage of the agreement required changes to the Constitution which had come into effect only 12 days before. The agreement violated Art. 1 of the Constitution guaranteeing that "the Republic of Belarus is supreme and possesses the fullness of power on its territory and exercises domestic and foreign policy independently." Having signed the agreement, the prime minister also ignored Art. 7, which stipulates that all officials shall operate within the limits of the Constitution and the laws adopted in accordance with it. Legal enactments conflicting with the provisions of the Constitution are not legally valid. The agreement also ran counter to Art. 141 which reads: "A unified budgetary financial, tax, credit, and currency policy is pursued on the territory of the Republic of Belarus." If the planned merger were to be accomplished legally, Art. 145 needed to be abolished altogether: "The banking system of the Republic of Belarus consists of the National Bank of the Republic of Belarus and other banks. The National Bank regulates credit relations, cash in circulation, determines the procedure of payments and has the exclusive right to issue money."

It is little wonder that the merger agreement triggered a fierce political storm. A group of deputies accused the prime minister of violating the Constitution and demanded a criminal investigation that, of course, went nowhere. Another group

of parliamentarians addressed Matthew Kahane, permanent UN representative to Belarus with a letter stating: "Mr. Kebich, resting upon those forces in the Supreme Soviet, which allow themselves grossly to violate the state constitutional system, attempts to incorporate Belarus into the Russian Federation by unconstitutional means." The authors of the letter expressed their certainty that the international community was interested neither in destabilizing the situation nor in maintaining Russian nuclear weapons in the center of Europe. They asserted that the United Nations should therefore evaluate the agreement in legal terms. The letter also criticized the Russian Government, "a member of the UN Security Council," for signing an agreement which clearly contradicted the Belarusian Constitution.

Moscow's political circles are divided regarding the union with Belarus. On the one hand, Russian polls continually show the popularity of integration. Politicians from both sides—radical economic reformer Grigory Yavlinsky on the democratic side, to Vladimir Zhirinovskiy, the ultranationalist on the totalitarian side—favor it. Prime Minister Viktor Chernomyrdin appears to support a union at almost any cost. On the other hand, Russia now has an articulate lobby which believes that any attempt to recreate the empire is dangerous. Yegor Gaidar and Boris Fedorov oppose the union. They argue that an attempt to reconnect the unreformed economy of Belarus to Russia's will cause a surge of inflation in Russia. Within a short time, they add, all Belarusian problems will be blamed on Moscow. As Fedorov has put it: "The easiest way to create Belarusian nationalism would be for us to take over the place again."

The National Bank of Belarus found itself at the epicenter of the turmoil. Like a bolt from the blue, the news arrived that NBB chairman, Stanislau Bahdankevich, signed the agreement in Moscow on the condition that the National Bank retain the exclusive right to conduct its own monetary policy. On May 20, just before the beginning of the presidential campaign, Mr. Bahdankevich voiced his opinion in *Narodnaya Gazeta*: "I believe the monetary union has gone wrong. It is possible only on the terms put forth

by Russia. There appears to be no room for compromise. I consider Russia's conditions as absolutely unacceptable." This statement revealed a major rift between the government and the National Bank. For the first time, the general public saw Belarusian bankers exhibit some independent behavior.

When Belarus was part of the USSR, it had no banking system of its own. All banks operated as branches of the State Bank of the USSR. The sovereignty acquired in 199, did not require an immediate introduction of an independent financial system. In a kind of post-divorce inertia, the ruble continued to circulate in all former Soviet republics. But, in the second half of 1992, Russia undertook the first steps towards creating its own monetary system. Banknotes, with portraits of Lenin, were replaced with new, de-Leninized ones. The Central Bank of Russia refused to supply automatically its new money and credits to other republics, which contradicted the CIS agreements. After a series of empty protests and in need of money, the republics began to build their own financial systems.

The government of Belarus first tried to protect its market by introducing a number of different ration coupons and other surrogates. These had little if any effect and, in June 1992, the interim Belarusian "ruble" was issued. This currency, printed in Russia, is better known as the *zaichuk* or "hare." Parliament, however, did not endow the *zaichuk* with the status of a national currency. There were different exchange rates for different Russian goods, and Russian rubles continued to circulate in Belarus. Within a very short period of time, the Belarusian ruble did not even represent the original value of its one-to-one exchange rate. So quickly did the *zaichuk* lose its value that one soon had to add a zero to any denomination to calculate its actual value. But the National Bank alone can hardly be blamed for the endless confusion. It had little real authority in the face of Parliament.

Though formally subordinated to Parliament, during the first years of Belarus's independence, the National Bank played the role of a technical govern-

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Stanislau Bahdankevich,
Narodnaya Gazeta

mental body. It issued credits and fulfilled orders from the Council of Ministers. Gradually, though, Belarusian bankers began to understand that their role should be that of an independent institution, if market reforms were to be successful. Stanislau Bahdankevich conducted talks with the IMF, World Bank and the European Bank for Reconstruction and Development. The IMF gave considerable technical aid to the banking system in Belarus, primarily by teaching the basics of market economics to its personnel.

In an assertion of independence, in early June, the board of the NBB refused to grant the government a huge credit to buy animal food. By that time, the government had already used three quarters of all centralized credits for 1994 to support the unreformed *kolkhozes* and *sovkhozes*. The budget allocation to agriculture amounted to 3380 billion rubles, or over a quarter of all expenditures.

Prime Minister Kebich publicly characterized the refusal to grant credit as treason and charged the NBB with acting politically. He also blamed the chief banker for the non-implementation of the monetary union with Russia.

Stanislau Bahdankevich asserted that the bank favored such a union, but a union based on equal rights, that did not destroy the independence of Belarus. He said: "We do not agree that a foreign state—even a friendly one—should begin to formulate our economic policy. We oppose the transfer of the National Bank of Belarus—with its assets and liabilities—to the ownership of another state; the approval of the Belarusian budget and the amount of its deficit by the Russian Duma; the recalculation of our bank and enterprise funds on the basis of an unprofitable-for-us exchange rate. The monetary merger—one based on conditions which violate our Constitution and contradict our economic and political interests—should not be implemented. Instead of the monetary merger, it is possible to sign an agreement on bilateral payments with Russia."

Economic integration with Russia was a central theme in Kebich's presidential campaign. (See the

Belarus Update in this issue.) This card, however, was also played by his most dangerous opponent, Alexander Lukashenka. After the first round of voting, the latter led with 45 percent; the prime minister finished second with 17 percent. In a desperate attempt to save the situation, Kebich was reported to have asked his Russian counterpart to send five railroad cars of Russian rubles to Belarus in order "to show something to the people." Instead, Viktor Chernomyrdin himself arrived in Minsk and the two sides signed yet another communiqué on monetary merger.

Kebich suffered a severe defeat in the second round of elections. But the NBB is hardly safer now than before. The new president, Alexander Lukashenka, has no consistent economic views or program. He promises to strengthen the state-regulated economy, free prices, provide high levels of social protection and market reforms—all at the

same time. Like Kebich, he seeks a solution to the economic crisis in closer relations with Russia. Yet, for now, Stanislau Bahdankevich has preserved his position as chief banker.

It is still too early to make any judgments concerning the future relations of the executive and the bank. It is interesting though, that the new prime minister, nominated by the president, is banker Mikhail Chyhir, former head of the Agrarian Bank. So far, the new Constitution has passed its first test and protected the NBB from liquidation. But the idea of merging the two monetary systems is far from dead. A possible union with Russia remains on the Belarusian political agenda. Perhaps the time is coming for the National Bank of Belarus to protect Belarus's sovereignty.

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Monetary Policy and Central Banking in Russia

Boris Fedorov

Monetary policy and central banking in Russia have a very short but tumultuous history. Throughout the 1980s, in the former State Bank of the USSR, the debate on central banking, monetary policy and its independence from government was ongoing. But nothing could be done given the existing political environment. The Central Bank of Russia (CBR) was created in 1990 as a branch of the State Bank of the USSR. As an indicator of the Soviet bank's reluctance to accept reform, the CBR governor was not admitted onto the premises of the Soviet bank on his first day in office. The Law on the Central Bank of Russia was enacted in December 1990, but during the following year, the central bank was extensively used in the political fight against Soviet authority and hence was too distracted to develop monetary policy. After the collapse of the Soviet Union, in January 1992, the CBR took over the activities of the State Bank of the USSR and became a full-fledged central bank. This coincided with the initial negotiations with the IMF, when monetary policy became politically important and a fashionable subject.

Strangely enough, reformers like Yegor Gaidar joined forces with anti-reformers like Ruslan Khasbulatov, former speaker of Parliament, in ousting the first governor of the CBR, Georgy Matyukhin. His removal came just when he had begun to do the right things, like increase interest rates. A wise Soviet "pragmatist," Viktor Gerashchenko, replaced Matyukhin and immediately took on the reformers. The end of the Gaidar government, in 1992, began with Gerashchenko's assent. The compromises of the second half of 1992 boiled down to the following: issuance of CBR credit to cover inter-enterprise arrears and replenish working capital of state enterprises; a freeze on interest rates; and automatic and uncontrolled loans

to CIS countries. I was not surprised when I entered the government in December 1992 and was confronted with soaring inflation, a collapsing exchange rate and an enormous budget deficit, officially claimed to be five percent of gross domestic product, and in reality 35 percent.

But the worst problem was that credit emissions were not controlled and no one really knew how much credit was being issued. It was also clear that combating inflation in the traditional sense was impossible until the financial system was brought under control and made more efficient and manageable. The plan was first to close the biggest black holes of the economy and create the cornerstones of a monetary policy: to reduce and control credits to the CIS, increase the central bank interest rate to the level of inflation (a positive rate), create a system of control over central bank loans, abolish subsidized loans, include all federal expenditures in the federal budget, stop the obligatory sale of export revenues, decrease pure central bank emissions and complete the price liberalization process. The whole strategy was to cut bank leakages, to make the system more responsive to monetary policy and, in general, to fiscal policy. I am quite pleased that most of these goals were reached. The main monetary policy instruments were (last year and today) as follows: limitation of central bank credits to the government and the economy, unification and increase of central bank interest rates and stabilization of the ruble exchange rate.

Constraints

There were numerous constraints that made the plan outlined above nearly impossible to implement. The president and prime minister gave insufficient and inconsistent support, and the majority of the government did not really support the financial

stabilization plan or the reforms. Throughout the year most reform policy measures were opposed by the central bank and Parliament, which constantly tried to undermine reforms at any cost. Finally, there was a complete lack of qualified staff in the public sector. Very low wages had led to the exodus of the best specialists.

