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PROJECT INFORMATION:

CONTRACTOR: University of Chicago
PRINCIPAL INVESTIGATOR: Stephen Holmes
COUNCIL CONTRACT NUMBER: 808-05
DATE: September 7, 1995

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* The work leading to this report was supported in part by contract funds provided by the National Council for Soviet and East European Research, made available by the U. S. Department of State under Title VIII (the Soviet-Eastern European Research and Training Act of 1983). The analysis and interpretations contained in the report are those of the authors.
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Constitution Watch

Albania

The constitution-making process was suspended in February when the ruling Democratic Party (DP) refused to consider the opposition's draft constitution in the People's Assembly (Parliament). Ali Spahia, chairman of DP's parliamentary party, confirmed that the Constitutional Commission will shortly begin negotiating a new draft. The "Law on Major Constitutional Provisions" mandates that the draft charter "be prepared by a Special Commission appointed by the People's Assembly" (Art. 44). Members of the Constitutional Commission have yet to be elected by Parliament.

Judicial independence and the appointment of judges remain a source of partisan discord in Albania as the DP maneuvers to place its own people on the bench and to oust its opponents. According to Art. 15.6 of the Constitutional Laws of the Republic of Albania, the Supreme Council of Justice appoints, discharges, and transfers judges. In recent months, the Supreme Council has appointed a number of lawyers to the bench who only recently graduated from a special accelerated law program. When the course was initially organized, the Ministry of Justice assured the public that graduates would work only as assistants to police officers, investigators, prosecutors, and judges, and that they would be ineligible for the bench. They nevertheless have been appointed judges and inspectors in the Ministry of Justice. One graduate was appointed chairman of the district court, a court of first instance in Albania. He is the judge who rejected Fatos Nano's appeal.

Various commentators have argued that the appointments will reduce the professional qualifications of the judiciary, and that they are attempts improperly to perpetuate the DP's influence on the judiciary. "The fact is incomprehensible," wrote the newspaper of the opposition Party of the Democratic Alliance (PDA) on May 26, "that simple administrative employees require a competitive examination but that the same does not apply to judges who issue opinions in the name of the people and the law."

DP members have renewed their efforts to remove judges they perceive as political opponents. Following DP's failure to repeal the immunity of Zef Brozi, chairman of the Court of Cassation (Albania's highest appellate court), several DP deputies introduced a motion to discharge two judges of the Court of Cassation on the grounds that they do not meet the requirements for an appointment to it under Art. 6.6 of the Fundamental Law (Provisional Constitution). Article 6 provides that a member of this Court must "be an Albanian citizen, holding a degree in law, distinguished for professional competence and with not less than seven years experience in a legal institution or as lecturer at the Faculty of Law." (See EECR, Albania Update, Vol.4, No. 2, Spring 1995.) The allegation seems disingenuous since the two judges were appointed by the DP and parliamentary deliberations preceding the vote were accompanied by a full disclosure of the candidates' professional experience and credentials. The sponsors of the motion did not offer any novel arguments to substantiate their claims or cast doubt on the validity of the earlier vote. It seems that the two judges were attacked because they are generally perceived as Brozi's closest allies on the Court of Cassation. Their removal, his enemies calculate, would probably curtail his influence.

Members of the opposition as well as political commentators consider the motion groundless and argue that it threatens the independence of the judiciary. In response to opposition at home and abroad, in particular from the Council of Europe, the DP parliamentary chairman convinced his colleagues to strike the motion from Parliament's agenda.

Executive agencies also enjoy vetting sitting judges. For some time, inspectors from the Ministry of Justice have been reviewing the files of cases brought before the district courts. The inspectors allegedly uncovered a number of procedural violations, such as unjustified delays in the adjudication of cases, proceedings in the absence of one of the parties, and failure properly to notify the parties of the day of the trials. After the inspection was completed in Tirana and Elbasan, Minister of Justice Hektor Frasheri determined that two judges of the Tirana Court and the chairman of the Elbasan Court committed various violations. Frasheri then requested the Supreme Council of Justice to remove the judges.

The chairmen of the two courts condemned the actions of the administration as efforts to interfere with judicial independence. The inspection, however, continued and resulted in the resignation of Agim Bendo, chairman of the Tirana Court.
two deputies remained on the Court but were no longer deputy chairmen. In a public statement, Bendo declared that he resigned in protest against the minister of justice who, he alleges, tried to prevent certain cases from being heard and attempted personally to select court personnel. Some commentators, however, have speculated that the resignations were due to the fact that the three judges in question were all involved in famous cases, such as the trials of Fatos Nano, former members of the Politburo, and the "Arsidi" case. (See EECR, Albania Update, Vol.4, No. 1, Winter 1995.) The inspection is still under way and will probably continue to fire political debates.

Article 18.6 of the Constitution provides that the Constitutional Court shall consist of nine members—five elected by Parliament and four selected by the president. The terms of three members of the Court will be chosen by lot after the first appointments to the Court and run three years. The present Court was installed in May 1992. A lottery should have been held last May to select the justices to be replaced. But the members of the Court thought otherwise, reasoning that the function of a lottery was fulfilled when three members of the Court resigned in November 1994 to protest the Court's decision that a referendum was a proper method for ratifying the constitution. (See Albania Update, EECR, Vol.4, No. 1, Winter 1995.) These vacancies were filled at the beginning of the year by three new justices, one chosen by the president, and two elected by Parliament.

The "Law on the Return of Property to Former Owners," passed by Parliament in 1993, mandated that land in rural zones may not be returned to former, precommunist owners and that alternative forms of compensation be introduced. This policy antagonized former owners who demanded the restitution of their property and eagerly awaited an amendment to the law which the government indicated was forthcoming. The new draft law, however, does not significantly alter existing arrangements. Former owners and various right-wing parties which support their claims conducted an energetic campaign against the proposed legislation. Those sympathetic to the government's position point out that the new law will bring about a rapid rise in agricultural production by quieting title disputes and promoting the marketability of farmland. But the strong reaction of the former owners and their political allies compelled the government and the DP-led parliamentary majority to postpone consideration of the draft law for the time being.

The new Penal Code, which came into force on June 1, will reduce sentences for many crimes and in some cases even shorten the terms of current prisoners. Under the new detention formula, one day of pre-trial detention equals one and one-half days of postconviction imprisonment. The formula applies retroactively and 36 prisoners, including some former Politburo members, have gained early release. Among those released is Ramiz Alia, former President of Albania and leader of the Communist Party.

Alia was sentenced to nine years in prison for "violation of the rights and freedoms of Albanian citizens." Nano, who has been in prison since his arrest in July 1993, was convicted in April 1994 for misappropriating state funds and forging documents. Lawyers for the two prisoners have argued that they should benefit from the new Code's formula, while prison officials have maintained that, according to computations made in accord with the new Code, neither of the two prisoners has completed his term. On June 10, a Tirana court held that Alia is not due for release until March 29, 1996. On June 19, a court in Tepeleca rejected Nano's appeal, holding that he should serve out his sentence. On July 7, following the vote on Albania's admission to the Council of Europe, the Court of Appeal reversed the Alia decision and ordered his immediate release, agreeing with his lawyer's computation of the applicable time period. The Court of Cassation has deferred ruling on Nano's case until September.

In a recent interview, Ilir Hoxha, son of the late Enver Hoxha, Albania's dictator from 1946 to 1985, referred to the "vandal bands" that have come to prominence in present day Albania and asserted that "one day those people that scoffed at my father and my family will have to pay for it." Immediately after the interview was published, Ilir Hoxha was indicted, brought to trial, and found guilty both of "inciting national hatred by endangering public peace" and of calling for "vengeance and hatred against parts of the population." Hoxha rejected these accusations, calling his verdict "a political punishment," denouncing it as a violation of the freedom of speech and a blow against the independence of the press. His one-year sentence to house arrest has been affirmed by the Court of Appeal, and will probably be appealed further to the Court of Cassation.

Albania's application for membership in the Council of Europe was approved on June 29. Pjetër Arbnori, chairman of the Albanian Parliament, signed a last-minute declaration pledging to adhere to the CE's demands to guarantee human rights and democracy. Albanian representatives promised to adopt a new constitution, to introduce reforms bolstering the independence of the judicial system, to increase press freedom, and to impose a moratorium on the death penalty and abolish executions within three years. As a condition of CE membership, Albania must sign the European Convention on the Rights and Protection of Ethnic Minorities. Presidential spokesman Fatos Beja said that CE membership represents another step towards Albania's integration into the international community.

Belarus

On May 14, voters in Belarus failed to elect a new parliament in the first postsoviet election since independence in 1991. The low voter turnout (64.7 percent in the first round, 56 percent in the second round, held on May 29) invalidated results in more than half the districts. Only 120 deputies of the 260-member Supreme Soviet (Parliament) were elected in two rounds of voting, most of them members of the Agrarian (30 deputies) and Communist (27 deputies) parties, as well as
members of the president's administration and the executive. Fifty-five new deputies ran as independents. Only four members of the present Parliament were re-elected, speaker Myachyslau Hryb and former Premier Vychaslau Kebich among them. Defeated candidates included Belarus's first post-soviet leader Stanislau Shushkevich and Belarusian Popular Front (BPF) leader Zyanon Paznyak, who ran in Minsk. Not a single seat was won by a candidate in Minsk, a city of 1.8 million and the main base of democratic support. No deputies at all were elected in urban constituencies, where electoral supervision was presumably stricter than in the countryside.

In the referendum that was held at the time of the election, all four questions proposed by President Alexander Lukashenka were overwhelmingly approved. In response to the first question, 83.1 percent agreed that Russia should have "equal status" with Belarusian as a state language (in fact, after decades of severe russification, Russian is far more widely used in the republic than is Belarusian). Slightly fewer, 82.4 percent, voted in favor of Lukashenka's course for closer economic integration with Russia, while 75 percent of voters, nostalgic for Soviet days, backed the return of Belarus's communist-era state emblem and red flag. Only these first three questions are legally binding. But when 77.6 percent of the voters, in an advisory referendum, favored giving the president the authority to dissolve Parliament if it violated the Constitution, the president claimed that the people had given him the right to dissolve Parliament whenever he deems it necessary.

The election campaign started in February. Two hundred sixty constituencies (about 30,000 voters in each) and district electoral commissions were set up. According to the electoral law, deputies are elected, in two rounds, by direct vote of a simple majority within each district. To run, a candidate had either to collect 500 signatures of local residents or obtain the nomination of a party. The two main political players, BPF and the Communist Party (CP), had candidates in almost all constituencies. A large number of candidates came from the ranks of the KGB, militia, and procuracy. Members of the president's administration, as well as his new nominees in the regions, also actively ran for parliamentary seats.

All together, more than 2.5 thousand candidates took part in the elections. Even a diligent reader of the press, however, would not have been aware that elections were imminent. At the beginning of April, the president issued a decree "On Providing Equal Possibilities at the Elections," which banned the national media from covering the campaign. Candidates were allowed to use only the local media in their constituencies. The decree also prohibited any use of personal or sponsors' funds to support campaigns; it permitted only official funds (about $40 per person). This decree was immediately criticized as violating the "Law on Elections" and Art. 72 of the Constitution.

Western observers criticized the ban as well. "Restrictions on media, together with a ceiling placed on the use of funds during the campaign, led to a lack of information about candidates and to the critical absence of political debate," read a statement issued by the Council of Europe. According to the Council, the election did not meet standards for Belarus to join the 54-nation group. Further bolstering the Council's position was President Lukashenka's personal appeal to voters to participate in the referendum but to ignore the election because, as he put it, "new deputies will deceive you no matter what they promise."

According to the Constitution, a two-thirds majority is required for the new Parliament to begin its work; until then the current Parliament remains in power. The old Supreme Soviet held its fourteenth session on June 14. Members of the opposition vowed not to attend the parliamentary session ("A parliament, where armed soldiers enter, is no longer a parliament," said opposition leader Zyanon Paznyak, alluding to the violent dispersal of opposition hunger-strikers by the president's special guards on April 12.) But the opposition did take part in the session. The president tried hard to convince Parliament to dissolve itself voluntarily. He suggested that the Supreme Soviet change the Constitution and allow the two-fifths of newly elected legislators to start work. However, the majority rejected this and similar proposals and fixed the new election date as November 28. In order to ensure a bigger turnout, election day was declared a non-working holiday. This was evidently the last significant decision of the outgoing Parliament. Immediately after the session, the president seized Parliament's bank account and took control of its property (including their hotels, garages, cars, and recreation facilities). Speaker Hryb complained that he could no longer contact the president when necessary. Lukashenka, for his part, further humiliated the speaker by canceling Hryb's scheduled official visits abroad.

The Constitutional Court kept a low profile during all these events. The Court made no comment on the controversy surrounding the incident. The Constitution clearly forbids deputies from making changes to it in the last six months of their term (Art. 148). Yet the results of the referendum required constitutional changes. The hunger-strike of opposition members who protested against the president's referendum was brutally dispersed. The Court chose to ignore this violation of deputies' immunity as well as other questionable executive acts. Even though the judges considered several appeals regarding the violations of freedom of expression, they postponed handing down a decision until the new Parliament interprets the Constitution.