In view of these constraints, the whole reform exercise was a constant game of political maneuvering with reformers negotiating, cajoling and playing friends with the opposition (e.g. the so-called Round Table, a fruitless exercise), pitting some power bosses against others. We adopted an aggressive style and used pressure from the "international community" to fight for reform. Money from the West was never crucial, but influence on policy definitely was. Messages coming from Western advisors and international financial institutions were listened to, sometimes more than what domestic reformers admit. Because the mild academic style was found ineffective, the reformers' aggressive stance was a forced necessity.

Price liberalization

One should start with price liberalization because it is a prerequisite for an effective monetary policy. General price liberalization began in January 1992, but was not completed and thus remained a primary task for 1993. But the political situation had changed by 1993 and the idea of a price freeze was much more popular than was further price liberalization. Nonetheless, the coal price liberalization came into effect on July 1, 1993, mainly because the situation in this industry became so desperate that people were prepared for anything. One can give credit to the newly appointed first deputy prime minister, Oleg Soskovetz, who at that stage was instrumental in making the decision. Similarly, grain and bread price liberalization was helped by the difficulties with payments for outrageous state purchases and the inability to sub-

sidize bread prices any further. The events after the dismissal of Parliament gave the government the resolve to go through with this. Bread prices are always extremely politically sensitive and the prime minister shed considerable sweat before he signed the decision.

While coal industry problems continued for obvious reasons, the grain and bread price liberalization, within months, brought a new phenomenon. Suddenly, after 30 long years, there was enough grain to discontinue imports. The more immediate result was that it eased the burden on the budget.

Indeed, the whole concept of money was distorted. Simple market notions, like yields or present value of money, did not exist. Contrary to basic monetary notions, in Russia, most people think inflation is caused by higher interest rates. Such thinking is a result of the experience with the planned economy where economic decisions were never based on the price of goods or credit.

Interest rate policy

Interest rates never played an economic role in the former Soviet Union. There were no interest rates. Indeed, the whole concept of money was distorted. Simple market notions, like yields or present value of money, did not exist. Contrary to basic monetary notions, in Russia, most people think inflation is caused by higher interest rates. Such thinking is a result of the experience with the planned economy where economic decisions were never based on the price of goods or credit. That is why the inflation rate was at 1000

percent per year while the central bank maintained an 80 percent interest rate, from May 1992 to March 1993.

It took three months of bitter attacks on the central bank to make it raise interest rates. The policy of bringing interest rates to a rational, positive level became a fact only on May 22, 1993, after the famous joint economic policy declaration of the government and central bank. The government stipulated that the official interest rate could not be more than seven percent below the prevailing market rate (in March 1994 this was changed to five percent). Reformers can claim an outright victory since between March and October 1993, the official interest rate was

raised from 80 percent to 210 percent, despite resistance from the central bank. By the end of 1993, for the first time in years, the central bank's lending rate was positive.

The main objective was to phase out the absurd difference between market and central bank rates, and then to make deposit rates positive. On two occasions we had to pressure the savings bank, which still holds 80 percent of all personal savings, to hike its deposit rates and hence decrease the outrageous interest margins. In December 1993 this occurred, creating a basis for longer term credit and the macroeconomic conditions compatible with stabilization policies.

The biggest problem for the development of the economy was, and is, a total lack of financial sources beyond 36-month notes. The only way around this dilemma is to approach the authorities, who simply issue money, once again destabilizing the system. If technological renovation does not take place and financial instruments are not introduced, people cannot save money for investments and there is no chance to break the vicious cycle.

Throughout 1993, lending rates were always lower than the inflation rate. If we compound the 210 percent interest rate, it is still only about a 600 percent annual rate. But inflation on average was running 900-1000 percent per annum. Thus, all the complaints about high interest rates were absurd. At the same time, high inflation and low productivity had the effect of depriving enterprises of their working capital, and firms with long production cycles had to make use of short-term loans, which is nearly impossible. The only viable answer was to bring down inflation.

Interest rates differed substantially between regions. The greater the distance from Moscow—the higher the rate. In certain cases this fact has been used by regional authorities as a valid reason for even more separatism. That is why the efficiency of money markets was, and is, one of the most important tasks in the near future. Otherwise, interest rate policy has little effect on the system.

Credit control

In 1993 we tried to implement a policy of slowly tightening credit, cutting off central bank loans to the government and economy. As a ratio to GDP,

such loans went down in 1993, from 35 percent to 12.8 percent. But the share of centralized loans in aggregate credit decreased only from 88 to 85 percent, which shows that our policy had more effect on the overall volume of credit than on central bank loan practices. The overblown role of the central bank extending credit pointed to serious disproportions in the economy.

The main task in 1993 was to control this growth in credits. The government's Credit Commission played a crucial role in this by assuming responsibility for credit control, and initiating quarterly credit limits. The idea was to create a mechanism for curtailing credit expansion, a bottleneck to stop unwarranted central bank credits. It was a primitive mechanism, but at that time it was essential and the most effective form of control. The heaviest borrowers were the agriculture and energy sectors and the northern territories (which have shortened seasons for supply deliveries).

The credit limits were largely observed (except for the third quarter) and resulted in a falling inflation rate. The main problem was resistance from within the government and the CBR. The Credit Commission became a powerful and hated institution and that is why a battle for its control has begun.

A milestone event in the fight against inflation came on September 25, 1993, with the decision to abolish subsidized loans. This meant that all credits had to be given at the CBR rate. (Previously, all loans to the agricultural sector were extended at a fraction of the CBR rate.) The abolition, combined with the constant increases in the rate, helped diminish the demand for centralized loans. The current government has promised not to reinstate the subsidized loans. But the unsolved problem is the very low repayment rate of CBR loans. The repeated extension of these loans makes them, in effect, similar to budget expenditures and subsidies. They distort credit markets. Again, the current government promised not to extend repayment of any loans, but it is not clear how these loans will ever be recovered.

Other forms of control

Obviously it is not enough to control only CBR credit, but at the initial stage this was of

paramount importance in order to create the conditions for a more effective monetary policy. Once interest rates are positive and CBR credit under relative control, one should start thinking about other forms of regulation. The most obvious is the minimum reserve requirement of commercial banks, which existed for several years at approximately 20 percent. This instrument really does not work because too many items are excluded from the calculation formula, for example, CBR credits. Thus, reserve requirements actually stimulate taking loans from the CBR. Direct quantitative credit controls on commercial banks and interest rate ceilings do not exist for the moment and will be politically difficult to install. This means that the only realistic way to improve efficiency is to refine refinancing mechanisms, the CBR interest rate and market operations policy.

Refinancing mechanisms

The other major problem is the absence of normal refinancing facilities at the CBR. The law asks the CBR to extend loans only to commercial banks. But in practice CBR officials are still intent on providing loans to specific enterprises under the disguise of refinancing commercial banks. For more than a year the CBR promised to create a new system of credit auctions, but they began only in February 1994, and represented only a tiny portion of total CBR credits. The target was to have ten percent of CBR credits allocated through auctions in the first quarter, and 15-17 percent in 1994 as a whole. I think the traditional forms of bank refinancing based on securities and "lender of last resort" principles should be developed. There is some talk about creating rediscount facilities at the CBR but it is unlikely that this will soon occur.

Financing the budget deficit

Cutting the relative size of the budget deficit is important, but no less important is the system of deficit financing. Our biggest problem today is that nearly 100 percent of the deficit is financed by printing money. In 1993, issues of securities covered just two percent of the budget deficit (330 billion rubles). In the beginning of 1994 security issues

increased slightly but not enough to seriously change the situation. Most of the existing securities are three-month treasury bills that have been issued since May 1993, in ever increasing amounts. Now, six and 12-month treasury bills are to be issued. In September 1993 the government issued gold-backed bonds, a deferred forward contract to purchase ten kilograms of gold. Medium term securities for the population are planned. The biggest issue in covering the deficit with marketable securities today is the government's credibility. After so many instances of the government not paying its obligations and announcing monetary reforms, there are few who believe in government bonds.

Inter-enterprise arrears

One of the most painful problems of the Russian economy is the mountain of inter-enterprise arrears, which seem to have had a snowball effect. One cannot deal with monetary issues without addressing this problem. It is one of the most important tools used by the opposition to fight reforms and, at the same time, it is a potential disaster for any financial stabilization policy. The reasons for arrears are simple. There is an inflation tax on the working capital of enterprises with long production cycles and the legal system allows firms not to pay debts, with relatively no impunity. The real scale of nonpayments by enterprises is not known but it is clear that in real terms (and relative to GDP) it is not the most important problem today. The best indicator is that even industrial managers are no longer as hysterical as they used to be.

The problem is that instead of applying financial discipline with insolvency procedures, many government officials continue to cover inter-enterprise arrears with CBR credits. In addition, they consider it appropriate to index the working capital of enterprises, using the same source. In 1992 such an idea was applied and caused the exchange rate to freefall, destroying the chances for stabilization. If there were a boost in production then it was like a drug addict who gets more happy and lively after an injection. As later checks showed, most of the money was, in any case, misused. In 1993, despite a lack of real sup-

port within the government, we managed to avoid a repeat of this situation. But the danger is still there. In late 1993, a presidential decree on the mandatory conversion of arrears into bills of exchange was issued. The idea is that once the bills expire, enterprises either pay or go bankrupt. Thus far, resistance to this scheme is so strong that practical implementation is impossible.

The banknotes exchange

One of the most controversial events and the only "shock" of 1993 was the ill-conceived and unexpected exchange of banknotes issued from 1961-1992, for new banknotes, not given to the CIS countries. The prime minister fully relied on Gerashchenko in this matter and refused to listen to the Ministry of Finance. The monetary reform was illegal because the amount of banknotes to be exchanged can not be limited if the law says that they are the "unconditional obligations" of the CBR. In characteristic Soviet fashion, just two weeks before the action, promises were given to the CIS members to continue the exchange of old banknotes, at least until the end of the year. (In January 1991 there were similar promises before the exchange of the large denominated banknotes.) The agreements with other countries were clearly broken. In the end, of course, no one bore any responsibility.

At the moment the banknote exchange was announced, the CBR was assuring CIS members that supplies of new banknotes would soon follow. One could only guess about the motives behind the scheme. Could it be that the CBR aspired to be the central bank of several countries, virtually uncontrolled? Many officials held the misinformed perception that once the ruble was the only currency in the CIS, all of Russia's troubles would automatically disappear.

This monetary reform has led to numerous disorders and criminal offenses. Technically it was a disaster because the exchange points were not properly organized and there was a shortage of new banknotes and especially coins. The reform saw loads of cash poured into Russia, causing a shopping spree and an inflation hike. We lost at least two months in our fight with inflation. I still

think that the best way to have solved all these issues would have been to continue with a policy of supplying the CIS countries with old banknotes only, while, at the same time, withdrawing them in Russia and officially notifying CIS members that we could ask them to introduce their own currencies or consider joining the Russian Federation. Deceitful policies only worsened relations with the former republics, but deceit was always in the blood of communist officials.

Monetary policy vis-à-vis the CIS countries

On July 1, 1992, Russia ceased to accept rubles issued by other CIS countries in book entry form. Paper money continued to be printed only in Russia and then given to our partners free of charge. A unique system was formed with cash being Russian in origin, while deposit money was national. Banknotes had an obvious one-to-one exchange rate, but deposits were exchanged at an increasingly different rate, favorable to Russia. At the same time, locally created deposits were going at a one-to-one rate with Russian banknotes.

In effect, intercountry settlements had to be only in rubles earned in Russia (balances at correspondent accounts) by selling goods or services. Since this was not sufficient for our partners, a strange system of so called "technical credits" was instituted with two trillion rubles having been presented to CIS countries between July 1992 and April 1993 (not counting cash supplies and subsidized prices for many commodities). It was demonstrated beyond a doubt who was and is the donor in the former Soviet Union. But somehow Russia does not appear in the ranks of the world's largest aid providers.

It was also clear that despite something being called a ruble zone, CIS countries were absolutely autonomous in their monetary, credit, foreign exchange and customs policies. It was clear that reforms were moving much faster in Russia and that special arrangements with the CIS countries hindered the movement ahead. The first quarter of 1993 was spent in attempts to destroy the described system, using appeals to the government, Parliament and CBR. Nobody wanted to make an

effort and the CBR was bluntly refusing to cooperate. Success came only when we managed to insert a certain point in the Supreme Soviet statement on the budget that prohibited new automatic loans without Parliament sanctioning them in the budget. That appealed to the deputies' egos.

The new system envisaged fixed limits for CIS loans, amounts linked to dollars, definite time periods and positive interest rates. As a result, from January 1 to April 20, 1993, such loans amounted to 850 billion rubles and, for the rest of the year, only 400 billion which, given inflation, meant a tenfold decrease. The end to the "technical credits" meant increased demands for banknotes which the CBR provided. After the monetary reform in July 1993, there was a panic in the CIS countries, manipulated by the CBR to speed up formation of the "new ruble zone." Reform could have been used to form civilized relations with the CIS countries, but instead a battle between the two approaches ensued.

Nonetheless, the reform, for the time, finally split the monetary systems of the former Soviet republics. Despite frenzied attempts to have a new ruble zone within weeks, nothing really serious happened, until the agreements with Belarus were signed in April 1994. Turkmenia, Kazakhstan, Armenia, Uzbekistan, Kyrgyzstan, Azerbaidjan and Moldova have all introduced their own currencies. Ukraine, Georgia and Belarus still have currency substitutes leaving only Tajikistan, to a certain degree, in the ruble zone.

The recent agreements with Belarus show that the aim of our neighbors is to get Russian domestic prices for energy, a right to pay for it with credit emission, an exchange of savings at a one-to-one rate and a renewed supply of cash, free of charge. Today, Belarus has an inflation rate four times higher than in Russia; the "zaichik" ruble exchange rate appreciated in three months from four to ten local currency units per ruble. The intended unification of the two monetary systems will instantly give to each Belarusian about \$70 and prices will become more stable. But at the same time, Belarusian authorities resist the concept of a single monetary authority and a

single budget system. This is reasonable because without political unification such a loss of sovereignty can hardly be explained.

What is worse is that no one can explain what Russia gains from this deal. Instead of fostering real economic integration, irresponsible politicians prod the country to dangerous experiments. One hears astonishing things like "let us not discuss details" when it is a matter of long-term national interests. In my view, only full political unification could warrant the price we are all asked to pay. What is also worrisome is that during government consultations with the IMF, it was implied that the agreement on monetary unification would not occur without everything being properly prepared. The signing of the agreement was unexpected and leads one to think that there could be further unpredictable surprises this year.

Central bank independence

For more than 70 years the USSR had no real central bank and the State Bank of the USSR was just part of the government. The idea of central bank independence became widely popular without people understanding its meaning. The first mistake was to exchange the bank's dependence on the government for a dependence on Parliament. The idea was to lessen the inflationary influence of the government, but in reality it was substituted, with Parliament attempting day-to-day management of the central bank. In what country does the speaker of Parliament ever have a direct telephone line to the governor of the central bank? Since our Parliament is even more dominated by lobbies than is the government itself, it is like giving the central bank to vultures. The pro-inflationary pressures only increased.

The second problem is that given the lack of a central bank culture, our central bankers do not tend to act as normal central bankers. The experience of the last two years is that the Ministry of Finance is more like a central bank and the CBR is more like a licensed industrial and agricultural lobby. Given the inefficiency of the law, which never anticipated such a situation, the consequences were very grave. To cite but a few: disor-

der with the settlements system, bizarre monetary reform and disregard for primary, monetary policy objectives.

The biggest problem is that instead of pursuing just one target for the national currency, the central bank is always maneuvering and even participates in political games. Today, the degree of CBR independence, in practical terms, is unique because it really can do whatever it wishes. That is why we are preparing a new CBR law which will not take the independence away but will give guarantees that a more responsible monetary policy will be followed. This is primarily a question of decision-making procedure within the CBR.

The fate of financial stabilization in Russia

The inflation rate fell to about eight percent in March 1994, the lowest in nearly two years. In January, the new government was so frightened by criticism that it forgot about corrections to the economic policy and acted in quite a monetarist way. The problem is that a

financial stabilization policy is still not really embraced by the authorities. The recently declared target of seven-to-nine percent inflation per month by December 1994 is not something with which one can be truly content. What is surprising is that organizations like the IMF agree to such policies.

The latest joint declaration of the government and CBR has some correct points, but there are suspiciously too many points like "we shall not fix prices, exchange rates, etc." Instead, "we shall do this and this." There is still a chance that financial stabilization will be achieved, but the CBR and its monetary policy will have to play a crucial role. I do not think this will happen in 1994, but the foundation stones were laid and recent experience shows that it is possible to have an effective monetary policy in Russia.

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Constitutional Courts and Central Banks: Suicide Prevention or Suicide Pact?

Jon Elster

Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy. (John Potter Stockton)

The Constitution is not a suicide pact. (paraphrase of a dissent of Justice Robert Jackson in Terminiello v. City of Chicago, 337 U.S. 1, 37 [1949])

I shall argue that the double-edged suicide analogy applies both to central banks (including, in the US, the Federal Reserve Board) and to constitutional courts (including, in the US, the Supreme Court). On the one hand, these institutions can act as salutary chains on the tendency of democratic majorities to act under the sway of passion or short-term interest. On the other hand, courts or banks (as I shall call them for brevity) may, if unchecked, become dominated

by sectarian ideologies that take no account of the public interest.

Currently, strong and independent courts and banks are in fashion, largely because of the influence of the United States and Germany. In Eastern Europe, in particular, institutional and constitutional design owes much to the prestige of the Bundesbank and the Bundesverfassungsgericht. In this paper I sketch some arguments for the currently unfashionable view that very independent courts

and banks may be a remedy more dangerous than the disease. The insulation of courts and banks from parliament and government can be taken too far.

Democracies need to be stabilized by constitutions. Let me define the three key terms in this statement. By democracy I mean a system in which political power derives from majority voting by representatives chosen in free, fair and competitive elections under universal suffrage. By a constitution I mean a set of laws that (i) regulate more fundamental matters than ordinary laws and (ii) are more difficult to change than ordinary laws. The obstacles to constitutional change can take the form of obligatory delays, of requiring a supermajority, or a combination (as in Norway) or tradeoff (as in Finland and Bulgaria) of both. The idea of stabilization can be taken in two senses. On the one hand, one can think of a constitution as a kind of flywheel that, by preventing rapid changes, promotes predictability and long-term planning. In this perspective, it does not matter what the constitution is, only that it is relatively fixed and immutable. On the other hand, one may think of a constitution as a device for collective self-protection or self-binding that prevents the majority from yielding to sudden passions or short-term interests. In this perspective, the substance of a constitution obviously matters very much. In the present paper, I limit myself to stabilization in this second sense.

The idea of self-binding or self-protection has a literal interpretation in the theory of individual behavior, a paradigm case being that of Ulysses who bound himself to the mast to protect himself from reacting to the song of the Sirens. It is far from obvious in what sense this idea can be transferred to the field of constitution making. In the first place, one may cite the late Norwegian historian Jens Arup Seip to the effect that, "In politics people only try to bind others, not themselves." In the second place, there is the obvious fact that even if the founding fathers do in fact want to tie their own hands, they also tie those of later generations. (The often-made proposal of writing periodical constitutional conventions into the constitution has, to my knowledge, never been implemented.) In collective self-binding, that is, the self that binds can be

both less and more than the self that is bound. If I nevertheless adopt the fiction or myth that constitutions are collective acts of self-binding, I shall also note the occasions when the fiction becomes too obvious and implausible.

There are two main phenomena that induce individuals and collectivities, perceived now as individuals writ large, to limit their ability to take certain actions in the future. First, they might anticipate that, under certain, generally unknown circumstances, their passions might override their well-considered judgment. I am not talking here about what one might call "standing passions," such as religious or ethnic prejudice. Because these passions are as likely to be present at the constitution-making moment as at later times, the founding generation will not have an incentive to guard themselves against them. Rather, I have in mind the sudden panics, fears, greeds and hopes that can arise in turbulent situations.

Second, individuals might bind themselves to the mast because they know themselves to be subject to dynamic inconsistency. Roughly speaking, this phenomenon can be defined in terms of an inability to stick to past plans. It can arise in one of two ways. On the one hand, individuals who discount the future in a non-exponential manner will invariably find that when the time comes to realize plans laid in the past, they no longer have an incentive to do so. This mechanism is not relevant in the present context. On the other hand, dynamic inconsistency may arise through strategic interaction. As it is easier to illustrate this idea than to define it, consider inflation as an example. Once employers and workers have settled on a nominal wage contract, government reacts by setting inflation at a certain level. Because the government cares both about price stability and employment, it will choose a positive level of inflation, which will reduce real wages and increase the demand for labor. Workers, anticipating this reaction, will then set nominal wages at a level that gives them the real wage at which they are aiming. Exactly the same real wage would have been achieved if (i) the government had announced a policy of zero inflation, (ii) the workers had believed that the government

would implement it and (iii) the government had in fact implemented it. Moreover, that real wage would have been achieved without the costs associated with inflation. However, this policy suffers from dynamic inconsistency. If a policy of zero inflation is announced, workers will disregard it because they know that the government will have an incentive to deviate from it later. The optimal plan—zero inflation—is inconsistent.