In the absence of any counterbalance, President Lukashenka is acting increasingly as if Belarus is a country with neither a Constitution, nor laws, nor international agreements. For instance, he forced the resignation of the attorney general who was appointed by the Supreme Soviet for a ten-year term. According to the Constitution, Parliament alone can accept his resignation (Art. 83.7). One of Lukashenka's latest decrees, abolishing social benefits and financial privileges for pensioners and other needy groups, violates almost two dozen laws.

The president blithely ignores international commitments made by his predecessors. In January, Belarus stopped fulfilling its obligations under the Conventional Arms Limitation and
Over the last three months, the governing Bulgarian Socialist Party (BSP) has continued its efforts to repeal legislation adopted by previous parliaments and to reverse the pro-Western orientation of Bulgarian foreign policy. BSP's policies have been challenged by President Zhelev and a defiant Constitutional Court, resulting in serious strains on the institutional framework.

The quality of legislation is not the only issue over which BSP members have quarreled. Over the last few months, tensions have mounted within the governing majority. Differences of opinion among BSP members came to light for the first time during parliamentary debates on Bulgarian membership in NATO. A declaration on the issue was carefully worked out in the Committee on Foreign Policy and, as a result of discussions and mutual concessions, representatives of BSP and the parliamentary opposition prepared the text of the declaration. But not all ex-communists support the dramatic pro-Russian direction of recent Bulgarian foreign policy. There is a clear division among the BSP deputies on this question, though a break point has not yet been reached. Diverging attitudes towards the West and the process of European integration will perhaps manifest themselves even more vividly when the ratification of the European Convention on Minority Rights is placed on the parliamentary agenda.

Another conflict within the BSP government occurred when both the opposition and the press accused the cabinet of engaging in illegal transactions with the financial group "Multigroup." In June, there was an unprecedented split in the BSP vote on a crucial issue. Several deputies refused to support the cabinet nominee for director of the State Savings Fund—a state bank where most Bulgarians still keep their savings. During a plenary session, the opposition accused the cabinet of nominating a Multigroup affiliate, thereby assuring the group access to the most stable credit-providing institution in the coun-
try. In two consecutive votes, some BSP deputies (19 in the first vote and 15 in the second) refused to support the cabinet nominee. However, as befits an ex-communist party, BSP has developed reliable mechanisms for enforcing party discipline and, within a week, a new vote was scheduled and the nominee was appointed to the post.

The president has actively opposed the government’s policy in at least two spheres—legislation and foreign affairs. The president has vetoed four of seven bills passed by the BSP majority and, after having his veto overridden four times, has appealed to the Constitutional Court. Moreover, he has repeatedly criticized the government’s anti-Western rhetoric. After two weeks of public confrontation and mutual accusations, the president invited the prime minister to a confidential consultation. The meeting was held one day before Russian Prime Minister Viktor Chernomyrdin’s visit to Sofia and, though no public statements were made, there were signs that a partial agreement was within reach. However, no changes in the government’s policy have yet been observed—BSP’s official position remains that “at present no consensus on the issue of NATO membership exists in Bulgarian society.” The effort to conduct negotiations on the land law were even less successful. Personal consultations proved to be an ineffective mechanism for softening the position of the governing majority.

Thus, the Constitutional Court has emerged as the only institution that can effectively check the legislative onslaught by the ex-communists. More than a dozen laws have been appealed to the Court by the parliamentary opposition, the president, and the judiciary, but the Court has deliberated on only four. Fearing that a series of rulings of unconstitutionality would be perceived as a threat by BSP, the Court seems to have opted for alternating rulings which uphold and strike down legislation. In May, the Court declared part of the parliamentary regulations unconstitutional, including provisions limiting media access to parliamentary committee meetings, authorizing the Foreign Relations Committee to hold hearings with prospective ambassadors (thereby posing limits on the president’s constitutionally guaranteed power to appoint them), and empowering the ethics committee to shut down criminal investigations against deputies. The Court has “balanced” these anti-majoritarian rulings by overturning the constitutionality of the procedure whereby the parliamentary vice chairman of the Bulgarian Business Bloc (BBB) was removed from his office for opposing the BSP initiatives. After declaring certain amendments to the land law unconstitutional, in June the Court upheld the constitutionality of the amendment to the local government bill. (See EECR, Bulgaria Update, Vol. 4, No. 2, Spring 1995.) It is too early to evaluate the full impact of the Court’s decisions, because many of them have yet to be published.

The government has been subject to sharp criticism on two grounds. First, it was accused of ineffectiveness in the fight against organized crime. Over the last few months, BSP has staged a large-scale campaign to change the Criminal Code and even the Constitution to deter the expansion of criminal groups. But at times this campaign carries partisan and ideological intimations, since all evils are blamed on the “unhealthy liberalization” which has purportedly spoiled society since 1989 and on the judicial system which has allegedly been “contaminated” by the corrupting influence of the Union of Democratic Forces (UDF), the main opposition party.

In addition, the government has failed effectively to discourage the police from abusing its power. Several cases of torturing detainees, some to death, have been reported by the media. Although several police officers implicated in the beatings were quickly dismissed, the ruling party persistently refuses to allocate public resources to improve the situation.

The second issue attracting public attention was the government’s inability to establish clear-cut patterns of subordination and coordination within the executive branch. Since Prime Minister Jan Videnov took over the BSP leadership in 1991, his authority has been defied by a group of high-ranking ex-communist officials led by Andrei Lukano, the former prime minister, who allegedly masterminded the transfer of various state properties to private individuals. Now Lukano has emerged as the major figure in a political scandal. The controversy stems from a project to supply Russian gas to Greece and the Mediterranean via Bulgaria. All negotiations have been conducted by the cabinet, and Prime Minister Videnov played a key role in sealing the agreement with his Russian counterpart, Viktor Chernomyrdin, and Greek politicians. Apparently, Lukano had met with these officials as well, and was elected, along with the head of the National Electric Company Nikita Shevashidze, to the Board of Directors of the joint-venture company “Top Energy,” which will fund the project. When the names of the Board of Directors were announced, Videnov reacted by dismissing Shevashidze from his post as head of the State Energy Company. Soon thereafter, news surfaced that Lukano was actually elected by the Russian side (that is, by the Board of Gazprom) which owns 51 percent of the shares. Though Lukano is no longer considered to be a representative of the Bulgarian government, the political and diplomatic implications of this move are still unclear. This incident shows that state institutions are sometimes unable to prevent private interests from interfering with international negotiations conducted on the highest official level.

Czech
Republic

With no Senate in place, there is still no way to dissolve Parliament (and thereby create a new governing majority) before next year. According to the “Transitional and Final Provisions” chapter of the Constitution, “The Assembly of Deputies may not be dissolved while it is performing the duties of the Senate” (Art. 106.3). Nevertheless, parties continue to build coalitions and form campaign strategies in anticipation of the 1996 elections.

The anticommunist Club of Concerned Independents (CCI), one of the small nonparliamentary but historically
important parties, began streamlining the party system by merging with the smallest coalition party, the Christian Democratic Party (ChDP). ChDP then decided, in principle, to merge with one of the two main parties in the governing coalition: the Civic Democratic Party (CDP) or the Christian Democratic Union-Czech People's Party (CDU-CPP). After some hesitation, ChDP leader, Ivan Pilip, decided in favor of Vaclav Klaus's CDP. In response, on May 4, five ChDP members (led by Pavel Tollner), favoring a merger with CDU-CPP, formed a separate caucus in Parliament. ChDP leaders then demanded that Tollner resign from his position as deputy speaker of Parliament, a post he held as a ChDP representative. On June 17, the CDP and ChDP leadership signed a formal merger document which is to be ratified at party congresses this fall. The resulting formation will retain the trademark of the CDP, the strongest parliamentary party, which has consistently led in the polls since 1992. The merger agreement guarantees ChDP four seats in the next Parliament or five if CDP wins more than 75 seats. Before the split, the ChDP caucus had ten members, courtesy of a governmental pact with CDP. Although Pilip has been criticized for "selling out Christian values" by merging with a secular party, he has countered that the policies of his party and of the CDP are virtually identical.

Another wave of party consolidation came on July 3, when the government asked the Supreme Court to ban 40 minor political parties. The government cited violations of various legal provisions, including a widespread failure to provide annual reports and audits.

In accord with Art. 100.3 of the Constitution, President Vaclav Havel has called for the government to draft a constitutional law creating higher territorial self-governing units. On June 23, Parliament voted on a bill aimed at decentralizing the state, prepared by Deputy Prime Minister and Chair of the Civic Democratic Alliance (CDA) Jan Kalvoda. CDA members of the ruling coalition, however, were not as enthusiastic about the administrative decentralization envisaged in the bill. In fact, only six CDP members supported the bill, and many abstained. The final vote revealed that only 98 deputies favored the bill, far fewer than the 120 votes required to pass a constitutional law. As this vote suggests, consensus on a regional administrative structure has been difficult to reach. CDA and CDU-CPP support a system with nine units, but the Movement for Self-Governing Democracy for Moravia and Silesia (MSDMS) insists on the creation of eight units, including a special Moravian administration. Prospects for adoption of any territorial reform before the June 1996 general elections are dim.

The governing coalition was also split over retirement reform. CDP reluctantly yielded to CDA's demand for a national pension fund distinct from the state budget. On the other hand, Klaus's party supported an increase in the retirement age over the opposition of another coalition partner, CDU-CPP, whose electorate is largely recruited from persons older than 45. CDP received the votes necessary for passing this bill from the opposition CMUS after cutting a political deal: CDP agreed to a reduction in the wine tax in return for CMUS's support on the pension question (both parties grudgingly admit that such a bargain was indeed struck). CDU-CPP protested loudly against what it interpreted as a violation of the coalition agreement signed in the summer of 1992.

The governing coalition also failed to agree on a bill regulating church-state relations. The bill in question, submitted by Minister of Culture Pavel Tigrin, was rejected by the government in early June. No consensus could be reached on the extent of church-state separation or on how churches should be funded. Miloslav Fiala, a representative of the Czech Conference of Bishops, stated that these matters must be clarified before next year's elections if the ruling coalition hopes to retain the Christian vote.

In May, Anna Roschova (CDP) resigned from her post as president of the Mandate and Immunity Committee after refusing to submit to a breathalyzer test or to sign a police statement following a car accident. Ironically, Roschova is one of several MPs sponsoring a bill which would limit the immunity of deputies, making them liable for misdemeanors.

After the Constitutional Court last year abolished paragraphs 55 and 74 of the Penal Code, which allowed for the anonymity of witnesses (see EECR, Czech Republic Update Vol. 3, No. 4, Winter 1994), hundreds of witnesses have recanted their testimonies. One more notable example of this was the highly publicized trial of sculptor Pavel Opocensky, who was sentenced in March to three years in jail for stabbing to death a 17-year-old skinhead. Opocensky pleaded not guilty, claiming that he acted in self-defense. When witnesses (unable to remain anonymous) would not corroborate his version of events, he claimed they were too frightened by the prospect of the skinheads' revenge. The court of the first instance rejected Opocensky's claims. His three-year sentence stirred widespread protest, a petition drive in his favor, and demands to amend the existing legislation on legitimate self-defense. Both the sculptor and the state attorney appealed, and a higher court annulled the verdict in June, asserting that Opocensky did indeed act in justifiable self-defense. Although no revision of the law on self-defense is planned, Parliament did, in late June, pass an amendment to the Penal Code designed to enable more effective police action against organized crime and racially motivated attacks.

Evidence of police brutality surfaced when, on April 9, Frantisek Kahanek died in custody one day after his arrest for sexually assaulting and murdering a ten-year-old boy. After initial claims that the detainee died either of self-inflicted wounds or at the hands of his cell-mates, four prison guards were arrested on charges of participating in the death. Minister of Justice Jiri Novak later dismissed the head of the prison system and several other prison officials.

In late March, the Czech government approved a bill on access to former communist secret police (StB) files. Roughly 100,000 files will be available for inspection by citizens who...
would like to learn the names of former StB agents who informed on them. After some hesitation, the government decided to disclose not only the code names of agents but also their real names, while the names of third parties will be blacked out. Photocopies of the files will be available to present and former Czech citizens for five years starting January 1, 1996.

A bill, rewarding WWII resistance fighters, proposed by Josef Janecek (CDU-CPP) and approved by Parliament in April, was vetoed by President Havel in May. Havel objected to the bill because it would have excluded resistance fighters who later joined communist repressive organizations like the People's Militia (the Communist Party's private army), or worked for the StB. Havel argued that "it is impossible to link acts of heroism during the antifascist struggle with deeds that had no connection with it." Havel also called the bill "humiliating and discriminatory" as it would force veterans to prove that they had not collaborated with the communists or the StB in the course of the subsequent 50 years. On May 24, Parliament voted again, but only 78 members voted in favor of the bill, far short of the 101 needed to override a presidential veto.

Another ruling dealing with the communist past came down on June 22, when the Constitutional Court annulled the ruling of an Usti nad Labem Court which had denied Rudolf Dreithaler, an ethnic German with Czech citizenship, the return of his family's property. Unlike his earlier appeal to the Constitutional Court, which questioned the legality of the postwar Benes decrees confiscating German property, this time Dreithaler's appeal was limited to his own property claims. The case will now be returned to the Usti nad Labem court. Dreithaler's lawyer said that this would be a test case for hundreds of other Czech citizens of German ethnicity who, unlike ethnic Czechs, have not received retribution for property confiscated by the communists.