If an individual or collective actor is subject to sudden impulses or to time inconsistency and *knows* it, it makes sense to take precautions against these tendencies. Self-binding, while not the only precautionary strategy, seems to be the most important one. In the political context, self-binding can take several forms. To guard oneself against sudden impulses, an obvious precaution is to create delaying devices. These can operate either in the normal political system—bicameral systems are often justified by their “cooling-down” effects—or by writing certain laws into the constitution and making them subject to especially slow and cumbersome amendment procedures. To guard oneself against time inconsistency, one might also envisage two procedures. First, the time-inconsistent agent might write the optimal policy into the constitution and require a supermajority for its amendment. Second, the agent might confer policy-making powers in this area to an independent agent not subject to time inconsistency and endowed with similar constitutional protection.

Constitutional courts and central banks fit naturally into the general scheme I have sketched here. Let me consider them one by one.

Courts

If a constitution is seen as a precommitment device, a court may be seen as its enforcer. More specifically, a court may serve as a restraint on majoritarian passions, notably to prevent the violation of individual rights. Many countries have had or now have an effective constitution without anything like a court to enforce it. Until 1971, this was the case in France. It is still the case in Sweden. This does not imply that government or parliament can freely enact decrees or laws that violate the consti-

tution. If that document is at all taken seriously, violators may incur severe *political* sanctions, similar to those triggered by the violation of unwritten “constitutional conventions.” There is nevertheless an enormous difference between countries in which courts are able to set aside decrees and laws on the grounds of constitutionality and those in which they have no such powers. In the former, constitutional interpretation gives rise to a jurisprudence that takes on a life of its own and whose relation to the original text can be extremely tenuous. It would be naïve to say that current practices of judicial review in, say, Hungary, the United States or France simply amount to a faithful enforcement of their constitutions.

In practice one faces the choice between under-enforcement and over-enforcement of the constitution. Without a court, clear violations may go unpunished. With a court, legislation may be set aside that on its face is perfectly compatible with the constitution. In such cases, the idea that the court is acting as the agent of self-binding becomes ludicrous. Rather, it is acting as a “third chamber” of parliament. The question, then, reduces to whether under-enforcement or over-enforcement is the more serious danger. If judicial activism is the price one has to pay for effective enforcement of the constitution, is the price too high? I return to this question below.

Banks

The constitutional concern with monetary policy is an old one. The American Constitution, for instance, prohibits the states from printing paper money, a clause inspired by the inflationary policies of debt-relief that had been followed in several states. Later such clauses disappeared from constitutions, until reappearing in more recent times and now focusing on the role of the central bank. Although the bank is usually regulated by statute rather than by constitutional provisions, the statutes in many countries have hardened into conventions with quasi-constitutional force. Explicit references to the bank in modern constitutions include the following issues. Who appoints the governor? What is the tenure of the governor? Can the governor be dismissed—and by whom?—before the end of his

tenure? Can the government instruct the governor? Is the bank allowed to lend money to the government? What is the objective of the bank?

Some of these issues can be clarified by taking up again the question of inflation versus employment. Although the desire to create jobs is not the only reason why governments might want to expand the money supply, it is representative of the general issue to be discussed. Remember that policy makers would want to announce a policy of zero inflation, which, however, is not credible. To make it credible, they can follow one of two courses. On the one hand, they might opt for rules rather than discretion and write a specific monetary policy directly into the law or the constitution. This option, on reflection, is either undesirable or unfeasible. A simple mechanical rule, while feasible, would provide too little flexibility for adjustment to unforeseen events. Conversely, a rule that tried to specify optimal responses to all contingencies would be impossibly complex.

On the other hand, they might entrust discretion to an independent central bank rather than to the government. To ensure (i) the real independence of the governor of the bank and (ii) the likelihood that he or she follow the optimal low-inflation policy, a number of measures have been adopted. When the central bank of Norway was created in 1816, it was located in Trondheim, several hundred miles from the capital, in order to ensure its independence from the government. (It is also an interesting fact that many courts are located outside the capital—be it in Brno, Kosice, Karlsruhe or Tartu.) In countries with a dual executive, the bank governor may (as in Hungary) be appointed by the president rather than by the government, on the assumption that he will then be more likely to be conservative rather than activist, that is, place higher weight on price stability than on employment. The constitution may (as in the Czech Republic) explicitly forbid the government from instructing the bank or (as in Norway) require that, if it does so, the fact has to be made public. Furthermore, one may (as in Germany) constitutionalize price stability as the goal of the bank. In the spirit of Thomas Schelling, one may also try to strengthen the bank by taking

away some of its powers. Thus to protect the bank from informal pressure by the government, one may (as in Argentina) explicitly forbid it to engage in deficit funding.

It should be added that the reason why politicians might want to insulate the bank from their pressure need not be a high-minded motive to promote the welfare of the country. They might also abdicate simply to be able to shift the blame when something goes wrong. Constitutional courts and the threat of invalidation that they pose may serve similar functions. In his study of the French Conseil Constitutionnel, *The Birth of Judicial Politics in France*, Alec Stone claims that in France "governments may use constitutional arguments as convenient pretexts for abandoning radical measures once promised to party activists." (He observes a similar tendency in Germany.)

The problem with both independent courts and independent banks can be stated very simply: they may run amok. Constitutional scholars and central bankers not infrequently belong to extreme, sectarian and ideological schools of thought. This is especially true, I believe, of central banking, as evidenced in the following comment on monetarist reform: "Can a democratic government credibly commit itself to adhere to a policy no matter what its consequences—to guarantee that the monetary base will not be allowed to grow faster than x percent, even if the optimists should turn out to be wrong, and the policy leads to massive unemployment and idle capacity quickly, and slows down inflation only very gradually? Catch 22: maybe the theory is right, but the only way to test it is to convince people that the government would persist even if it is wrong" (Francis Bates, *The Economist*, March 21, 1981).

Courts, too, can become caught up in ideological attitudes. To take my examples from the United States, the (admittedly somewhat different) "Reagan judges"—Rehnquist, Scalia and Bork—are highly rigid and sectarian, proceeding from first principles with little regard for circumstances and consequences. Now, my argument does not require the reader to agree with my assessment of these particular judges and the courts on which they serve. For my purposes I only require agreement on the

proposition that dogmatic and sectarian judges and courts can and do emerge from time to time. Perhaps the danger is smaller in highly politicized courts such as the French one—but of course political appointments and decisions have other dangers associated with them.

The point is not that independent banks and courts, that can act as brakes on majoritarian pressures, are undemocratic. To the extent that they can be defended as self-binding devices, these institutions emanate from the People no less than do the representative ones. If the People, assembled in a founding moment, decide that the public interest and individual rights are best defended by a system of checks and balances, the decision cannot be opposed on the grounds that it is non-democratic. This characterization of the constitution-making process, is to some extent a myth, as mentioned above. The American ban on paper money was the act of a minority elite protecting itself against the majority rather than of a majority protecting itself against itself. The decision by the French Conseil Constitutionnel to expand its powers of judicial review was taken in direct contravention of the intentions of the founders of the Fifth Republic. With regard to other constitutions, notably the ones recently adopted in Eastern Europe, the characterization does, however, seem apt enough. In such cases, the decision to create strong and independent courts and banks can be criticized only on substantive rather than procedural grounds: that, in addition to (or instead of) their intended effects, they have other, perhaps very dangerous, consequences. Rigid bank governors can create unemployment. Dogmatic courts can delay much-needed reforms.

One response to this predicament is simply to accept the risk. One may argue, that is, that the overall effect of independent banks and courts is positive, and that it would be a mistake to focus on local failures that are bound to arise in any rule-governed system. The other response, which I shall explore here, is to try to retain the benefits without the risks. The obvious way to achieve this goal is to create checks on the checks—to constitutionalize protection against self-protecting devices. In many forms of medical treatment, the remedy against the negative side effects of medication is not to discontinue treat-

ment but to supplement it with other forms of medication that can suppress the side effects.

With regard to the courts, there exist a number of such devices. The most general is the amendment procedure. If the court interprets parliamentary legislation in a direction that parliament finds undesirable, the latter usually has the option of amending the constitution so as to leave no doubt about what it means. But this safety valve is not always available or, if it is, it may be too ineffective. (i) Some constitutions contain unamendable clauses. (ii) In general, the amendment procedure is slow and cumbersome. By the time the constitution is changed, irreversible damage may have been done. (iii) The opposite risk arises if parliament enacts a steady stream of amendments every time the court goes against its wishes. This was for a long time the case in India, and remains the case in Austria, where Parliament even incorporated into the constitution a law regulating taxi driving in Vienna when an ordinary law on this matter had been struck down by the Court.

Consider, more specifically, the United States. In addition to the provision that judges serve only during "good behavior," the appointment procedure—involving both the executive and the legislative—allows for close scrutiny of any possible "suicidal" tendencies of the candidates. History is full of cases in which the behavior of judges, once appointed, proved very different from what their prior behavior had led one to expect. In such cases, there are additional safeguards. For one thing, there is the possibility of packing the court by appointing new judges, as Franklin Roosevelt threatened to do. For another, Art. III of the Constitution assigns jurisdiction to the Supreme Court only "with such Exceptions, and under such Regulations as the Congress shall make." Under a literal interpretation, this clause would enable Congress to emasculate the Court entirely. Not surprisingly, the Supreme Court has eschewed this interpretation, yet the clause may have exercised some restraining influence.

Two of the current East European constitutions embody a very different kind of check on the court. The Romanian Constitution says that Parliament may, by a two thirds majority in each chamber, override a Court ruling on the unconstitutionality of

laws and regulations. The Polish Constitution says that Court rulings regarding the unconstitutionality of laws (not regulations) are subject to review by the Sejm. The Constitution does not require a qualified majority in the Sejm to overrule the Court. These unusual provisions may have several explanations. The Polish clause is taken over from the pre-1989 Communist Constitution, which was built on the (entirely fictional) principle that all power was vested in Parliament. When Parliament revised the Constitution in 1992, this clause somehow escaped revision. It is tempting to believe that Parliament found it hard to give up this important prerogative, thus illustrating the general proposition that it may be unwise to combine the functions of the constituent assembly with the legislative body. (This is not to say that the clause is necessarily bad, only that it was probably adopted for bad reasons.) I know less about the Romanian case, but the same two causes—the Communist legacy and self-serving parliamentary behavior—may have been at work here too.

Given the policy errors of the stagflation era, together with recent theoretical work on time inconsistency and credibility, protection against

excessively independent banks is not an equally central issue. There is agreement that mechanical rules à la Friedman will not work. The solution is not to avoid discretion, but to shift it from the government to an independent bank. There is also agreement that because of the possibility of unexpected exogenous shocks, such as the 1973 hike in oil prices, the bank should not give absolute priority to price stability, but also take some account of employment. The theoretical work on the implementation of this mixed objective is not very satisfactory. The seminal article by Kenneth Rogoff (*Quarterly Journal of Economics*, Vol. 100, 1985) simply argues for the selection of a governor known to balance the two considerations in an "optimal" way. This procedure is similar to the screening of judges by the executive and the legislative, and is vulnerable to a similar objection. Bankers, like judges, may turn more rigid and conservative over time. Although *ex ante* screening is indeed indispensable, some form of *ex post* control should also be available. One might allow, for instance, a qualified majority (two thirds, for instance) of Parliament to vote the dismissal of the governor.

Three views of the new Constitutional Court Act

ROUNDTABLE: Redesigning the Russian Court

Introduction

Lawrence Lessig

Within a stable legal culture, where the rule and limits of law are well established, the task of a constitutional court is hard enough. Within a legal culture in transition from 70-odd years of communism, with no long-standing practice of either the rule or limits of law, it may well be impossible. The history of the first Russian Constitutional Court offers no great hope to the contrary. Drawn ever more deeply into essentially political battles, eventually the Court came up short, and was broken by an institutionally more powerful President Yeltsin. One year later, on the basis of a new Constitution and the new Constitutional Court Act, a second Russian Constitutional Court is about to return to the political scene. The underlying question which the three articles in this roundtable address is how long can we expect it to last.

To this question, there are as many answers as articles. But despite their diversity, the three together reveal common ground. First, all three are skeptical about whether the new act has done enough to assure that the politics of the old Court will not return in the new. For this Chernobyl of

constitutional courts faces an unenviable task—as Sergey Pashin puts it, if the Court acts to revive its damaged reputation, it is likely to be caught again in political battles that it cannot win; but if it does nothing to revive its damaged reputation, it is likely to be too timid to play the role required of a Constitutional Court in a postcommunist Russia. Somehow this Court must demonstrate, to itself and to the Russian people, that it is a court of law.

This will not be an easy task, and it is not made easier by the institutional design of this Constitutional Court. The two Russian commentators here think that it will not be an easy task because the Court will be overwhelmed with cases: Only this Court, these authors worry, has the jurisdiction to answer constitutional questions, which means that ordinary judges will not develop a constitutional sensibility, and that the Constitutional Court will not have the capacity to resolve the deluge of cases that will no doubt befall it. Moreover, because ordinary courts must suspend their proceedings to raise constitutional questions before

the Constitutional Court, the delays built into this system may be disastrous.

From a Western perspective, this problem seems much less pressing. We come from a tradition where constitutional courts never decide more than a fraction of the cases presented to them. In America, the Supreme Court decides but 100 of some 5000 cases presented to it each year; in Europe, the percentages are somewhat higher. And while America is different (since lower court judges can decide questions of constitutionality), and Europe is different (since the courts there function in relatively stable legal cultures), we can hardly expect a constitutional court in the first steps of transition to assume even greater burdens than their Western counterparts. Germany after World War II is a good model here: for it too concentrated constitutional jurisdiction in its Constitutional Court, and this Court too failed fully to resolve all the questions presented to it, or to resolve well the questions it did resolve. Nonetheless, that Court has matured from its imperfect beginnings, and now stands as the premier Constitutional Court in either the American or European legal context.

The more interesting question about the new act, at least from a constitutional law perspective, is what the three authors together reveal about the uncertain status of fundamental categories of law in the Russian constitutional scheme. One example is the Constitutional Court Act itself. The act is a type of law called a "federal constitutional law"—somewhere between ordinary legislation and the Constitution itself. Or so it would seem, if one followed European traditions. But the essays here suggest that it might be too early to say just where this special kind of higher law will fit. Vladimir Chetvernin suggests that we think of federal constitutional laws, though not technically constitutional amendments, as in effect constitutional amendments, which thereby supersede inconsistent constitutional provisions within their domain. This of course is not the only interpretive possibility: federal constitutional law could also be conceived as a gap filler within selected constitutional domains. While it may add terms to the constitutional structure, like any gap-filling normative

act, whatever terms it adds must themselves be consistent with the Constitution. But what is interesting here is not so much the precise legal status assigned to federal constitutional laws as the fact that a question so fundamental still remains open to doubt.

Finally, the essays draw attention to some of the very best in constitutional court reform, and some of the very worst aspects of the old system which have been allowed to remain. Alexander Blankenagel points to the rule that the Court continues to vote in public, a requirement that may induce a type of responsibility in these justices that secret voting would not. (Alternatively, one might ask if this rule is not the way political forces keep judicial resources in line.) On the negative side, Blankenagel points to the extremely detailed appellate procedure imposed by the act on the Court. Detailed procedure is necessary to keep lower courts in check, but in a supreme court, its complexity and inflexibility will only hamper the Court's work and may (when not strictly obeyed, as it cannot be) tend to discredit the Court's judgments.

Chetvernin points to an even more basic threat. This is the problem of perks for the judges. Rather than giving the judges a straight salary, sufficient to cover the expenses of judicial life and in accord with the status of a constitutional court justice, the new act continues the communist practice of rewarding judges with perks allocated by state bureaucracies. In theory, these perks are to be the same. But in practice, opportunities for abuse are too obvious to be ignored. For of course there are many potential differences among "the same" perks—an apartment in the center of Moscow may in one sense be "the same as" an apartment two and half hours outside of Moscow (they both are "apartments"), but clearly the one is quite different from the other. This system of perks gives the government a tool that it can exploit to keep pressure on the judges to decide cases in ways favorable to the government. It will therefore be a hindrance to any emerging judicial independence.

Much may have changed in Russia. But much has also remained the same. There has been no attempt to expropriate the former communist appa-

ratchiki—they continue to occupy the choice apartments in Moscow and, by one recent estimate, constitute 80 percent of Russia's most wealthy citizens. This old elite, and their traditional ways, will continue to weigh heavily on Russia's struggles towards constitutionalism. Whether the new constitutionalism will work depends in part upon how well new structures escape old patterns. This, in turn, depends upon whether constitutions can at all be effective in curing a culture of its most basic pathologies. One may well have doubts on this score not just about this constitutional system, but about any system which is so ambitious. (The failure of America to rid itself of racism, constitutional structures notwithstanding, comes to mind).

But these doubts do not mean that one should be quick to accept an old-style Russian fatalism. No law

is powerful enough to determine the results one way or the other, and the new law on the Court leaves plenty of opportunity to make the system work, at least in a moderately satisfactory way. What is most needed now is a kind of constitutional statesmanship that is not at all foreign to American and European traditions, and should not be foreign to Russia's either. This statesmanship is the Constitutional Court's responsibility first. What the Court must do is to learn the limits of what it can do well, and keep itself within those limits. For however important constitutional perfection is, more important at this stage is survival. And survival comes not from political activism, but from prudence. We will know how long this Court will survive when we see whether these professors (nine of 13 original justices were academics) have finally learned this first lesson of constitutionalism.

The Court Writes its own Law

Alexander Blankenagel

After the storming of Parliament, in October 1993, the Court was pressured to do something with Valery Zorkin, the Court's either ill-fated, ill-advised or evil-minded chairman, who for the past half year had discredited the Court by siding with Ruslan Khasbulatov and Aleksander Rutskoi in the conflicts between Boris Yeltsin and the anti-Yeltsin forces in the Supreme Soviet. At first, Zorkin was cajoled into resigning his post as chairman of the Constitutional Court. The Court (or at least five of its justices) then declared that it would abstain from "political cases" so long as there was no new constitution. Yeltsin then suspended the Court's activities, in the famous Ukaz #1612, citing the declaration by the five justices as evidence that the body could no longer fulfill its constitutional functions. Being an obedient Russian institution, the Court accepted Yeltsin's verdict and abstained from deciding any cases, whether political or not.

In the weeks that followed, heated public (and especially non-public) discussions centered around the

future structure and competence of the Constitutional Court. After some to-ing and fro-ing, the new Constitution finally did keep a place for a Constitutional Court (Art. 125). Yeltsin declared the old court act void because it was incompatible with the new Constitution. The special charm of this decree was that the new Constitution had a special transitional provision allowing old laws to stay in effect under certain conditions, but this provision Yeltsin ignored.

Without a new act, the Court could not function. And thus when the first conflicts between the new Parliament and president arose, all parties were frustrated because there was no Constitutional Court to which to turn. Zorkin and Viktor Luchin, who had originally been suspended from the Court, soon elbowed their way back in (Luchin did this by staging a hunger strike). Zorkin soon reverted to his old ways. He was quickly warned by the justices to cease his political activities—advice he was able to deflect by arguing that there was still no constitutional court act to forbid political behavior.

The making of the new act

The urgent need for a new law on the Court was evident from these events. Moreover, the political system obviously lacked a reliable agency of conflict resolution. Not surprisingly, this need was felt most actively by the Court itself, and so the Court decided to make use of its right of legislative initiative (Art. 104.1 of the Constitution, a right to initiate legislation in all areas that fall under its competence [*vedenie*], whatever that may mean) and worked out a draft for a new constitutional court act. The original idea was to introduce the initiative by the end of March, but this timetable turned out to be unrealistic. The draft had been sent to the Duma's judiciary committee and to the president's legal office and there was significant resistance from both sides. Discontent was aroused by numerous minor details concerning both the proposed procedures and the internal organization of the Court. But people were most outraged by the last chapter of the draft regulating the comfortable social and material situation of the justices and the Court's staff, even though these regulations were identical to those currently in place. The president's legal office seemed to be opposed to the draft in general, claiming that it contained provisions not within the competence of the Constitutional Court, and adding that acting Chairman Nikolai Vitruk had launched it unilaterally without full support from the Court.

Accordingly, a new group, consisting of representatives from the Court, president's office and Duma, was assembled to improve the draft. The group worked on the draft the whole of March and, partly with the help of Western experts, presented a leaner version on March 24. The last chapter with the supposedly indecent regulations on the social status of the justices was dropped, along with some other doubtful provisions (such as one allowing the Court to review its own decisions on its own initiative). Apart from these matters, the status of the Constitutional Court as a part of the court system had been clarified and the respective competencies of the plenum and the chambers had been worked out more precisely. Life-tenure was reduced to 12 years for the new justices (thereby creating an awkward

discrepancy among the justices, since life-tenure for the old justices was preserved in the Constitution's concluding and transitional provisions). Procedures for the abstract interpretation of the Constitution were regulated anew and considerable changes were introduced, especially concerning all aspects of Court procedure.

Despite the revisions, the draft failed to pass the Duma on its first reading on April 11. The Duma then took a sudden interest in selecting the justices (according to the Constitution, the president proposes the justices, while the Federation Council elects them) and tried to make a deal whereby some of the justices would in effect be proposed by the Duma in exchange for its consent to the law. Such a deal was struck and the Constitutional Court law was preliminarily accepted on a first reading on May 11. This "deal," however, hardly deserves its name. The new Art. 9 gives other political branches the right to propose candidates to the president (without any obligation on the part of the president to follow these proposals, so the Duma gained formally an authority that it already had). A list of five candidates to be proposed to the president was actually drawn up, but because it did not gain the required majority in the Duma, there were no Duma candidates among those eventually presented by the president to the Federation Council.