Controversy over the position of the Sudeten Germans and their place in Czech-German relations continued. On March 28, a group of 105 Czech and German intellectuals called for dialogue between the Czech government and Sudeten German leaders. The Czech signatories of "Reconciliation 95" were recruited among former dissidents and include former Czech Prime Minister Petr Pithart. The statement was drafted by Bohumil Dolezal, a former advisor to, and now a conservative opponent of, Prime Minister Klaus. Dolezal stated that the aim of the petition, which contains a list of numerous historical milestones and grievances, was to destroy the impression that all Czechs are biased against former Czech Germans. All official Czech reactions were negative, stressing that the government should negotiate solely with the German government.

Addressing the Bundestag on June 1, German Chancellor Helmut Kohl called for "mutual truthfulness" in dealing with past events in Czech-German relations. He expressed Germany's readiness for reconciliation and praised Czech efforts towards that goal. Several German government ministers made optimistic pronouncements in the following days, although Bavarian Premier Edmun Stoiber demanded the revocation of the Benes decrees and Sudeten German leaders continued to call for dialogue with Sudeten German groups. Kohl's speech evoked mixed reactions from the Czech side. President Havel praised Kohl, while Czech Social Democratic leader, Milos Zeman, said that the speech contradicted Czech national interests.

Estonia

In an address before the Riigikogu (Parliament) on May 31, Prime Minister Tiit Vahi set a cautious tone for his new center-left government, formed after the March elections, giving a sober account of the state of the nation. Prime Minister Vahi had already opened his term of office by publishing a 170-page booklet on the state of the nation. Describing the work of each ministry during the previous center-right government, this booklet presents a picture which Vahi has characterized as quite serious, though not hopeless. While noting that the country's postcommunist economic decline appears to have bottomed out, the prime minister asserted that real growth had yet to take hold, contrary to the boasts of the former administration. Crime and public security were other issues which Vahi described as desperately in need of attention. Opposition politicians belittled the report as long on facts, but short on solutions and programs for the future. As summer approached and after Parliament went into recess, it became clear that no progress will be made on economic and security issues before September.

In his speech, Vahi also addressed the longstanding issue of residency permits and citizenship for the country's 400,000 mostly-Russian non-citizen population. Soviet-era immigrants to the republic (and their descendants) were denied automatic citizenship after independence in 1991. Under Estonia's current citizenship legislation, non-citizens are required to apply for new residency permits by July 12, while waiting to go through the naturalization procedure (which entails passing an Estonian language exam).

After a slow start in organizing permit application procedures, the government began actively accepting applications in 1994. Still, by only 50 percent of the expected 400,000 applicants had submitted their formal requests. The procedure has been sharply criticized by non-citizens groups in Estonia as unfair and degrading. Moreover, Estonia's aliens law guarantees applicants temporary residency permits for three years only, with the option of later obtaining permanent resident status, although many of these people have lived in the country for decades.

The new ethnic Russian parliamentary faction wasted no time in attempting to amend the aliens law. Faction leader Viktor Andreev proposed granting all non-citizens residing in Estonia before July 1990 automatic permanent resident status and extending the deadline for work and residency permits (as had been done once before in 1994). The government, however, argued that there was no need to change the original dead-
June 28 marked three years since Estonia adopted its new parliament. In July 1996, the Riigikogu passed an amendment to the law that had demanded the restitution of her father’s property which was nationalized by the Soviets in 1940. Her father, however, was not an Estonian citizen at that time and, as a result, the woman’s claim had been denied previously. In the appeal, the Tartu Administrative Court noted that Art. 32.4 of Estonia’s Constitution guarantees people the right to inherit property. The Court claimed that in this case, too, this basic right should prevail.

In its ruling, the Constitutional Review Chamber struck down the lower court’s interpretation as inaccurate. In the process of property restitution, the Chamber said it was perfectly proper for the law first to delineate the range of persons eligible to reclaim property, and only thereafter to deal with questions of inheritance.

More controversial was the Chamber’s second ruling that day, involving the property rights of Soviet-era cooperative and collective organizations. The case before the Chamber was based on a request by the Tallinn City Court to declare unconstitutional a provision of Estonia’s 1993 “Law on Housing Privatization.”

In the Soviet era, housing “ownership” was divided among several entities including the state, local municipalities, and individual enterprises. In the process of privatizing the country’s housing, Parliament had passed a law in June 1992 allowing the state to force the privatization of apartments also held by non-state cooperative and collective organizations, so long as the housing in question had been built with state money and assigned to the organization free of charge. These organizations included such bodies as the Central Society of Estonian Consumer Cooperatives (involved in agricultural production), the military service organization (DOSAAF), several rural building organizations, as well as the Communist Party. Parliament had allowed such housing to be privatized to its former occupants under Estonia’s special voucher system.

But a problem arose concerning the 1993 “Law on Housing Privatization,” because Para. 3 of the law expanded the scale of state-enforced housing privatization to include housing which cooperative and collective organizations might have partially or fully paid for themselves and which they, in any case, did not receive for free. Organizations objected that such a takeover of their housing by the state (in the name of privatization) amounted to a confiscation of their property, without sufficient public need being shown or just compensation being paid as is required in such cases by Art. 32 of the Constitution. The organizations wanted to retain the right to sell such housing at full market value.

Ever since the very first debates on privatization, many parliamentary deputies had maintained that such cooperative and collective organizations still belonged to the broad Soviet-era category of publicly-owned “socialist property.” Following this interpretation, the state (as the ultimate arbiter of “socialist property”) could reclaim and force the privatization of housing belonging to such organizations, regardless of whose resources had been used to build it. No one in the interim, parliamentarians argued, had made these
Concretely, the case before the Constitutional Review Chamber involved the Central Society of Estonian Consumer Cooperatives and a group of apartments it had built for its employees in downtown Tallinn. The Tallinn City Court had ruled that the state (according to the "Law on Housing Privatization") could not force the Society to privatize these apartments through the voucher system. The City Court agreed that such a move would constitute a violation of Art. 32 of the Constitution and therefore asked the Constitutional Review Chamber to annul the offending paragraph of the "Law on Housing Privatization."

In its decision, the Chamber upheld the lower court's ruling and declared Para. 3 of the law to be unconstitutional. In particular, it found that cooperative and collective organizations (such as the Central Society) were semi-private entities, which had legitimate rights to control and therefore sell the housing which they had built with their own resources.

As a result, the Chamber in effect repudiated the notion of "socialist property," through which lawmakers had previously sought to allow the administration to centralize property to facilitate its privatization. Instead, the Chamber declared that cooperative and collective organizations were entitled to control their property, if they had contributed to its creation.

This decision fundamentally changed the process of privatization for these organizations, giving them new rights to retain (or even reclaim) and sell their property. The original list of cooperative and collective organizations, whose property the government had sought to repossess and privatize through the voucher system, enumerated 154 organizations. These included the former Communist Party (now re-christened as the Estonian Democratic Labor Party), which already in early May was allowed to keep one of its old buildings in Tallinn based on the Chamber's ruling. Other property claims on the state from such organizations were expected to follow. One parliamentarian asserted that the new claims would cost millions of Estonian kroons to settle. Although the budgetary consequences might be significant, the Constitutional Review Chamber based its decision on the letter of the Constitution, which states simply that "the right to property shall be inviolable."

**Hungary**

On June 19, in the first-round of voting, the Hungarian Parliament re-elected Arpad Goncz president. The election was held by secret ballot, and Goncz was approved by a two-thirds majority as required by Art. 29B(2) of the Constitution. Opposing Goncz was Ferenc Madl, minister without portfolio and minister of education in the last government, and the current chair of the International Business Law Department at the Law Faculty in Budapest. Madl was nominated by the opposition parties: the Young Democrats (YD), the Hungarian Democratic Forum (HDF) and the Christian Democratic Party (CDP). Under Art. 29.B(1) of the Constitution, nomination requires the written recommendation of at least 50 members of Parliament. Any enfranchised citizen, at least 35 years-old is eligible for nomination (Art. 29.A[2] of the Constitution). In his acceptance speech, Goncz encouraged members of Parliament to place the country's well-being above party interests as they face the challenge of rationalizing and streamlining public education, health and social insurance, and the reform of state finances. Prime Minister Gyula Horn, whose Hungarian Socialist Party (HSP) had endorsed Goncz months before the election, welcomed the president's victory. Under Art. 29.A(3), a sitting president may be re-elected only once.

On March 14, in the run-up to the June elections, the opposition Independent Smallholders Party (ISP) presented a petition to Parliament with 200,000 signatures calling for a national referendum on four questions: (1) whether, from 1995, the president of Hungary should be elected directly by citizens; (2) whether the authority of the directly-elected president should be increased in order to restrict the powers of the government; (3) whether the directly-elected president should initiate acts within six months of taking office to facilitate and promote the access of young people to find their first flats and first jobs and; (4) whether the directly-elected president should initiate acts within six months of taking office to ensure that the retirement age for women remains 55.

According to the Act on National Referenda and People's Initiative (1989 Act XVII), Parliament may call a referendum when it receives a petition asking specific questions and is supported by 100,000 signatures. The act was passed by Parliament by a two-thirds majority in 1989 as required by Art. 19.5 of the Constitution. Under Art. 9.3(a) of the act, the Constitutional Committee of Parliament shall propose to Parliament the specific questions to be put to a vote.

Rather than make a recommendation to Parliament, in this case, the Constitutional Committee petitioned the Constitutional Court to interpret the Constitution with respect to the following issues: (1) whether the Constitution may be amended by a national referendum; (2) whether question two of the ISP petition would extend the general constitutional authority of the president and; (3) whether a national referendum may compel presidential action.

With the presidential elections only two months away, the Constitutional Court gave expedited consideration to the Constitutional Committee's petition in opinion 5/1995. (V.10) AB hat. In answer to the first question, the Court cited an earlier opinion holding that the "question of national referenda cannot include hidden amendments to the Constitution" (2/1993. [L23] AB hat). The Constitution cannot, therefore, be amended by national referenda. The Court refused to answer the other questions it received, explaining that Parliament had failed to fulfill its legislative obligations to amend the "Law on National Referenda" as mandated by previous Constitutional Court rulings (2/1993. [L23] AB hat).
addition, the Court ruled that it is a violation of the constitutional principle of the separation of powers for Parliament to petition the Court on a case-by-case basis to determine whether a national referendum should be held. The calling of referenda is Parliament's duty under Art. 19.5 of the Constitution.

The Court's ruling sent the referendum questions back to the Constitutional Committee and to Parliament. Parliament refused to call a national referendum (Res. 54/1995 V.26). The Constitutional Committee cited the Constitutional Court's ruling which explained that, since question one of the ISP petition sought to alter the constitutionally mandated election procedure of the president, the question could not be submitted to a referendum. The Committee determined that the remaining questions in the ISP petition were cognates of question one and therefore also could not be put to a referendum. Moreover, the Committee argued that the “Act on National Referenda” provided that referenda may impose obligations on Parliament, but not on the president.

The docket of the Constitutional Court included many petitions challenging the constitutionality of the austerity program, popularly known as the “Bokros Package” after its central architect. Minister of Finance Lajos Bokros. The Bokros Package was passed by Parliament in March. (See EECCR, Hungary Update, Vol 4, No. 2, Spring 1995.) It included a set of parliamentary acts, cabinet resolutions, and ministerial decrees that together comprise a far-reaching austerity program, which will add nearly 12 billion forints to the state budget. Several elements of this austerity program were held unconstitutional by the Court. The Court only rarely struck down provisions on the grounds that they violated the fundamental constitutional rights of citizens. Rather, most of the elements struck down were determined to be unconstitutional for reasons involving the authority of regulating organs and the relationships between departments of government. Even in cases where the Court determined that a particular government act violated fundamental rights, at least for the time being, the Court left open to Parliament avenues for enacting the essential elements of the austerity program.

In case No. (1) 31/1995. (V.25) AB hat, the Court struck down sections of cabinet resolutions which mandate a staff reduction of 1000 at Hungarian Television (1023/1995. [III.22] Kormhat, 2091/1995. [IV.4] Kormhat, and 1032/1995 [IV.24] Kormhat). Petitioner argued that the cabinet cannot compel the television station to make staff reductions without changing the Budget Act, which is the legislative responsibility of Parliament alone under Art. 3.d of the Constitution. In addition, petitioner argued, the television staff may not be reduced by operation of the Civil Service Act. The petitioner cited authority from earlier decisions of the Court (37/1992. (VI.10) AB hat), which prohibited the cabinet from maintaining a controlling influence on the programming of Hungarian Television.

The Constitutional Court requested that the prime minister explain the government's position. According to the prime minister, because the president of Hungarian Television is entitled to decide which individuals shall leave their jobs, the president remains the person responsible for staff reductions under the staff reduction order. Hence, the staff reduction order does not violate the Court's earlier rulings and the government has neither a direct nor an indirect determining influence on television productions. The prime minister also explained that the cabinet was acting according to the cabinet resolution “On the Supervision over Television by the Cabinet” (1047/1974. [X.18] MT hat), which, although found unconstitutional in 1992, was left in force by the Constitutional Court until a new media law is enacted by Parliament.

The Court ruled that the staff reduction order violates Art. 46 of the Act on Legislation. This act allows the cabinet to issue resolutions only to institutions which are under its direction. According to the 1992 decision of the Constitutional Court, the cabinet cannot maintain direct control over Hungarian Television. Moreover, the Court explained, that the resolution on which the prime minister relied, did not itself empower the cabinet to compel staff reductions at Hungarian Television. The obligation for staff reductions supposes a direct guiding relation between the cabinet and Hungarian Television. This relation is not supported by any regulations in force and is unconstitutional.

Case no. (2) 31/1995. (V.25) AB hat addressed the constitutionality of an ordinance (No. 11607/95) imposing budget restrictions and staff reductions on institutions of higher education. Cabinet Resolution 2143/1995. (V.19), on which the ordinance was based, was struck down in part while the ordinance was determined constitutionally invalid in its entirety.

The cabinet resolution aimed to reduce the number of faculty and staff at institutions of higher learning by 15 percent in 1995. An ordinance issued by the deputy minister of culture implemented the cabinet resolution by establishing the means and levels by which budget expenditures and staff reductions of the relevant agencies would be achieved.

The petition of the Conference of Rectors and the Trade Union of the Employees of Higher Education challenged the application of the resolution and ordinance on institutions of higher education. Petitioners claimed that, in accord with the Act on Higher Education (1993), all issues not explicitly delegated to a state or local government by an act of Parliament, or by another legal rule, are subject to the authority of institutions of higher education. Moreover, according to the “Act on Legislation” (Art. 1.), the cabinet resolution in question is not a legal rule.

According to the Court, neither the “Act on Higher Education” nor any other regulation gives the cabinet authority to establish the student-to-faculty ratios or to impose staff reductions on institutions of higher education. The resolution is therefore contrary to the autonomy of the institutions of higher education. In addition, based on the “Act on Legislation,” cabinet resolutions are controlling only for institutions that are under cabinet direction according to law. Institutions of higher education are not under cabinet direc-
The ordinance of the Ministry of Culture is therefore void, because the resolution on which it is based unconstitutionally obliges the minister to implement ordinances outside the cabinet's jurisdiction.

Parliament amended several laws in a single act to implement the austerity program (Act XLVIII 1995). The Constitutional Court handed down five decisions in two weeks after the publication of the act and determined that certain amendments contained in the act were unconstitutional. The Court took note that many more petitions challenging the austerity program will be included on its docket this fall.

In case No. 42/1995. (VI.30) AB hat, petitioners challenged the constitutionality of Act XLVIII 1995 on the grounds that it was not a unified act but a collection of unrelated amendments. In its opinion, the Court examined the Constitution, the Act on Legislation, and the Standing Orders of Parliament. But the Court discovered no provisions in these regulations requiring that an act modify only one earlier act. Nevertheless, the Court expressed its hope that this kind of law making, i.e., the modification of many previous acts in one corrective act, would not become the model of Hungarian law making.

In case No. 43/1995 (VI.30) AB hat, the Court found unconstitutional those parts of the act which have changed the systems of family and maternity support. The Court's argument was based on the need for legal certainty, property rights, and the principle of vested rights. The Court drew a distinction between supports granted for a short and specific period of time (maternity supports) and those allocated for a longer period (family support).

According to the Court, the Constitution places greater restrictions on government attempts to limit short-term social support than to curtail social support granted to an individual for many years. In line with this principle, the Court ruled that maternity support could not be altered in cases when women were pregnant at the time the law was published. Any modification in maternity support must be delayed 300 days after publication before coming into force. Only in this manner could citizens be given due notice of the alteration in expected social support.

With respect to family support, the Court ruled that Parliament may change the support regimen to affect those who are already entitled to social support prior to the alteration coming into force. However, even in this case, the transition from one system to another requires an "adequate period of time." Many commentators have confessed that they are confused by the Court's ruling.

As a result of an amendment to the "Act on Social Security," authors must pay social security fees on royalty payments, which until now were not subject to the fees. The amendment was opposed, for not wholly disinterested motives, by many intellectuals. The government argued in the press that employers often abuse the royalties exception as a way of circumventing the social security contribution. The Court ruled that the amendment is unconstitutional because, under the present regime, an author must pay into the social security system, but does not receive any benefits for the payment (44/1995. [VI.30] AB hat).

In case number 46/1995. (VI.30) AB hat, the Court ruled unconstitutional an amendment extending the use of identification numbers by four years. The Court has issued previous rulings restricting the use of identification numbers. In 1991, the "Act on Registration of Citizens' Personal Data and Place" (1992) established a deadline of December 31, after which identification numbers would not be used, and also limited the agencies that are entitled to have access to the identification numbers. This deadline was extended by the austerity act as was the group of agencies permitted access to identification numbers.

On June 17, Parliament established a committee responsible for the preparation of the new Constitution. The Coalition Agreement—made between the two parties to the government last summer—has emphasized the need for the establishment of such a parliamentary committee. (See EECR, Hungary Update, Vol. 3, No. 2, Spring 1994.) According to the Coalition Agreement, the minister of justice should have been chair of the parliamentary committee. At present, however, the speaker of the House is chairman. Both the minister of justice and the speaker are from the same party (SPH). The Alliance of Free Democrats (AFD) and the opposition parties opposed the direct involvement of the executive in the constitution-making committee.

As a result of negotiations with opposition parties, Parliament amended the Constitution as well as the Standing Orders and established a Constitutional Committee. Act XLIV (1995) amends the Constitution to require that the resolution of Parliament, establishing the rules for preparing the new Constitution, shall be passed by four-fifths of the members of Parliament. No other resolution of Parliament requires such an overwhelming majority, but because of the two-thirds majority of the governmental parties, this is the minimum fraction which ensures that the opposition will have to agree to any draft. In practical terms, this formula also means that changes to the parliamentary resolution require the agreement of at least five of the six parliamentary parties.

Resolution No. 62/1995. (VI.17) amends the standing orders that govern the operations and term of the Constitutional Committee. The term of the committee shall expire upon the ratification of the new Constitution or when the mandate of the sitting Parliament, elected in 1994, expires. If a new constitution is not drafted during the term of the present Parliament, the process of constitution making must begin again. The amendment also requires that each parliamentary faction have an equal number of MPs on the Committee, that party delegations have an equal vote, and that each Committee decision receive at least five votes. The five votes must be cast.
by members of incumbent parties who represent at least two-thirds of the members of Parliament. The last rule requires that the HSP assent to any decision of the Committee. In addition, the amendment allows the Committee to hold closed-door sessions. Committee standing orders generally require open committee meetings. The amendment also gives the Constitutional Committee the authority to amend its standing orders on its own initiative. The resolution calls for the Committee to make an effort to introduce to the House the principles of the new Constitution by December 31.

Minister of Industry Laszlo Pal resigned and was replaced by Imre Dunai, one of Pal’s deputies. The reason for his resignation was that the former minister’s privatization policy concerning the energy industry was rejected by the majority of the cabinet on June 29 (although by only a very slim majority, voting in an eight to seven ratio). The issue at stake was the proportion of the energy industry which would continue under state ownership after the privatization period in 1995. The minister, and those who remained in the minority in the cabinet, did not want to keep the majority of property in state hands. According to the decision of the cabinet, the second period of privatization in the energy industry is expected to take place in 1997, when the remaining portions owned by the state will be sold.

Latvia

Minister of Finance Andris Piebalgs submitted his resignation to Parliament on May 19, for his part in the failure of the country’s largest commercial bank, Banka Baltija, and the ensuing budget crisis, which resulted in a 70 million lats ($134 million) deficit. President Maris Gallis at first refused to accept Piebalgs’s resignation, arguing that the country’s financial situation would only deteriorate further if leadership were transferred. Though budgetary shortfalls are not a new phenomenon in Latvia (in April the deficit had already reached 43 million lats), the bank failure plunged the government even further into the red.

Despite President Gallis’s attempts to keep Piebalgs in office, the Saeima (Parliament) confirmed Indra Samite as the new finance minister on May 25 by a vote of 57 to one, with eight abstentions. Under her direction, the Bank of Latvia then purchased 100 percent of the failed bank’s shares. In its effort to stabilize the banking system, observers have estimated that the state will have to spend between 80 and 147 million lats. Consequently, even after a year of decreasing interest rates, devaluation of the lat seems inevitable.

The failure of Banka Baltija served as a painful lesson to the government not to postpone legislation regulating banking and financial enterprises. Following the bank failure, rumors spread that other banks, too, were tottering, further aggravating the financial crisis. Depositors were dumfounded to learn that the bank’s guarantee to insure their deposits was not legally binding. Despite the urgency to pass new banking laws, conflicting political agendas slowed the legislative process. On July 18, the Saeima was willing to let the summer session end without having passed the three government-sponsored banking bills, and chose to focus instead on electoral campaigning. The Latvia’s Way (LW) government interceded by passing the laws itself, citing Art. 81 of the Constitution which allows the cabinet to issue regulations between parliamentary sessions. The new laws pertained to bank supervision, commercial banking, and compensation for losses incurred by bank failure.

Focusing on the October elections, on May 26, the Saeima approved, after its second reading, the electoral law proposed by LW. The bill remained basically unchanged from its original form. (See EECR, Latvia Update, Vol. 4, No. 2, Spring 1995.) It included the controversial stipulation that only registered political parties can present candidate lists for parliamentary elections. In the past, Latvian authorities have squelched aspirations of certain political organizations (namely the communists) to hold public office by labeling them as antistate groups and not allowing them to register as political parties.

Currently, Parliament contains no leftist party representatives. Three left-wing parties hope to change this situation in the forthcoming elections. The Association of Free Trade Unions (AFTU), the Latvian Socialist Democratic Workers Party (LSDWP), and the Latvian Democratic Labor Party (LDLP) signed a coalition agreement on April 12 intending to submit a single party list for October. Party leaders stressed that they are not communists or radicals and, if elected, intend to work within the framework of the present system based on social democratic principles. A month later, two other parties joined the coalition, the Latvian Party for Protection of Deceived People and the Social Democratic Women’s Party. The coalition will campaign under the banner of “Work and Fairness.”

The forthcoming elections have conjured up yet another new party formation. On May 2, the Democratic Party (DP) united with Saimnieks. The new party will campaign on a fairly conservative platform, supporting the amendment to the Constitution proposed by the Farmers’ Union (FU). On May 26, the Political Association of Economists (PAE) announced that it will withdraw from its current coalition agreement with the ruling LW and join the DP-Saimnieksticket in the next elections.

The FU initiative to amend the 1922 Satversme (Constitution) has received considerable support since the party began to collect signatures in April. The amendment under discussion would install a popularly elected president (affecting Art. 35), institute a constitutional court, extend the presidential and parliamentary terms from three to four years (Art. 10), and allow deputies to be recalled (Art. 14). (See EECR, Latvia Update, Vol. 4, No. 2, Spring 1995.)

Though the new electoral law disqualifies former KGB agents and collaborators from running for public office, the Saeima has not yet decided to open the archives of the former Soviet secret police (KGB). Members of FU, PAE, and the Popular Concord Party (PCP) oppose unlimited public access to the archives, though they do not necessarily agree
on how to deal with former KGB agents. Proposals range from holding a “Nurnberg-2,” to publishing names of current politicians who once served in the KGB, to destroying the whole archive, since the information contained in it would presumably be used for blackmail. MPs are likely to stall legislation on the issue until the results of parliamentary elections are known.

On June 12, Latvia signed the Association Agreement with the European Union. In their negotiations for associate membership, Latvian officials agreed that, during a transitional period, they will have to integrate Latvian laws with those of the EU, settle border disputes, and harmonize customs laws and policies concerning refugees with the other two Baltic states.

This last EU stipulation was prompted by the recent attempt by a group of refugees to use Latvia as a port of entry into Scandinavia. On June 30, the Baltic states signed an Accord on Illegal Immigrants, providing that each country will take back any of its citizens residing illegally in the other two countries, as well as refugees who had crossed the border illegally. Many refugees, however, come into Latvia from Russia and Belarus. Although these two countries have been less cooperative, the Latvian government hopes to sign agreements with them as soon as possible.

Even though a year has passed since the agreement “On the Social Security of Russian Military Pensioners and their Family Members Residing in Latvia” was signed, Russia has yet to begin payments for the health care given to Russian military pensioners living in Latvia. Although retired Russian military personnel are leaving Latvia for Russia in increasing numbers, the Latvian government asserts that Russia owes the country nearly 1.5 million lats, and has informed the Russian ambassador that medical care for the people in question will be denied until Latvia receives some form of compensation...

Finally, the budget crisis will no doubt make it difficult for the government to take appropriate steps to control the daunting diphtheria epidemic which has been growing steadily over the past few years. Since the beginning of the year, 213 cases have been reported in the country, 15 of which have been fatal.

**Lithuania**

Political parties are now gearing up for next year’s legislative elections. If the results of the recent municipal elections are any indication of the outcome of the parliamentary vote, the days of Lithuanian Democratic Labor Party (LDLP) dominance are numbered. The ruling LDLP will be a hard sell to voters, since the government must both introduce austerity measures and face emboldened opposition parties which have never hesitated to criticize every move. But LDLP cannot yet be written off. The government’s public relations campaign got a boost from the signing of the popular Association Agreement with the European Union. And if LDLP’s attempt to assuage the public should fail, the party will probably use its dominant position in the Seimas (Parliament) to pass amendments to the electoral law designed to promote its own incumbency.