These initial problems did not seriously hinder the further progress of the law. In July, it was passed practically unanimously, first by the Duma and then by the Federation Council. The president signed the law on July 21. According to Art. 2 of the transitional provisions of the law, all six of the new justices were to be elected within 30 days after the law has been officially published. The end of August came and went, however, without any action on the matter.

One of the biggest secrets in Moscow today is the list of persons Yeltsin will propose to the Federation Council in late September, whether the Federation Council is going to elect all, some, or none of the proposed candidates and whether the full complement of justices will be elected. Rumor has it that the legislative branch has a stronger interest in a functioning Court than the

president, at least at the moment. This makes sense because a functioning Court could possibly control the president's overbearing use of his decree power.

As far as the future justices are concerned, rumors are even more vague: Aleksandr Krasnov, Boris Zolotukhin, Boris Topornin, Mikhail Mityukov, Alexander M. Yakovlev, Vladimir Tumanov and Valery Savitskiy are among some of the names heard in Moscow these days. There are no former judges among these candidates, which would exacerbate a weakness of the old Court.

The basic outlines of the act

What are the basic characteristics of the law? On the one hand, the Constitutional Court must respect the new structure of constitutional jurisdiction established by Art. 125 of the Constitution—itsself a difficult task, since Art. 125 contemplates a "constitutional law" to regulate the Constitutional Court and no one has a real understanding of how constitutional laws will operate. (After all, the procedure for passing a constitutional law is similar to the amendment procedure of the Constitution. An amendment only needs the additional approval of two-thirds of the subjects of the Russian Federation.) On the other hand, the new law reflects the lessons of the past—a strong rejection of political justices and political decisions, as well as the elimination of many of the shortcomings of the old law.

Article 125 establishes a number of jurisdictional paths to the Constitutional Court. Section II allows the Court to review acts of Parliament, sublegal normative acts of the executive power, executive and legislative acts of federation members, as well as federal and international treaties, all at the behest of a wide variety of political actors. Section III provides for the resolution of conflicts between the highest federal and state organs. Section IV provides, in a somewhat weak form, a means for citizens to petition against the violation by law of their basic rights as well as the possibility for an ordinary court to take a law to the Constitutional Court if it believes the law to be unconstitutional. Section V permits a wide variety of political actors

to ask the Court for an official interpretation of a given provision of the Constitution.

As even this thumbnail sketch suggests, the different procedures have a tendency to overlap and hence compete. The constitutionality of a law could either be questioned under Section II or be brought before the Court as a conflict of competencies among the highest organs of the state under Section III. It might also be formulated as a "harmless" question for the official interpretation of the Constitution under Section V, if there were a suitable (from the point of view of Art. 125) initiator. Indeed, the four procedures are so similar that the Constitution might well have limited the available procedures to those outlined in Section II, except, of course for the very narrow provisions concerning citizens' complaints.

The real rub is that the Constitution is not very clear. It does not say, for example, whether every political actor mentioned in Section II must have access to all the procedures outlined in that section. And indeed, there is good reason why they should not. If a court is best designed to resolve concrete conflicts and protect individual rights, this wide range of possible initiators seems at best unnecessary. For in many cases, the initiators have other available avenues of redress besides the Constitutional Court. Why, for example, should the president take an ordinance of the government to the Constitutional Court under Art. 125, if he is able to abolish it on the basis of Art. 115.3. Or, in view of this power, why should the Court see any need to protect the president's interests in such a case?

The new law on the Constitutional Court should have resolved some of these open questions. Ideally, it would have first distinguished between conflicts that require a decision by the Court and those that do not (again because other institutions allow the actors to resolve the conflict themselves). It should also have distinguished between conflicts that can be resolved by the ordinary court system and conflicts that really require the Constitutional Court. Should, for example, sublegal statutes of the executive power be subject to the jurisdiction of ordinary courts? Third, the law should have minimized overlap in procedures by assuring that each procedure has a distinct character of its own. That

would be very important in the conflict of competencies (Section III) and in relation to the control of norms (Section II). Lastly, the law should have minimized the significance of undesirable aspects of the Constitution, by deliberately narrowing the application of those procedures. One example is the Court's power to render an official interpretation upon demand, as outlined in Art. 125.5. The law could have limited this power for fear that it would be abused in political conflicts.

But while Art. 125 gives the opportunity to structure effective procedures for the Court, the act has not quite lived up to this potential. The articles regulating the procedures under Art. 125.2 do not find a rational link between the initiators of procedures and the laws or other normative acts underlying that control. With minor exceptions, the law allows each body mentioned in Art. 125 the opportunity to challenge the constitutionality of any act covered by the article. The same is true of the procedures for regulating the Court's interpretation of provisions of the Constitution. Because nobody is going to ask the Constitutional Court for an interpretation without concrete cause, initiators who fall under Sections II, III and V may freely choose one or the other procedure. Furthermore, the law contains no restrictions that might prevent forced participation in political conflicts by the Constitutional Court.

Lessons from the past

One of the main objectives of the new law is to give the Court a more solid statutory foundation for its work. The drafters were naturally attentive to the special problems that the Constitutional Court has had in the past, especially those connected with the political activities of Chairman Zorkin. The law contains some interesting innovations in this regard. The most intriguing is the division of the Court into two chambers. The chambers will deal with minor cases, leaving to the plenum resolution of (1) more serious cases, or (2) any case when three justices demand it. There appear to be two reasons for this division: the increase in the number of justices to 19 presumably makes a single large plenum unwieldy, and there is an assumption that the Court will be flood-

ed with petitions from the political branches and from lower courts.

The suspicion that there are many unconstitutional laws in the Russian legal system, that could be brought in by ordinary courts, is undoubtedly correct. Nevertheless, the new law does not seem completely successful in dealing with this problem, due in part to the complexity of its procedures. The law divides the procedure for challenging an existing law into two parts: the first step deciding on the admissibility of the complaint, and the second deciding on its justification. Strangely, as the proposal stands, it is the plenum that decides the admissibility of any complaint, thus eliminating one advantage of the division between plenum and chambers.

An enhancement of the role played by the clerks of the Court also represents another effort to make the Court more efficient. Under the law, clerks have the discretion to reject claims that are plainly not admissible, an option that did not exist under the old law. The original draft stretched the clerks' autonomy quite far, for example, in the case of general incompetence of the Constitutional Court or the non-completion of mediation procedures provided for in federal laws. One might have argued that this power in the clerks would conflict with the constitutional guarantee of a lawful judge. In the enacted law, therefore, the plaintiff can now demand a decision of the Court itself.

Innovations, however, have not been uniformly positive, and at least one weakness in the old law has been magnified in the new. The previous Constitutional Court Act had very detailed and repetitious provisions, attempting (and failing) to regulate every step of the Court. The new law goes even further in this unfortunate direction, meticulously regulating such unimportant matters as protocol, and the questioning of witnesses and experts. The desire behind this very Russian approach is, of course, clear. The Court should be strictly bound in its actions in order to prevent the justices or the chairman from going astray. Apart from a slightly misdirected diagnosis of the Court's past problems (discussed below) this approach shows that the mechanics of constitutional jurisdiction have not yet been fully grasped. For a lower court dealing in

statutory law, strict procedures make sense because any mistake or misapplication of procedural law could lead to the annulment of the decision by an appellate court. A constitutional court, however, has final jurisdiction. Therefore, a very strict procedural law—which like any strict rule, opens the way for mistakes—will only serve as a means of delegitimizing the Court, opening it to random charges of procedural irregularity. Constitutional decisions very often have complicated consequences that no procedural law can entirely anticipate. Situations will inevitably arise for which no procedural arrangements have been made, and in these cases, the Court must have the power to exercise discretion.

As for lessons from the “political past,” it is doubtful that the law has found the right answers. This failure seems to be due to a partial misunderstanding of the causes of the Court’s past politicization. The Court evidently thinks that the old law allocated too much power and too much freedom to the chairman and that the new law should therefore be niggardly in this regard. But, this is at least a partial misconception of what occurred. The Court’s problem lay in its majority. Zorkin was usually supported by seven or eight of the 13 justices. Despite the fact that, under the old act (Arts. 18 and 19), the chairman could have been suspended or officially warned, there were never sufficient votes to take such an action. It was this same majority that, towards the end, produced the decisions favoring Khasbulatov and the Supreme Soviet. Preferring not to notice this problem of majority misbehavior the new law tries to control the chairman and the other justices in Arts. 17, 18 and 22. Articles 17 and 18 regulate the suspension of justices and their removal from office, respectively. Both provisions are very vague in important parts. Justices may be suspended if they commit actions that are incompatible with their office and may be removed (by majority vote) if the same circumstances persist for more than three months. The chairman may be removed on the initiative of five justices, if he fails to fulfill his duties (the Russian word is the untranslatable *nedobrosovestno*) or if he abuses the powers of the office. Removal of the

chairman requires the agreement of three-fourths of the justices.

The remedy provided against the political sins of the past is basically a self-purification of the Court and—so far as the chairman goes—strict super-majoritarian requirements. It is strange that the act does not give the means or at least the initiative of control to those who have a practical interest in the impartiality of the justices. Instead the opposite might in fact be the case. Article 54, which regulates the exclusion of a justice in the case of his feared non-neutrality, does, in its present phrasing, give the parties no right to challenge a justice on the basis of potential bias. While the justice may be excluded, there is no hint as to who may challenge.

Miscellaneous

The law has a few other peculiarities. It was astonishing to Western observers of the Russian Constitutional Court that, under the old law, the Court voted in public. Article 72 of the law retains this procedure. Another oddity of Soviet and Russian courts had been their power to initiate actions, rather than passively awaiting initiation by others. The new Constitution continues this approach as well, granting the right of legislative initiative to the Constitutional Court (and to the other higher courts as well). In implementing this constitutional provision, the Court had no alternative but to recognize its right in this respect, but the law actually goes much farther than the previous provisions.

Article 79 of the new law forbids Parliament to pass the same law again if the Constitutional Court has declared the identical predecessor unconstitutional and void. This at first seems to make sense, but it does not take into account that social change or new knowledge may mean that an originally unconstitutional law may now be constitutional. Additionally, a savvy legislator could evade the problem posed by the Court’s opposition by passing a slightly changed but, in its core, identical law.

Happily, comparisons between early versions of the draft and the law show considerable improvements. The fact that vast possibilities of autonomous action by the Court—in the early drafts, the Court could correct its decisions on its

own initiative—have been abolished, has already been pointed out. Another area of improvement is the conflict of competencies. In the earlier draft, this procedure overlapped strongly with that for interpreting the Constitution (Art. 125.5). Apart from that, the old version of the conflict of competencies limited this procedure to the control of "acts," thus excluding other forms of legally relevant behavior and inactivity as possible objects of conflicting competencies. The law now at least opens the conflict of competencies for "action of legal character," Art. 93.1.4, and thus, if interpreted generously, should allow for most of the possible conflicts between state organs. The parallelism with the interpretation of the Constitution on the other hand has not been abolished. Strange as this seems, one should be aware of the fact that this interpretation—*tolkovanie*—is a very traditional (Soviet) element in the Russian legal system which used to be reserved mostly for the Supreme Soviet or analogous institutions. So the fact that such a right is given to the Constitutional Court shows a shift of power towards the judiciary, an impression which has been confirmed in conversation by Justice Gadis Gadzhiev. One further change for the better is the fact that the law is much leaner than the earlier versions of the draft. Repetitious provisions have been deleted and the law makes more use of cross-references. This does not mean that the leaner law can now be considered perfectly succinct.

Summary

So what, on the basis of this new law, can we expect for the second (or third, counting the committee of constitutional supervision) phase of constitutional jurisdiction in the Russian Federation? At the

moment this is hard to tell. On the one hand, the law seems to be more precise and a bit more handy than its predecessor, taking into account, of course, the different constitutional framework and especially the deplorable absence of a proper route for citizen complaints. (Rumor has it that this was a queen's sacrifice to the ordinary court system which wanted its own constitutional jurisdiction and now will have to prove that it is up to this task.) On the other hand, no law can be so perfect that it does not matter which justices exercise the jurisdiction on its basis. That is certainly true for this law. Accordingly, the decision of who will be elected to the Court holds the answer to the future prospects of this law as well. Here professional quality and ethical standards are very important, as well as some other factions like a successful working relation between the old and new justices.

Nevertheless, the really vital question is another. After the storming of Parliament and its own suspension, the Court has never given any sign that it can stand against Yeltsin's free and autocratic disposition over the future of the Court. To an outside observer, the law looks like a deal that could be formulated as "no bad feelings or revenge for the past and feel free to regulate our future." But, in compromising in this way, the Court and the justices may have lost their identity, pride and dignity. They will have to strive very hard to (re?)gain these assets—indispensable for the future of Russian judicial power and constitutional jurisdiction.

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Three Questions to the Authors of the Act

Vladimir Chetvernin

To understand the nature of constitutional justice in Russia, one must keep in mind the nature of constitutional justice in Europe generally. At its core is one fundamental idea: While all other courts are bound to follow the law, the constitutional court alone can invalidate a law. This special status is justified by an administrative framework that in essence allows citizens to defend their constitutional rights against the legislator himself. All other cases considered by constitutional courts—in particular, jurisdictional disputes between the political branches—are related, though indirectly, to this core constitutional function. By defending the separation of powers established by the constitution, the constitutional court protects the legal organization and functioning of power as well as the freedom and the legal rights of citizens. To maintain this special status, as well as the court's independence, special guarantees for justices on the court are needed.

These theoretical considerations suggest several questions about the federal constitutional law, "On the Constitutional Court of the Russian Federation," passed by the State Duma on June 24, 1994.

A federal constitutional law in the Russian Federation is, first of all, a constitutional law. It constitutes an addition to the Constitution. Under Art. 108.2, and Art. 136 of the Constitution, federal constitutional laws are ratified under the same procedure that is specified for amendments to Chapters Three through Eight of the Constitution (the chapters governing governmental structure). Federal constitutional laws therefore should have the same legal status as the provisions of Chapters III-VIII. And since the precedence of recent decisions over older decisions is an established axiom of the law, any inconsistency between the provisions of a federal constitutional law and hierarchically equiva-

lent provisions of the Constitution should be interpreted in favor of the federal constitutional law. (Naturally, I am referring only to legal norms passed on questions stipulated by the Constitution). Thus, the law on the Constitutional Court could have introduced practically any changes into the Constitution concerning the subject it regulates, excluding changes that bear upon the provisions of Chapters I, II and IX of the Constitution.

The law on the Constitutional Court has resolved some ambiguities in the constitutional text. Article 120, for example, states that the courts are accountable only to the Constitution and to federal law. But whether, having determined that there is a contradiction between a law and the Constitution, a court may consider the law inapplicable in a concrete case (or even invalid in general), or whether it must refer the question to the Constitutional Court, remained unclear. Art. 125.4 of the Constitution did not resolve the question either. It states that the Constitutional Court, acting upon inquiries of the courts, reviews the constitutionality of a law that was applied or that must be applied. From this it follows only that the courts may address inquiries to the Constitutional Court and that it is obliged to act upon these inquiries. It did not resolve whether reference is mandatory, or how conflict between these normative sources is to be resolved.

The new law on the Constitutional Court has clarified some of these issues (whether finally or not remains to be seen), while raising others. Under Art. 101 of the law, for example, ordinary courts may address inquiries to the Constitutional Court. But two new questions have been raised. Under Art. 128.3 of the Constitution, a federal constitutional law was envisioned to lay down the powers

and procedures for the formation and activity of the Constitutional Court, but the article does not mention anything about ordinary courts. So does this mean that the law may also lay down procedures for ordinary courts? The Constitutional Court itself will have to answer this question.

The second question relates to the transitional provisions of the Constitution, requiring that laws in effect before the Constitution came into force should be enforced only when they conform to the Constitution. Of course, practically all of the laws applied today were adopted before the Constitution came into force. Thus in practically every case a court must determine whether a law (or part of it) accords with the Constitution. Many of these old laws contradict the new Constitution in some respect, especially on issues involving guarantees of freedom and ownership of property. But it would be impossible for the Constitutional Court to review every constitutional question raised by these old laws. If lower courts were to act in accordance with Art. 101 of the new act, and refer every case raising a constitutional question to the Constitutional Court, the Court would not just be "overburdened," it would hardly be able to register the avalanche of judicial inquiries.

Under these circumstances, it would be reasonable for the Constitutional Court to give up its exclusive right to invalidate laws adopted under the old regime. Lower courts should share this right, at least with respect to the old laws. While ordinary courts should dutifully respect the new democratically elected legislator who adopts decisions in accordance with the Constitution in force, they need not accord the same respect to a defunct legislator who acted under very different social and political circumstances, not to mention under a different constitution.

Other questions relate to citizen access to the Court. As I mentioned above, the prerogative of constitutional courts is based on the need to guarantee citizens the chance to challenge a law before the legislature. The value of this right depends therefore on the real ability of citizens to appeal to the Court when provisions of the law violate their constitutional rights. What is important is

whether the citizen is in reality guaranteed access to constitutional justice or not.

The new law (Arts. 37, 38, 39 and 96.2) lays down a rather extensive list of requirements for filing a constitutional complaint, all of which make it hard for an ordinary citizen to appeal to the Constitutional Court. Nevertheless, the procedure for filing a constitutional complaint has been simplified relative to the earlier law.

The most radical change is in the list of reasons for the Court to refuse a complaint. In Art. 69 of the old law, claims could be dismissed on formally unlawful grounds, such as missing the deadline for filing the complaint or for correcting an improperly filed complaint. The Constitutional Court was even allowed, quite simply, to find that it was "unnecessary" to consider the complaint. Under the new law, in theory at least, a complaint can be refused only on grounds related directly to the constitutional complaint itself. If the complaint is filed properly and the appealed law concerns constitutional rights, the complaint cannot be denied. In practice, of course, the access of citizens to constitutional justice is restricted by the fee requirements for filing a complaint, now equal to the standard "monthly salary," though this may be reduced.

Improperly filed complaints are not registered but are returned to the person lodging the complaint. Can this condition be regarded as a restriction on the right of citizens to protection of their constitutional rights and freedoms? Probably not. The meaning of this condition is obvious. If citizens know their constitutional rights well enough to enter into a dispute with the legislature, they should probably be able to obtain qualified legal help in order to file a complaint properly with the Constitutional Court.

This open accessibility of the Court, however, is giving rise to a paradox: the new law, formally granting law-abiding persons unlimited access to the Constitutional Court, will in effect make the Court inaccessible. For it is not hard to predict that, in the near future, the Constitutional Court will be overwhelmed with numerous complaints, and that persons who lodge complaints will have to wait years to have their case resolved.

The situation could easily be improved if complaints were considered by panels of say, three

judges. The authors of the law, who instituted two chambers as the organizational form of constitutional proceedings, presumably considered this alternative arrangement.

Finally, consider the independence of the judges. It is well known that judicial independence is determined not so much by guarantees of immunity and indemnity, but also by the financial well being of the judges. Judges—especially higher court justices—should receive a compensation worthy of their dignified status, even after retirement. This is exactly what occurs in normal countries, even if the salary does not make the justice very rich. But the mentality of a post-totalitarian society—one that has for decades been corrupted by paternalism and "*uravnilovka*"—is different, and the new law only continues this inherited hostility to appropriate compensation for the justices.

Part 2 of Art. 13 of the new law establishes financial guarantees of independence for Constitutional Court justices. Together with a salary, an annual vacation and other mundane things, the statute also specifies housing privileges, special services and state insurance for property belonging to the judge and to members of his family.

These guarantees were much criticized in the original draft of the law, and the final draft has reduced their quantity significantly from the origi-

nal draft. Unfortunately, the net reduction may have been too great, for I am no longer sure that the privileges now granted to federal judges in general, and by the federal law in particular, are sufficient for a life style worthy of a constitutional court judge.

But apart from the amount of salary, the real question is why the law does not simply grant the judge a salary to cover both compensation and the cost of "social privileges," rather than giving him or her a salary plus these privileges, and requiring the state to manage these privileges itself. In this way the judge could, first of all, manage his or her finances as he or she wished and not as prescribed by law. Second, this would benefit the state since it would no longer to employ people to provide housing and social services for the judges. Finally, in this way, justices of the Constitutional Court would acquire true financial security. They would be insulated not just from the burdens of life but, more importantly, from the many powerful bureaucrats still in charge of distributing social goods.

So long as Russia retains its paternalistic approach to the problem of financial guarantees, the independence of judges, will be more fictive than real.

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A Second Edition of the Constitutional Court

Sergey Pashin

After the excessive political activity of Chairman Valery Zorkin during the October events of 1993—apparently supported by a majority of the judges—the Constitutional Court was viewed by President Yeltsin as a political opponent rather than as a legal body. This opponent had to be neutralized. The president's Ukaz #1612, of October 7, 1993 suspended the activity of the Court, and the Court thereafter

ceased considering cases and instead proceeded to draft the law on itself.

The Court's draft had essentially three objectives: (1) to bring the powers of the Constitutional Court into accord with the new Russian Constitution; (2) to restructure relations within the Court, in particular, to reduce the status and powers of the chairman, and (3) to grant considerable social privileges to the judges and the staff of the

Constitutional Court. The draft law also divided the Court from other federal courts, and it provided that the Constitutional Court was to function independently as a closed system.