Held on March 25, local elections gave a solid win to the Homeland Union (Conservatives of Lithuania) (HU[CL]). (See EECR, Lithuania Update, Vol. 4, No. 2, Spring 1995.) As expected, mayoral elections in April tracked the party distribution observed in the March elections to the municipal councils. HU[CL] representatives were given majorities in all the largest cities, and they now control 38 municipalities in total. The Lithuanian Christian Democratic Party (LCDP) won five mayoralties and the Nationalist Union (NU) won three. Only in the obscure city of Visaginas was an LDLP mayor elected. Hence, a firm coalition of predominantly right-wing municipalities are forming a strong source of opposition to the ex-communist party now in power. The Association of Municipalities met at the end of June and is an increasingly powerful and united body, with which the central government will have to contend.

On June 12, Lithuania and the European Union signed the Association Agreement. This is the first step in a process by which Lithuania may become a full-fledged member of the EU. The treaty envisages a transitional period, lasting until 1999, to harmonize national legislation with EU law, as outlined in the “White Book.” Government officials hailed the agreement as the most important document for Lithuania since the March 11, 1990 “Independence Restoration Act.” Prime Minister Adolfs Slezevicius stated that, exiting “from Russia’s political space, we are entering a completely different one—the family of the EU countries.” Alternatively, some analysts predict that this latest step towards Lithuania’s integration into the EU might be the last that Russia is willing to accept without strong resistance, as is suggested by Russia’s negative attitude towards NATO expansion.

Throughout the negotiations, EU representatives made it clear that signing the agreement with Lithuania was contingent on the adoption of a constitutional amendment allowing foreigners to own land. (See EECR, Lithuania Update, Vol. 4, No. 2, Spring 1995.) After much encouragement from President Algirdas Brazauskas, the Seimas, on May 4, adopted a declaration expressing its determination to prepare and adopt a constitutional amendment which would allow foreigners to purchase land. In its statement, the Seimas emphasized that integration into the EU is a top priority for the country and promised to eliminate all obstacles hindering the signing and ratification of the EU associate membership agreement. This political statement was drafted and approved by the seven main parliamentary parties, including the ruling LDLP. While the statement does not lay down any timetable for the adoption of the constitutional amendment, it is understood that its adoption should take place in the near future.

Nearly 90 percent of Lithuanians support the country’s efforts to join the EU, perhaps expecting such palpable benefits as economic prosperity and collective security. The public apparently knows very little about the prospects of integra-
tion or, at best, has a very simplified picture of it. For the most part, political parties have caught on to the popularity of the initiative and have strongly supported the European agreement. Only two small political parties—the rightist NU and left-wing Peasants Party (PP)—have displayed euroskepticism. NU bases its opposition on general arguments: it is unwilling both to give up national interests for international agendas, and to parcel out Lithuanian land to foreigners. Alternately, PP claims that Lithuania’s integration into the EU will jeopardize the economy in general and its agricultural sector in particular. PP’s chairman expressed fear that “European Union laws will have supremacy over Lithuania’s national laws, and the dictatorship of the Kremlin will be replaced by that of Brussels and Luxembourg.” The party hopes to organize a panel of experts to determine “what Lithuania will lose by joining the EU and who will compensate for the damages resulting from the move.” Indeed, agriculture—a sector employing one-third of the population—is a top priority for the present government, and protection of farmers’ interests is and will remain one of the biggest bones of contention for Lithuania in the contemplated six-year transitional period.

On April 27, the Seimas unanimously ratified the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms together with its Fourth, Seventh, and Eleventh Protocols. The Seimas ratified the Human Rights Convention after the Constitutional Court, at the president’s request, ruled in January that the Convention does not contradict the Constitution. (See EECR, Lithuania Update, Vol. 4, No. 2, Spring 1995.)

Lithuania signed the European Human Rights Convention and Protocols One, Four, Seven and Eleven when it was accepted as a member of the Council of Europe in May 1993. Upon ratifying the Convention and its protocols, Lithuania failed to ratify Protocols One and Six. Article 1 of Protocol One provides for the protection of property rights. Seimas leaders explained that, until the issue of the restitution of the property rights is resolved, adherence to this protocol is simply not possible. Lithuania also refused either to sign or to ratify Protocol Six, which abolishes capital punishment, because Art. 105 of the Lithuanian Penal Code provides for the death penalty.

On May 11, the Lithuanian Presidential Mercy Commission turned down the clemency plea of Boris Dekanidze, leader of criminal gang known as the “Vilnius Brigade.” Last fall, the Supreme Court sentenced Boris Dekanidze to death for organizing the murder of investigative journalist, Vytas Lingys. (See EECR, Lithuania Update, Vols. 3-4, Nos. 3-2.) Dekanidze’s execution was carried out on July 13.

In response to the failure of “Baltijas” bank in Latvia, central bank Governor Kazys Ratkevicius explained that the bankruptcy of the biggest commercial bank of Latvia was due to loans amounting to about 200 million given to people closely related to the bank. During the LDLP meeting, it became clear that loans are often granted to bank shareholders in Lithuania as well, though often through middlemen—either private persons or limited private companies. At a plenary meeting, members of the Seimas discussed the crisis of Lithuanian banks, illegal privatization of state banks, and defaulted loans amounting to almost half a billion litis (nearly $125 million according to unofficial data). Though the “Law on Commercial Banks” allows bank shareholders to borrow no more than ten percent of their total share capital, violations of this rule are apparently quite common. While the central bank has responsibility for monitoring these activities, some observers speculate that Ratkevicius is turning a blind eye. They even contend that Ratkevicius was appointed to his post upon the condition that he would not interfere with certain financial groups, such as the “EBSW” group which conspired to acquire a large part of state bank shares. Not only Ratkevicius, but also Prime Minister Slezevicius knew that the EBSW group actively strove to seize control of the state commercial banks. The credibility of these accusations is conceded even by several members of the LDLP faction. During a plenary meeting of the LDLP faction held on June 22, sensational information was announced by the chairman of the parliamentary Commission for Investigation of Economical Crimes, Vytautas Juskus. He presented material collected by the Commission showing that the financial group “Luke” (responsible for the failure of the eighth largest commercial bank, Aurabankas), having bought a large portion of the shares of Lithuanian Agricultural Bank and the State Commercial Bank of Lithuania, has considerable influence over certain LDLP MPs. The evidence presented allegedly proves that the purchase of these shares was abetted by bribes and political pressure.

“Solving social problems through social democracy is the main goal of the government, of the party, and of the LDLP faction in the Seimas,” announced Prime Minister Slezevicius, chairman of LDLP, after the conclusion of the closed meeting of the Board of LDLP, held on June 3. Slezevicius announced record high revenues during the last quarter and asserted that the budget remains balanced. He added that the budget proposal, which the government will present to the Seimas in September, will “address the problems of pensioners and other socially dependent people.” He added that 48 percent of pensioners will receive higher pensions, and the sums paid shall increase by 22 percent. Despite the prime minister’s promises, pensioners complained that even the larger pensions will not be large enough to keep pace with price hikes, predicted to be in the range of 25 percent this year.

The gradual decay of public services continues unabated. In an address to Parliament on June 20, Minister of Health Antanas Vinkus announced that, due to insufficient funding of the health care system, free medical care can no longer be provided adequately, thereby mocking Art. 53 of the Constitution, which guarantees free medical care to all citizens. Vinkus disclosed that, in the last quarter, the health system received only 67 percent of the funds formally allocated.
owes nearly 60 million lits (S15 million) to other government agencies. This fiscal crisis means that medicines and medical equipment have become scarce in hospitals and pharmacies. Moreover, doctors, nurses, and their assistants complain of low monthly salaries, which on average are at least 100 lits below those of government workers. "We will be forced to turn to the government and the Seimas and ask that an unpopular decision be made, either to supply the outstanding funding promised in the budget or else to introduce a new health care system in which citizens will have to pay for their own medical care," Vinkus warned.

On June 20, the Constitutional Court upheld a lower-court ruling restricting land restitution to permanent residents of Lithuania, declaring that it did not contradict the Constitution. The petitioner, the Vilkaviskis area Circuit Court, based its reasoning on the fact that the Constitution protects ownership rights of citizens, not of individuals. The case involves the "Law on Procedure and Terms of Restitution of Citizens' Property" of 1990, in which the Supreme Council chose restricted compensation over unconditional restitution of property nationalized during the Soviet period. At the time, exiled Lithuanian nationals were allowed to take part in the restitution process, but only if they moved to Lithuania. The Constitutional Court expressed the opinion that "the rule of obligatory residence in Lithuania is not a violation of equal rights nor is it a restriction on the freedom to change one's residence."

After more than five years of independence, the issue of citizenship has yet to be resolved. Under pressure by organizations of Lithuanian exiles, Brazauskas has stated that nationals and their descendants must be allowed to gain citizenship irrespective of how long ago and under what circumstances they left Lithuania, in what country they currently reside, and what citizenship they currently possess. This liberal citizenship policy was clarified during the sessions of the preparatory commission for amendments to the citizenship law. The commission was created following a February 1 presidential decree. The commission (made up of the minister of the interior, the minister of justice, several MPs, and representatives of ethnic minorities and Lithuanians living abroad) is scheduled to meet again in late summer. Final resolutions will be adopted and submitted to the president by September 1.

Brazauskas faces another potentially unpopular decision regarding restoration of church property. During the euphoria of the Aigimmas (rebirth), Brazauskas (then Lithuanian Communist Party Central Committee Prime Secretary) made the expansive gesture of returning the Vilnius Cathedral to the Catholic Church. The Supreme Council not only approved of Brazauskas's initiative, but took it a step further, vowing to reimburse Church losses suffered during Soviet times. Although the Catholic Church restitution act was passed, it was not enforced for lack of implementing legislation. The Church's claims on real estate have led to particularly tense negotiations. The government is now apparently committed to preventing antagonism between Church and state. Since the Church is respected by the majority of the electorate, a technically complicated restitution matter has been transformed into a political trump-card. On the other hand, the LDLP cannot ignore what happens to the newly possessed when their confiscated homes are returned to religious communities. Moreover, the state's obligation to reimburse the Church for housing estates, apartments, and other non-returnable buildings, in the face of budget constraints, will be difficult. The "Law on Religious Communities Ownership Restoration in Respect of the Surviving Real Estate," which is now being debated in the Seimas, stipulates that compensation will not be paid to the Church until five years after the approval of the bill, conveniently after the end of the current government's term of office.

In a Seimas by-election, held on April 8, Vytautas Einorius, minister of agriculture, who ran as a candidate of the LDLP, was elected. Einorius beat Liudvikas Sabutis (HUC-CL) by 451 votes, or ten percent of all voters. This election was the fifth attempt organized in a rural constituency of Kaisiadorys, to fill the parliamentary seat left vacant by Brazauskas when he was elected president in 1993. (Previous attempts to fill the seat had failed due to low voter turnout.) Einorius will hold his office only for one year, since the Seimas term expires just before parliamentary elections in the fall of 1996.

Despite Einorius's election, the Seimas still does not have the 141 legislators foreseen by the Constitution. Since the death of Juozas Bastys (LDLP) on October 8, 1994, no candidate has emerged to assume his place. According to the "Law on Elections to the Seimas," the next candidate on the LDLP party list must take over Bastys's mandate. But after the landslide LDLP victory in 1992, everyone who stood on the LDLP party list is already serving in Parliament. This embarrassing situation was unforeseen by the drafters of the electoral law. HU(CL) party leader Vytautas Landsbergis has suggested that the electoral law does include one article which is applicable here, because it states that in case any political organization receives more seats in Parliament than it has candidates on its list, the unused mandates are to be allotted proportionately among the lists of the other parties. Understandably, LDLP members disagree. Seimas Chairman Jozteas Bernatonis proposed an amendment to the electoral law in which this problem would be solved by holding a party congress in the unrepresented district, and by choosing from their midst a new representative. MPs could not decide which of the two projects to adopt, so the Seimas, in a populist gesture, decided to publish both drafts in the press under the caption: "Please present your proposals and evaluations for the consideration of the Seimas State and Law Committee." Ultimately, only five citizens sent their opinions, all of them supporting the Landsbergis project. Parliamentarians then asked: what legal significance did those five letters have? Some MPs even argued that they constituted an unofficial referendum, and that Parliament should take immediate steps to appoint a new
MP according to the Landsbergis plan. Thus far, however, the chair remains empty.

Two amendments to the 1990 "Law on Political Parties and Organizations" have been drafted. On May 31, the parliamentary Committee of State and Law presented a draft amendment to the law that would require the state to finance campaigns only of parties already present in Parliament and in proportion to their parliamentary representation. Committee Chairman Pranciskus Vitkevicius (LDLP) stated that neither the leaders of the ruling party nor those of the opposition have raised any plausible objections to the amendment. Minister of Justice Jonas Prapiestis drafted yet another change to the "Law of Political Parties and Organizations," proposing to decrease the minimum required number of founders of a party and the number of party members necessary for registering with the Electoral Commission before elections. According to the current law, at least 400 people must participate at the constituent conference of every party and each party must present membership lists containing no less than 400 eligible voters' names before every election in order to register with the Electoral Commission. These standards disqualified several parties from running in previous parliamentary elections, including the Lithuanian Liberation League and the Republican Party. If the amendment passes, or so Prapiestis believes, the number of parties would not increase sharply, but would rise only from 21 to 26. The passage of this law would most likely not result in more parties being represented in Parliament, for parties would still have to pass a six percent national threshold. The increased number of parties participating in the elections, however, might diffuse the vote and allow the larger parties to dominate the proportionally-elected half of the Seimas.