The federal constitutional law passed by the State Duma on June 24, 1994, and subsequently approved by the Federation Council (July 12) and signed by the president (July 27), retained the broad outlines of this model. The only significant modification was that, under mounting public pressure, some of the social privileges for the justices were limited.

The principal innovations of the law

Having lost some of its former powers, and after its jurisdiction limited to abstract review of normative acts, the Constitutional Court formally part of the judicial power has been stripped of its characteristics as an organ of legal justice. Its effective legal nature now approaches that of a subsidiary institution of the legislative power. The scarcity and vagueness of regulations concerning both procedural rules and the legal status of the parties before the Court confirms this thesis.

The status of Constitutional Court justices has also undergone important changes. Formerly, the justices had life-tenure (until age 65), being the first officers in Russia to whom the Law of May 6, 1991 granted this privilege. Now their term is limited which may be a precedent for overturning some important achievements of judicial reform. A Constitutional Court justice will henceforth be appointed for a 12-year term (Art. 12 of the law), although this provision does not apply retrospectively to those 13 justices who were appointed before the new Constitution came into force. Qualifications for candidates to the Court have also been tightened: candidates now have to be 40 years of age (formerly 35) and to have at least 15 years of legal experience (formerly ten), though, unlike other judges, justices of the Constitutional Court need no recommendation from a qualified college of judges. On the other hand, the retirement age has been raised from 65 to 70 (Art. 12). Procedures for nominating justices have been modified, opening up the possibilities for a more political appoint-

ments process (Art. 9). Considering the ease with which the last Court swerved into political activities, this change in particular may prove quite unfortunate. Finally, the Federation Council has gained the power not only to appoint Constitutional Court justices but also, in some cases, to suspend their powers (Art. 18). This will increase the dependence of the organ of constitutional control on regional elites.

The organizational forms of the activities of the Court have also undergone changes. From now on, the Court shall consider cases either at a plenary meeting or at the sittings of its two chambers (*palat*), each chamber consisting of nine or ten justices (Art. 20). Even with this innovation, however the capacity of the Court will nevertheless be insufficient to fulfill its constitutional function.

The regrettable experience of Chairman Zorkin's political activity in 1992-1993, and the justices' own discontent with bureaucratic snags and hierarchies within the Court, were in part responsible for the new limitations regulating the activity of the Court's leadership. Not only have the Chairman's powers been curtailed, but the office has also become subject to a three-year term limitation. Moreover, on the initiative of at least five justices, the powers of the chairman and his deputy may be suspended on grounds of irresponsibility or abuse of power.

In accord with the Constitution, the new law stipulates that when a court of general jurisdiction or a court of arbitration questions the constitutionality of a law, it may suspend all proceedings in the case and direct an inquiry to the Constitutional Court (Chap. XIII). This procedure demonstrates a certain distrust of the ability of ordinary judges to apply constitutional norms. It also impedes the development of their understanding of the Constitution and in the long run, will prevent the direct application of the Constitution in ordinary cases. The new law recognizes individual and collective complaints of the citizens in case their rights and freedoms have been violated by the law. But an incorrect interpretation or application of the law (an old tradition in Russian law enforcement practice) may no longer serve as grounds for appeal to

the Constitutional Court. This is unfortunate because people in a lawless state (which Russia still is) suffer more from arbitrary enforcement of the law and misapplications of proper legal norms than from the enactment of bad laws.

The abolition of the previous procedure for reviewing the decisions of the Constitutional Court also seems to be important. Note that this innovation is combined with the absolute lack of responsibility of the justices of the Constitutional Court for their decisions (Art. 15), an immunity that contrasts starkly with the criminal responsibility of other judges for deliberately unjust decisions. Another problem lies in Art. 73, which enables the Court to retreat from a "legal position" without formally revoking its former decision. In other words, conflicting findings of the Constitutional Court, both binding and immune to appeal, may be in force at the same time (Art. 79).

Two unfavorable forecasts

We can state with some confidence that constitutional procedure shall remain sluggish in the near future. Only two teams of justices can work simultaneously; yet the number of cases that come under the jurisdiction of the Court is very large. Even if the established deadlines for preparing and hearing a case are met, and there are no delays or waiting lists, it may take up to half a year to decide a case. During this period, other courts and law enforcement bodies will have to suspend proceedings on the case, while awaiting the decision of the Constitutional Court. This paralysis may at times create critical situations.

Here is just one example. Before its activities were suspended in October 1993, the Constitutional Court heard, but did not decide, the complaint of the Union of Attorneys with respect to mass unlawful arrests during the previous period. Upon application to the Constitutional Court, proceedings in the cases were suspended, which meant that any further investigation of the cases had to cease. Detainment of the arrestees, however, was not interrupted. Holding the arrested suspects in custody until the Constitutional Court considered their complaints constituted a severe violation of human rights. On the other hand, to continue proceedings in their cases would have rendered

an appeal to the Constitutional Court useless. The adopted federal constitutional law does not say anything about the procedure for reinstating rights violated as a result of enforcing an unconstitutional law. Therefore, revoking an unconstitutional law after the fact shall provide scant remedy for those who have suffered already. Under such a procedure, decisions of the Court seem doomed to be untimely.

As soon as two more justices are appointed, the Constitutional Court will be able to resume its work. This is an event that many eagerly await. Indeed, the relative ease with which the draft law was passed can be explained by the desire of various political forces to utilize the mechanics of the Constitutional Court to elevate political disputes to a constitutional level. The Constitutional Court will inevitably be drawn into political clashes between the center and the subjects of the federation, between the legislative and the executive powers, and even between individual groups of deputies. On the other hand, the Constitutional Court will have to choose its position between supporters of the ideal of the rule of law and the conservative wing of the *nomeklatura* who, following Soviet traditions, attribute a purely decorative role to constitutional norms. Inevitably, the Court will encounter a dilemma: Should it pass decisions that would please the authorities and secure its future, or should it declare void acts contrary to the constitution without having any real mechanism to ensure the enforcement of such decisions? (Unfortunately, the new law does not provide for this either.)

The political climate in which the Constitutional Court will now resume its work is no less aggressive than it was a year ago. Retaining the old members of the Constitutional Court, who have had the experience of unlawfully interfering in political conflicts, preserves the original (low) level of judicial efficiency and a similar quality of constitutional control. The new justices' possible political engagement may again aggravate the situation and force the Court into trite and incomprehensible political adventures. For again, the new law does *not* prohibit the Constitutional Court from considering political matters.

Formerly, the isolation of the Constitutional Court was conditioned by its foreign-ness to the

Soviet judicial system. The law of May 6, 1991 had for the first time set forth many requirements concerning justice and the status of justices. Now, when the Constitutional Court has demonstrated its ability to exploit the legal basis of its own activity for political purposes and when, on the other hand, the whole system of justice has undergone significant changes and the bodies of judicial self-government have developed, it would be appropriate to provide for external guarantees of the Constitutional Court's observance of legal procedures. Naturally, I am not suggesting any infringement on the independence of the Court. But, for example, by including the judges of the Constitutional Court into the community of judges and making them responsible before this community and its legal bodies we might be able prevent many misfortunes.

One final omission: The Constitution (Art. 15, Part 4) declares the precedence of international law

over domestic legislation and it grants the right of appeal to international human rights organizations to anyone (Art. 46, Part 3). This means that a decision of the Constitutional Court, which contradicts norms of international law, should be repealed. The new law on the Constitutional Court does not make any provisions for this eventuality.

It is unlikely that under present circumstances constitutional control in Russia will prove very effective. On the one hand, since it is not legally responsible for its decisions, the Constitutional Court may attempt a power play to repair its damaged reputation. On the other, a meek Court, preoccupied with self-preservation and obediently approving unlawful but "reasonable" acts, will pose an equal danger to Russia today.

Sergey Pashin is Head of the Judicial Reform Department in the President's Administration.

From The Center

Workshop in Novosibirsk

The Ford Foundation supported a seminar on the future of the Russian Constitution, organized by the Moscow branch of the Center and held in Novosibirsk on June 27-30. Participants in the workshop, besides a diverse group of lawyers, professors, and politicians from Novosibirsk, included Alexander Blankenagel, Gadis Gadzhiev, Stephen Holmes, Lawrence Lessig and Inga Mikailovskaya.

Warsaw Conference on Constitutions

The Center, along with the Ford Foundation, supported a conference on "Constitutional Courts in Transition," discussing the new constitutional courts in postcommunist Europe. The conference, held in Warsaw on September 9-11, was attended by justices from all of the major postcommunist constitutional courts, as well as academics and scholars from the region. Participants from the Center included Jon Elster, Stephen Holmes, Lawrence Lessig and Wiktor Osiatynski.

Central Bank Articles

The articles on central banks featured in this issue were originally written for the Conference on Central Banks in Eastern Europe and the NIS, held in Chicago on April 21-23, 1994. The conference was supported by the Eurasia Foundation, George Soros Foundation, German Marshall Fund of the United States, Ford Foundation, John D. and Catherine T. MacArthur Foundation and University of Chicago Law School.

Two New Journals

We are pleased to announce the publication of two new journals on constitutionalism in Eastern and Central Europe—*Journal of Constitutional Law in Eastern and Central Europe* and *East European Case Reporter*. These journals feature full texts of constitutional court decisions and articles on constitutional developments in the region. Both are published by BookWorld Publications, Anton van de Plas, Editor-in-Chief. For subscriptions (except in Canada and US), write to BookWorld Publications, Utopialaan 35 m, NL-5232 CD Den Bosch, The Netherlands, telephone: 3173-491542, facsimile: 3173-491543. To subscribe in the US and Canada, contact Wm. W. Gaunt & Sons, Inc., Law Book Dealers & Subscription Agents, 3011 Gulf

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The Baltic Story

Mr. Adolf Sprudz, Foreign Law Librarian Emeritus at the University of Chicago and former president of the International Association of Law Libraries, has published a chronology detailing the history of the Baltic States (Estonia, Latvia and Lithuania) from 1918-1991. The chronology, "Introducing the Baltic Story," includes references to further readings for more information. This 30K document is available worldwide via Internet. Gopher bookmark for accessing: (on the U of C Law School main menu, choose "Center for the Study of Constitutionalism in Eastern Europe") Name=The Baltic Path to Independence, edited by Adolf Sprudz, Type=1, Port=70, Path=1/.center/.baltic, Host=lawnext.uchicago.edu.

Russian-Language Review

The East European Constitutional Review is published in Russian as *Konstitutsionnoe Pravo Vostochnoevropeiskoe Obozrenie*. Copies can be obtained from its editor, Olga Sidorovich, at the Russian Science Foundation, 8/7 B. Zlatoustinsky Lane (formerly Bolshoy Komsomolsky per.) 103982 Moscow, Russia; facsimile: 7095-206 8774; (e-mail: olga@glasapc.org).

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