Since its establishment in November 1993, the Constitutional Commission of the National Assembly has agreed on more than half of the 215 articles of the draft constitution. Among the roughly 100 remaining articles, several are bound to stir controversy. For one, the Commission has yet to design the difficult relationship between government, president, and Parliament. No consensus has been reached on the role of the prime minister. The Commission will also need to decide how best to organize the constitutional regulation of the judiciary and the state prosecutors' office. Furthermore, the jurisdiction of the Constitutional Tribunal will have to be established. Especially important questions concern the finality of its rulings and the right of citizens to petition the Tribunal directly. Finally, the Commission's decisions concerning local government will be important, particularly the restoration of the powiats—legal structures of local governments on an intermediate level.

Despite the Commission's progress, its work has not escaped the criticism of the Episcopate, the president, and the opposition. These criticisms cannot be dismissed by the Commission because each of these groups has a great deal of political influence, and the Commission's draft must be put to a vote in a national referendum (Art. 9 of the Constitutional Act of April 27, 1992, "On the Rules and Procedures for Preparing and Passing the Constitution of Poland"). On June 18, the Polish Roman Catholic Church issued a statement rejecting the constitutional draft in its present form because it lacked any reference to God (invocatio dei), and therefore, does not guarantee human dignity. This criticism came as a surprise, because the Commission had worked closely with bishops to pass mutually agreeable articles regulating church-state relations. (See EECR, Poland Update, Vol. 4, No. 1, Spring 1995.) It is now apparent that these concessions were only the first on a longer list of Church demands.

The Solidarity Labor Union submitted an alternate constitutional draft, called the "citizens' draft," to the Constitutional Commission together with the support of 1.5 million citizens' signatures. Due to widespread support for the draft, Solidarity urged Parliament to present both the citizens' draft and the Commission's draft to a constitutional referendum. However, this request—which contradicted the law on the proper mode of preparing a new constitution—was rejected by the ruling coalition.

Presidential representatives withdrew from the Constitutional Commission after President Lech Walesa criticized them for being "bad lawyers who had prepared for him a bad, socialist draft." The president then threw his support behind both the citizens draft and the Senate draft.

Finally, representatives of the ruling coalition of the Polish Peasant Movement-Union of the Democratic Left (PPM-UDL) in the Commission have come under fire for politicizing the constitution-drafting process by using its majority position to dominate discussion in the Constitutional Commission. Out of 56 members of the Commission, 36 are members of the ruling coalition, including the chairman and the vice chairman of PPM-UDL. Thus, with so many different groups to appease, chances for reaching an agreement on the constitutional draft are diminishing.

The presidential campaign has also managed to impede the work of the Constitutional Commission. Although the date for presidential elections has not yet been set, campaigning began at least two months ago. Freedom Union (FU) representatives in the Constitutional Commission submitted a motion to postpone the work of the Commission until after the presidential election. FU argued that "entangling constitutional problems in a temporary political conflict, and attempting to decide on constitutional questions in the pre-electoral fervor creates unfavorable conditions for reaching a national compromise on the constitution." On July 6, the Commission rejected the motion, arguing that everything the Sejm works on is politically entangled. Parliamentarians responded by demanding that Commission Chairman Aleksander Kwasniewski resign.
from his post, because he has announced his candidacy for presidential elections.

Apart from Kwasniewski, other presidential candidates include Jacek Kuron (supported by FU) and current Ombudsman Tadeusz Zielinski (supported by Union of Labor [UL]). FU and UL had originally intended to support one candidate, Jacek Kuron. But, during the UL electoral congress held on May 9, Kuron lost to Zielinski and UL decided to support its own candidate. So far, coalition member PPM, does not have a presidential candidate, though it may decide to support either Waldemar Pawlak (former prime minister and the head of the PPM) or Sejm Speaker Jozef Zych. Not surprisingly, President Walesa also has begun his campaign. In addition, groups not currently represented in Parliament have put forth their candidates. Among these are Adam Strzembosz, chief justice of the Supreme Court, and Hanna Gronkiewicz-Waltz, the head of the central bank.

None of the candidates has yet registered with the State Electoral Commission. A candidate for president can register if at least 100,000 signatures have been collected to support his or her name and are presented to the Commission within 20 days before elections (Art. 40 of the “Law on the Election of the President,” September 27, 1990). As EECR goes to press, Kwasniewski still enjoys the greatest amount of support, fluctuating near 20 percent in public-opinion polls. Next in line are Kuron, Walesa, Gronkiewicz-Waltz, and Zielinski.

The candidates of Zielinski, Strzembosz, and Gronkiewicz-Waltz have been controversial, since each of them currently heads a government institution which should be independent of political conflicts and campaigns. Although they deny that the campaign will interfere with their everyday duties, their candidacies may face legal hurdles. The “Law on the Ombudsman” requires impartiality (Art. 4 of the law, passed July 15, 1987). Though “impartiality” might be loosely interpreted in Zielinski’s case, arguments against Strzembosz’s candidacy seem stronger, since the “Law on the Supreme Court” explicitly states that the “chief justice of the Supreme Court cannot be a member of any political party nor can he participate in any political activity” (Art. 34 of September 20, 1984).

The struggle for influence over the mass media remains an important factor in the ongoing presidential campaign. UDL demanded Chairman of the National Radio and Television Council (NRTC) Wieslaw Walendziak’s resignation, arguing the “need for objectivity and protection of the rules of political pluralism in public television.” According to the ruling coalition, public television is “rightist” and “unfair” towards the PPM-UDL coalition. Meanwhile, on June 22, during the meeting with the television board, President Walesa promised to support Walendziak, in order to guarantee that television “be independent from political influence,” though, only a few months ago, it was Walesa himself who violently opposed Walendziak’s candidacy for his current post. The UDL battle over the Walendziak coincided with the nomination of Marek Jurek (member of Christian National Union [CNU]), to the chairmanship of the NRTC. President Walesa signed his nomination on May 4.

In response to Walesa’s nomination, protesters cited a Constitutional Tribunal resolution from March 7, which states that “the commonly binding interpretation of a law publicly known through its publication in the Journal of Laws, describes a binding understanding of the interpreted law from the day it comes into force throughout the period it is in force.” First, this means that the interpretation of Art. 7.2 of the “Law on Radio and Television” of December 29, 1992, on which the president based his dismissal of the first chairman of NRTC, Marek Markiewicz, was in force during his removal. (See EECR, Poland Update, Vol. 4, No. 1, Winter 1994.) Thus, Markiewicz’s dismissal had no legal basis, since the Tribunal decided that Art. 7.2 does not give the president the right to remove the chairman from his post. Also, they argued that the nomination of Jurak took place without the countersignature of Prime Minister Jozef Oleksy. According to Oleksy, the Little Constitution states that “legal acts of the president require for their validity a countersignature from the prime minister.” The exceptions to that rule are listed in Art. 47 of the Little Constitution and they do not include the decision concerning the appointment and removal of the chairman of NRTC. The president’s consistency in neglecting the prime minister when it comes to his NRTC nomination was the original basis for amending the “Law on Radio and Television.” Thus, the members of the television board, in line with the amended law, prepared to choose the chairman themselves. On June 13, however, the president vetoed the amendment arguing that it transforms the board from a “state organ” to a “parliamentary one,” thus subjecting the board to “political influences dictated by the shortsighted interests of the parliamentary majority.” These arguments did not convince the deputies and, on June 29, the presidential veto was overridden by an overwhelming majority vote. In response, the president promised again to appeal to the Constitutional Tribunal.

The conflict surrounding Television Board Chairman Walendziak cannot be separated from the Walesa’s presidential campaign. His nomination of Jurek was perceived as an attempt to bolster CNU support of Walesa’s campaign. The president’s strategy became even more apparent after CNU politicians were given other posts in the president’s jurisdiction (i.e., the head of the Office of National Security and head of the President’s Chancellery).

Presidential nominations of the CNU politicians have served as a counterbalance against the ruling coalition’s dominance. Therefore, PPM-UDL has undertaken a new strategy of dismissing opposition politicians from their posts. One such dismissal took place on May 26 when, in response to a motion of the ruling coalition, the Sejm removed Lech Kaczyński from the chairmanship of the Supreme Control Bureau (SCB). Kaczyński became chairman of the SCB in
1992 on the recommendation of Centrist Alliance (CA), one of the post-Solidarity parties involved in creating the Olszewski government. Three years later, Aleksander Bentkowski (PPM) argued that Kaczyński's dismissal is required by the passage of a new law on the SCB. This law introduces a six-year term for the chairman, and also increases his jurisdiction. According to Bentkowski, Kaczyński's dismissal is necessary in order to begin a new term. The Senate accepted Kaczyński's dismissal on June 8 (the majority of senators belong to the ruling coalition). Janusz Wojciechowski, PPM deputy and vice secretary of state in Oleksy's government, became Kaczyński's successor on the basis of the coalition agreement. He was accepted for the post by both the Sejm and the Senate on June 22. According to the opposition, the SCB's credibility as an agency that controls the ruling coalition has been destroyed by Wojciechowski's political appointment.

On June 20 the so-called "Packet of Laws on the Police," which includes drafts from both the cabinet and parliamentary committees, passed the Sejm. The new law introduces the right of police, border guards, and State Protection Office (SPO) to make monitored purchases or offer monitored bribes in "sting" operations in attempts to arrest traffickers in narcotics, arms, and radioactive materials. The use of these methods is limited only to situations in which the police already have substantial evidence, and only with the approval and supervision of the minister of internal affairs and the prosecutor general. The new law also expands the catalogue of crimes for which police can secretly monitor suspects in order to collect and preserve evidence of such crimes. The law also allows police officers to use fire-arms more liberally, both for self defense and while in hot pursuit of a criminal.

On June 29, the Sejm passed another amendment obligating the minister of internal affairs to disclose top secret materials to the chief justice of the Supreme Court, not, as earlier proposed, to the prosecutor general. This amendment will allow the minister of internal affairs to disclose materials containing names of the secret collaborators of the former militia. It was previously impossible to solve cases concerning political murders and deadly beatings, like the case of Stanislaw Pyjas, a dissident whose death in 1977 was never explained. All parliamentary clubs supported the proposed amendments during the debates, though they did nor always agree on how to control effectively the use of these methods. While the governing coalition stressed that current laws guarantee the sufficient protection of citizens rights, the opposition voiced its reservations. Deputy Bogdan Borusewicz (FU) proposed that the Sejm would re-evaluate these regulations after they have been in force for a year.

During the past month, the Sejm also passed several amendments to the Code of Criminal Procedure. On May 25, the Sejm introduced the institution of anonymous witnesses. The amendment in question permits secrecy of personal data, place of residence, and the testimony of witnesses when there is a possible threat to the potential witness' life, health, freedom, or possessions. The defendant would have the right to appeal any verdict based on anonymous testimony. Other major changes include the restructuring of the appeal system, granting the court the exclusive right temporarily to arrest suspects, and new regulations concerning crimes committed by Polish citizens abroad or by foreigners on Polish territory.

On June 9, the Sejm passed amendments to the Criminal Code. All parliamentary clubs were in favor of most of the changes, but the proposed five-year moratorium on the death penalty remains contentious. Only FU was completely in favor of the moratorium proposed by Deputy Andrzej Gaberle (FU), professor of criminology, who notes that most countries in Europe have abolished the death penalty. According to Gaberle, Poland, too, should aim at eliminating capital punishment. He hopes that a moratorium would be a step towards its ultimate removal from the Criminal Code. UDL, PPM, and the Confederacy for Independent Poland (CIP) disagreed. PPM deputies argued that one cannot sentence a convicted party to death, suspend the punishment and then, when the law changes, simply perform the execution. CIP called for the issue to be voted upon in the constitutional referendum. Public opinion polls show that 60 percent of Poles support the death penalty (Gazeta Wyborcza, June 8, 1995). With such steady support of the death penalty by the electorate, the Senate rejected the moratorium on June 30. In response to this rejection, Senator Alicja Grzeskowiak (Solidarity) stated that it was a shame for the Senate that the ruling coalition believes that the death penalty "assures the effectiveness and certainty of the punishment of criminals in Poland." On July 12, the Sejm rejected the Senate decision and proclaimed the moratorium with 160 votes in favor, 99 against, and 33 abstentions.

The Sejm introduced a new regulation concerning crimes committed by public officials between 1944 and 1989. With bilateral support for the bill, the Sejm proclaimed that public officials who participated in crimes against life, health, and freedom of administration of justice between January 1, 1944 and December 31, 1989, are liable to punishment and imprisonment for up to three years. The Senate went even further in its decision, locating the above crimes in a catalogue of infractions that do not expire, just like war crimes and crimes against humanity. The Sejm did not yet vote on the Senate amendment. UDL sharply criticized the annulment of the expiration date for these crimes and promised that it will appeal to the Constitutional Tribunal if the amendment comes into force. UDL also argued that the amendment violates the principle of non-retroactivity of law. The ombudsman, Tadeusz Zielinski, agreed with the UDL argumentation.

On April 28, the ombudsman submitted to the Sejm a report of his year-long activities. As a result of the abated efficiency of the administration of justice, he wrote, Poles feel less secure and economic and ownership rights are not
respected. His examples included the delay in drafting the reprivatization law and the fiscal stringency of the state. He also mentioned other laws that limit economic freedoms of citizens and expressed concern for the state of social justice in the country. All parliamentary clubs were in favor of accepting the report except for CIP, which accused Zielinski of using his post to press his own presidential campaign. Also, deputies from FU and NPPB stressed that the ombudsman needs to pay more attention to protecting individual rights and to his contacts with citizens, than to general statements and attempts to influence the actions of the government and the president. CIP deputies wanted the Sejm to change the usual parliamentary procedure, and vote on whether to accept the ombudsman’s report. For the first time, the Sejm voted on the report and accepted it with an overwhelming majority of votes.

On April 27, the Sejm rejected the Constitutional Tribunal’s decision on the constitutionality of the tax law for 1995. (See EECR, Poland Update, Vol. 4, No. 2, Spring 1995.) Three Hundred Three deputies voted to reject the decision, 130 voted in favor of the decision, and no one abstained. According to the coalition, the costs of accepting the decision could reach 1.8 billion zloty, which would require dramatic budget cuts, while the average taxpayer would gain a mere four zloty per month. The opposition also stressed that, above all, the law violated the principle of non-retroactivity and, therefore, should not have been accepted by the Sejm.

Another decision at the Constitutional Tribunal is about to reach the Sejm for approval. The Tribunal declared unconstitutional a rule in the banking law that allows a bank to conduct an execution of liabilities on the basis of bank documents without judicial consent only if the debt were transferred to the bank by a person who was not a bank client. This decision was the Tribunal’s response to the ombudsman’s motion in which he argued that special powers of the banks violate the principle of equality of citizens before the law and as well as the rights of citizens to trial. The ruling is not final but, if the Sejm accepts it, banks will have to go to court to receive a decision on the execution of liability in order to trade debts.

On June 23, the Sejm renewed its work on the reprivatization law. Four drafts were reviewed during the first reading: a parliamentary draft law on the expiration of reprivatization claims and compensation for lost possessions, a government draft law on compensation for possessions lost on the basis of laws passed in the years 1944-1962, a parliamentary draft law on reprivatization and compensation, and a presidential draft law on reprivatization and compensation. The latter two drafts would compensate pre-communist owners and their heirs who lost their assets behind Poland’s current eastern border. These laws stipulate that dispossessed owners must receive either a return of those assets “in kind,” if possible, or be granted reprivatization coupons with which they can purchase stocks in privatized companies. At the same time, the president guaranteed the inviolability of property given to peasants in the land reform. In addition to these four drafts, others were submitted by FU and CIP, proposing to return lost assets in the form of grants of stocks in companies that now own the assets, or granting substitutional assets. The Sejm rejected all these drafts, though the government’s and the Polish Socialist Party (PSP) parliamentary drafts were sent back for further work. The PSP draft stipulates reprivatization bonds as the only form of compensation by the government, which can be distributed for the equivalent of up to 300 million old zloty. The government draft stipulates that only “repatriates” who left their assets behind the eastern borders and those whose possessions were illegally taken over by the state in 1944-1962 should receive compensation in reprivatization bonds. The government proposed not to recognize the claims of those whose assets were taken away on the basis of land reform or nationalization decrees. UDL, PPM and PLU supported the government draft arguing that “in today’s economic and social circumstances, this gives an opportunity to solve reprivatization problems as fairly as possible. Only compensation in the form of bonds is acceptable, other drafts make amends for old injuries by creating new ones.” The opposition, however, claims that the government draft is unacceptable since it sanctions the nationalizing actions of the communist governments.

On June 30, the Sejm passed the “Law on Privatization and Commercialization of State Enterprises.” The Sejm’s Extraordinary Commission and the government prepared the drafts that were considered. The debates over the drafts pitted the ruling coalition against the opposition and the president, who argued that the privatization plan would limit the competence of Minister of Privatization Wieslaw Kaczmarek by giving the right to decide on the commercialization of state enterprises to state administrations governed by the ruling coalition. The opposition argued that UDL and PPM will divide amongst themselves the board-of-directorships of state companies. Another controversy surrounded the draft’s so-called “privatization map” (Art. 1), according to which manufacturers and traders of goods strategically important for the national economy—including alcohol, gas, arms, coal, telecommunications—will be privatized through individual votes in the Sejm. Former Minister of Finance Leszek Balerowicz criticized the law, arguing that it creates the legal basis for a “goodfellas” economy. President Walesa said that “instead of creating favorable conditions for investors, the law gives state enterprises directly to politicians and officials.” Following his statement, the president vetoed the law on July 17, but his veto was overridden by the Sejm on July 21, by a vote of 293 to 142. The president intends to appeal this vote to the Constitutional Tribunal and Solidarity Labor Union has threatened a general strike if the law is adopted.
The governing Social Democratic Party (SDP) launched a legislative offensive this past quarter unprecedented in the short history of Romanian democratic politics. Parliament approved several important acts that had been on the table for many months. At the same time, the SDP offensive gave rise to a realignment of political forces within Parliament that will shape the political process in general and the upcoming elections in particular. The lack of precise constitutional regulations to guide bicameral operations and the ambiguous status of parliamentary acts remain serious impediments to the governing process.

In April, Parliament debated the draft "Law for Accelerating Privatization," the "Law Concerning the Status of Nationalized Buildings," and the education law. Deliberations revealed tensions within the governing coalition that may well increase to a breaking point. In early May, the privatization law stalled when members of the Romanian Socialist Labor Party (RSLP), supporters of the government, opposed any form of privatization. The SDP accused their disgruntled partners by awarding RSLP members new cabinet posts. Presidential Decree No. 108/May 5, 1995 gave the RSLP the ministries of culture and trade. This is the fourth governmental shake-up since Prime Minister Nicolae Varicou took office in November 1992 (previous reshufflings occurred on August 28, 1993, March 6, 1994, and August 18, 1994). Article 85 of the Constitution states that all ministers must be approved by Parliament. Yet Varicou’s replacement cabinet members have not been presented for parliamentary endorsement. Consequently, only 11 of the 20 ministers have Parliament’s consent. With nine unapproved cabinet members, in violation of Art. 85, Varicou is vulnerable to the charge that his government is illegal, or at least illegitimate.

Coalition in-fighting was another reason behind the cabinet replacements. When Varicou began to distribute offices, the Party of Romanian National Unity (PRNU), the second governing party, requested at least two portfolios, but received none. Government partners RSLP and the Greater Romania Party (GRP) also requested some leading positions but, like the PRNU’s, their demands were rebuffed and they received only posts of secondary importance (PRNU members, for instance, were appointed as prefects and managers of the private property funds). RSLP and GRP may politically benefit from this snub since their formula for defeating SDP in the next elections is apparently to argue that they share no responsibility for the sitting government’s failures.

GRP however, gained positions in the ministries of culture and tourism, thus effectively joining the government. But SDP and President Ion Iliescu ignored the demands of this antisemitic party for diplomatic posts. This refusal moved GRP Senator Corneliu Vadim Tudor to attack Iliescu in a GRP newspaper, repeating the accusations of 300 Romanian Army officers that the president had engaged in high treason by yielding ignominiously to NATO demands. Coalition strife notwithstanding, the cabinet reshuffle helped SDP achieve its principal aim: passage of the privatization law.

The privatization regime now in place will award each adult citizen free privatization coupons which may be exchanged for shares in the state-owned enterprises which are up for sale. Coupon distribution will run until December 31. The government claims that 1500 enterprises will be sold in the coming year. The plan has been criticized on two grounds. First, privatization coupons are not exchangeable on the open market. This means that the government must redeem each single coupon rather than collections of coupons gathered by private intermediary funds. Skeptics remain unconvinced that the state bureaucracy can carry this load. Second, 40 percent of the value of privatized enterprises will not be distributed in the coupon-exchange program but will be reserved for private auction. Since the Romanian government chronically overprices state assets, the auctioning of shares on the open market may prove impossible. The government would then remain a substantial shareholder even in "privatized enterprises."

Parliament’s work was stymied this quarter by two recurrent structural problems: the inefficiency of existing procedures for ironing out differences between two chambers under Art. 76 of the Constitution, and the lack of clear criteria for distinguishing between “statutory” and “normal” laws as outlined in Art. 72.

Article 76.1 provides that, in all cases of disagreement between the two chambers of Parliament, “the presidents of the chambers will initiate a mediation procedure through the intermediary of a joint commission with equal representation.” The Constitution contains no procedural rules to guide such mediating commissions. Thus, for example, when the report of the joint committee for mediating the disputed texts of the privatization law was passed by the Senate on May 8 and readied for promulgation, the opposition contested the procedure by which the mediation committee’s report was validated. The opposition argued that the report should have been approved by a two-thirds majority, but was only approved by a simple majority, 71 ayes, 39 nays, with seven abstentions. The opposition’s argument is not based on any particular constitutional provision. Article 74.1 of the Constitution prescribes an absolute, not a two-thirds majority for the passage of a statutory laws such as the mediation report. (Statutory laws are enumerated in Art. 74 and include regulations such as electoral rules that are perceived to be more important than ordinary laws.) Rather, the opposition’s claim is that their own representatives should have an impact on the decisions of mediating commissions regarding statutory laws, and that the members of the commission should try to reach a consensus. Consensus is better guaranteed, argue the opposition, with the two-thirds requirement. Neither the Senate Regulations nor the Constitution specifically addresses this issue. In order to
avoid a debate in plenum, the Senate chairman decided that the final vote on the report should be repeated.

The opposition contested this procedure as well, referring to Art. 76.2 of the Constitution which stipulates that, in cases where a mediation report on a law is rejected, the two chambers should be summoned in joint session. The Senate chairman discounted this rejection, and the voting on the report went forward on May 15. Many MPs of the majority coalition were absent, however, and the report failed to muster the 72 votes necessary for a two-thirds Senate approval.

Consequently, the two chambers of Parliament convened for a joint session on May 24 where the "Law on Accelerating the Process of Privatization" won 249 votes. All 147 nays came from the opposition which once again contested the voting procedure by claiming that only the text of the report of the mediation committee was voted upon, and that no debates on the texts under consideration were allowed. The opposition warned of a petition to the Constitutional Court, but their protest did not dissuade the majority from enacting the law.

Similar circumstances arose during the debate on the "Law on Restitution of Nationalized Buildings." For months on end, the partners in the ruling coalition could not agree on a draft. When a compromise was finally reached, the opposition contested the procedure. As with the privatization law, a plenary session was called where the mediation report was debated in full session and was finally passed.

The new law clearly favors the interest of tenants over those of precommunist owners. Previous owners are entitled to the return of only one apartment which they must personally occupy at the time of their claim in order to gain recovery. Under these conditions, it will be impossible for the vast majority of ex-owners to regain their property. In addition, tenants are given the right to buy apartments confiscated by the communists, while the ex-landlords will be reimbursed by the state. The law establishes a rather controversial procedure for settling conflicts between landlords and tenants: such cases will be adjudicated not by a court but by special committees designated by prefects, all of whom are governing-party appointees.

Mediation procedure also menaced the passage of Ordinance No. 1/1995, which prohibits pay increases for state employees and links salary hikes in industry to increased outputs. The ordinance was reviewed and subsequently approved by the Chamber of Deputies on April 6, 141 pros, 84 cons, the latter belonging both to the opposition and to the Socialist Party, an ally of the government. The ordinance was reviewed and subsequently approved by the Senate; thus, the governing-party majority was entitled to the return of only one apartment which they must personally occupy at the time of their claim in order to gain recovery. Under these conditions, it will be impossible for the vast majority of ex-owners to regain their property. In addition, tenants are given the right to buy apartments confiscated by the communists, while the ex-landlords will be reimbursed by the state. The law establishes a rather controversial procedure for settling conflicts between landlords and tenants: such cases will be adjudicated not by a court but by special committees designated by prefects, all of whom are governing-party appointees. The ordinance was reviewed and subsequently approved by the Chamber of Deputies, 101 ayes, 65 nays.

GRP deputies abstained. During the May 25 Senate session, the opposition protested that the law had been passed by a simple majority. Yet, the majority groups maintained that the act was an ordinary law. On May 25, the Constitutional Court rejected the opposition's claim that the law was unconstitutional.

The Court struck down several provisions of the Standing Orders of the Chamber of Deputies. (See the article by Stanley Bach and Susan Benda in this issue.) According to Art. 145 of the Constitution, decisions of the Court can be overruled by the two chambers, voting separately, with the agreement of two-thirds of the MPs present. But the deputies failed to override the Court's decision regarding the constitutionality of the Chamber's own regulations. SDP deputies Viorel Munteanu and Ilie Nica proposed an amendment to Art. 145 of the Constitution, arguing that the two-thirds majority requirement be abolished. This debate, however, never progressed beyond the stage of preliminary discussions.

The governing party's effort to amend the Constitution reflects its dissatisfaction with what has become a permanent feature of Romanian political life: all major decisions by Parliament have been deemed unconstitutional. Among the laws challenged by the Constitutional Court were the "Law for Social Security," the "Law Regarding the Status of Deputies and Senators," the "Law of Empowering the Government to Issue Orders," the education law, the decision to overrule debates on the motion of local administration, and the decision of bringing into use a "Rule Concerning Confidential Papers in the Chamber of Deputies," as well as the laws concerning nationalized buildings, the privatization law and Ordinance no. 1.

The education law, which was passed two days before Parliament adjourned, brought the ethnic issue to the forefront once again and exacerbated further relations between representatives of the national majority and Romania's ethnic minorities. At the beginning of May, the European Council announced that all members of the Council are obliged to adhere to Recommendation 1201 concerning minority rights. The failure of the Romanian-Hungarian negotiations, the Congress of the Democrat Alliance of Hungarians in Romania (DAHR) held in Cluj on May 28, and ambiguous statements by the president of the European Council regarding the obligatory nature of Recommendation 1201, all riled up the ultranationalists. They accused the majority party and the president of toadying to international institutions. PRNU demanded again that DAHR be outlawed and that the participants in that party's congress be imprisoned. GRP requested the resignation of the minister of foreign affairs on the grounds that he had made concessions to the Hungarians. RSLP threatened to withdraw from Parliament if Recommendation 1201 were to be included in the bilateral treaty with Hungary. Under these circumstances, SDP tried to overcome the deadlock and to revitalize the process of European integration, appealing to the understanding of "all political forces," that is, seeking the opposi-
tion's formal approval. On April 18, the Chamber of Deputies adopted the Framework Convention for Minority Protection and, on April 28, the Convention was promulgated by the president. During a special May 23 meeting, the government introduced a draft law on minorities, but parliamentary debate was postponed until the autumn session.

On June 6, the opposition presented a motion requesting that the government's policy toward integration into Europe be debated. President Iliescu criticized this gesture, asserting that such a motion negatively influenced foreign affairs. The Senate overruled the motion, 54 to 16, with 59 abstentions. The Chamber of Deputies adopted a declaration in which all parliamentary parties expressed their commitment to Romania's integration into European and North Atlantic structures. On June 16, the 13 political parties signed a common political declaration concerning the strategy for Romania's integration into the European Union. The declaration was drafted by the ruling party, the SPD. Several days later, in Paris, the minister of foreign affairs presented Romania's application for membership. Preoccupied with nationalist attempts to sabotage the foreign policy program, SPD is currently trying to refurbish the cabinet's image, which undoubtedly suffers as a result of endless bickering among the leaders of DAHR, GRP, and RSLP. Along with other things, SPD proposed a project of harmonizing local administration Law no. 169/1993 with European legislation. This initiative, however, was taken only after the Congress of Local Powers in Strasbourg submitted a report which was extremely critical of the Romanian government's discharging of mayors and local officials.

Local autonomy and the education law are the main bones of contention between DAHR and the other parliamentary parties. Concerning the right to autonomy based on ethnic criteria and the notion of collective rights, the opposition firmly supports the parliamentary majority, rejecting any legislative changes on the matter. As for the education law, the opinions of the governing coalition and the opposition diverge slightly. DAHR submitted to Parliament its own education law draft, accompanied by 500,000 signatures—more than the number necessary to exercise the collective right to legislative initiative according to Art. 73 of the Constitution. Parliament refused to act on DAHR's draft until the Constitutional Court would verify the 500,000 signatures supporting the DAHR bill. This effectively excluded the draft from the agenda. During Senate deliberations, DAHR proposed an amendment concerning confessional education. The amendment was overruled. The 12 DAHR MPs were absent during the remaining debate on language education because they had left the Senate in protest.

DAHR leaders consider Art. 8 of the education law, which requires that teaching at all levels be carried out in Romanian, as well as Chap. 12 of the law on teaching in the language of the minorities, to be extremely restrictive and even to infringe upon rights guaranteed by the Constitution. After DAHR had left the Senate, the education committee modified Art. 116 which was adopted earlier the same day (June 13), granting minorities the right to study in their native languages irrespective of the educational field. DAHR declared that these concessions were not sufficient and that the current provisions of the education law jeopardized the national identity of minority communities in Romania.

During the last quarter, Costica Bulai was appointed to the Constitutional Court after the term of Miklos Fazekas expired (pursuant to Art. 140 of the Constitution). Fazekas was widely considered a representative of the Hungarian minority on the Court. A professor of law at the University of Bucharest, 69-year-old Bulai is backed by the SDP. His term on the bench lasts for nine years. DAHR argues that the defeat of the DAHR candidate Gabor Hajdu leaves the Hungarian minority underrepresented on the Court. Also, Ioan Muraru was elected chairman of the Constitutional Court by a six to three vote. The new chairman, also chairman of the Public Law Department of the University of Bucharest, was appointed to the Constitutional Court in 1992, on the nomination of the Chamber of Deputies.

The proposed amendment to the Penal Code, at long last, was passed by the Senate on April 11. According to the final version, homosexuality as such is no longer a crime. Homosexuality can be punished by imprisonment of one to five years only if the act itself is carried out in public. The main opposition party, National Peasant-Christian Democratic Party (NP-CDP) fought to criminalize homosexuality irrespective of circumstances, but failed to muster the support necessary to block the amendment. The Romanian Orthodox Church also filed a protest with the Parliament Bureau immediately upon the amendment's passage. This was the second time that the Senate debated the draft law. In fall 1994, the Chamber of Deputies rejected a Senate draft of the provision and proposed instead a blanket decriminalization of homosexual behavior.

Fiery debates also raged over Art. 205 (punishing insult) and Art. 206 (punishing slander) of the Penal Code. Deputies of the majority, moreover, proposed that the Penal Code include the notion of terrorism, nonexistent in Romanian legislation until now. The government also submitted to Parliament a draft law on the prevention of, and fight against, terrorist actions, demanding that the draft be considered under the "emergency basis" procedure established by Art. 74.3 of the Constitution which allows Parliament, at the request of the government, to pass draft laws or legislative proposals in an accelerated manner.

Russia

This summer witnessed the most serious constitutional crisis in Russia since the events of October 1993. Political events of constitutional relevance included the Constitutional Court's controversial decision to uphold the constitutionality of the Chechnya decree, negotiations on ending the Chechen conflict and about the future political status of Chechnya (provoked by the hostage taking at Budennovsk), the struggle between the branches over the laws regulating the December 1995 elections to the Duma.
and “formation” of the Federation Council, as well as the June 1996 presidential elections, the Duma’s unsuccessful stab at a no-confidence vote, its even feebler attempt to impeach the president, Boris Yeltsin’s dismissal of some important ministers, judicial attacks on independent television, and the president’s failing health (which again raises the riddle of succession). All of these events underscored the untested nature of Russia’s new constitutional order, not to mention the shifting and ill-defined power of the major political players.

Beginning on July 10 and lasting for the rest of the month, the Constitutional Court considered the constitutionality of three presidential decrees and one government directive issued in November 1994 and December 1994 and aimed at the forcible elimination of Dzhokhar Dudayev’s regime in Chechnya by the deployment of federal troops. The court examined the conformity of these presidential and governmental acts to the Constitution on a request submitted by a group of Federation Council members. Deputy Prime Minister Sergei Shakhrai and the president’s national security advisor, Yuri Baturin, who represented the presidential side in court, argued that the most important of the acts in question, secret presidential decree No. 2137, “On Measures to Re-establish Constitutional Law and Order in the Chechen Republic,” of November 30, 1994, was repealed in December of that year and consequently could not be legally examined by the Court. They also claimed that no government resolution or order of the minister of defense was issued on its basis. But their main points were that Dudayev presided over an indisputably criminal regime, and that the Russian president is directly empowered by the Constitution to prevent secession from the Russian Federation. (Article 80.2 reads: “Within the procedure established by the Constitution of the Russian Federation, [the president] adopts measures to safeguard the sovereignty of the Russian Federation and its independence and state integrity.”) The December 1993 Constitution holds open no legal path for seceding from the Federation. The opposing side adduced both legal and political arguments. Their main legal points were the following. First, a military action deploying Russian troops on Russian territory should not have been undertaken without the declaration of a state of emergency. Second, declarations of states of emergency require consent of the Federation Council (Art. 102.1.c) and hence the administration’s unconstitutional refusal to declare a state of emergency, when one was obviously required, was tantamount to abrogating unilaterally the constitutionally mandated responsibility of the executive branch before the legislature. And third, secret decree No. 2137 stood in blatant contradiction to Art. 15.3 of the Constitution which reads: “Normative legal enactments affecting human and civil rights, freedoms, and duties cannot be applied unless they have been officially published.” Sergei Kovalev and others, who stressed the cruel and massive violation of the rights of Russian civilians (tens of thousands of deaths in Grozny alone, devastation of housing, proliferation of refugees, etc.) also invoked Art. 15.4 of the Constitution, according to which “generally recognized principles and norms of international law...are a constituent part of [Russia’s] legal system.”

On July 30, the Constitution Court handed down its decision. A majority of the justices ruled for the presidential side. Chairman of the Court, Vladimir Tumanov, explained on August 1 that the real basis of the decision lay less in constitutional niceties than in the raison d’etat doctrine that the government has a right to do virtually anything it desires, with no legal limitations and no accountability before the assembly, whenever it unilaterally determines that the “integrity” of the fatherland is in danger. Dated December 9, presidential decree No. 2166, “On Measures to Suppress the Activities of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict,” was found wholly constitutional, as was the gist of the December 12 governmental directive, which implemented the president’s decree. The Court did not examine the conformity to the Constitution of secret decree No. 2137 (November 30), on restoring constitutional order in Chechnya, precisely because this decree had been repealed. The presidential decree of November 2, outlining the basic elements of Russian military doctrine, was also held to lie beyond the Court’s jurisdiction. As a minor sop to appellants, two provisions of the governmental resolution No. 1360 of December 1994, one concerning the forcible eviction from Chechnya of persons who “threatened public order” and another dealing with the government’s right to strip journalists of accreditation in the conflict zone in case of necessity, were found unconstitutional.

Eleven of the 19 justices fully supported this decision. The remaining justices dissented or concurred in varying degrees and for various reasons. After the decision was handed down, Justice Nikolai Vitruk stated that the Court had, in essence, written the president a blank check, allowing him to apply general provisions of the Constitution without a legislative basis and freed from any form of political accountability. According to Rossiyskaya gazeta of August 11, the dissenting opinions of justices Nikolai Vitruk, Boris Ebzeyev, Anatoly Kononov, and Viktor Luchin emphasized that the normative acts of the president and government and, particularly, subsequent measures for implementing these normative acts, were inadequate to the goal of restoring constitutional order. The special legal regime established on the territory of the Chechen Republic, these dissenters argued, required prior legalization in the form of a federal law, which had not been passed or even submitted to the legislature. Contrary to the majority, therefore, dissenters held these acts to be unconstitutional.

In a more conciliatory special opinion, Justice Gadis Gadziev argued that, even though presidential decree No. 2166 did not contradict the Constitution by ordering the deployment of federal troops, it did contradict the Constitution by empowering the government “to use all means at its disposal,” including restricting the fundamental rights and freedoms of citizens. According to the special opin-
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Ritter, citing Yeltsin's last-minute dismissals of Federal Security
the article by Richard Rose in this issue.)
Another constitutional shortcoming, alongside lack of
coordination among different ministries with overlapping
responsibilities, is the total absence of effective legislative con-
trol over ministerial action. The current unaccountability of
ministers was made plain during the Duma's successful June
21 and failed July 1 votes of no-confidence in the government,
conducted in accord with Art. 117.3 of the Constitution. On
June 21 (with 241 deputies voting in favor, 70 against, and 20
abstaining), the Duma, anticipating the December elections,
passed a preliminary vote of no-confidence in Chernomyrdin's
government. The various factions joining forces in the vote did
so for many different reasons (some objecting to the government's economic policy, others outraged by events in
Chechnya and Buddenovsk, and so forth) and could not possibly
have united in support of a common candidate for the premiership. Rather than wait for a second vote of no-confidence, which could occur anytime within a three-month period after
the June 21 vote, Chernomyrdin pre-emptively invoked Art.
117.4 of the Constitution, which reads: "The chairman of the
government of the Russian Federation may submit to the State
Duma a motion of confidence in the government of the Russian
Federation. If the State Duma refuses its confidence, the
president adopts a decision within seven days on the dis-
missal of the government of the Russian Federation or on the
dissolution of the State Duma and the holding of new elec-
tions." Calling for a confidence vote was a very aggressive
countermove on the PM's part, for it effectively placed the
Duma before the embarrassing choice of having to muster 226
votes in favor of the cabinet (which has never received parlia-
mentary approval) or accepting its own pre-term dissolution.
(Article 109 of the Constitution makes it impossible for Yeltsin
to disband the assembly once impeachment proceedings are
underway; but the Duma's sly attempt to block its own Art.
117 dissolution by invoking Art. 109 failed when futile
impeachment motions were unable to muster the necessary
two-thirds vote.) Unfortunately, Chernomyrdin's confronta-
tionalist call for a vote of confidence turned out to have an
unanticipated and unwelcome consequence for the PM him-
self, for the current electoral law (chapter V.32.1) restricts par-
ticipation in the upcoming elections to parties and blocs which
registered at least six months prior to election day. Since
Chernomyrdin's Our Home is Russia (OHR) bloc did not reg-
ister until May, it would in all likelihood have been disqualified
in a snap election. Hence, the premier was forced to look for a
way to back down quietly. His solution was to allow the Duma
to hold a second vote of no-confidence on July 1. Only 193
deputies voted in favor of the motion this time, which was well
short of the 226 needed for passage. For various reasons, 48
deputies had reversed their votes of June 21. At this point,
Chernomyrdin simply withdrew his earlier request for a vote
of confidence, and the status quo ante was restored, even if the
atmosphere of political crisis was not wholly dispelled. Some
commentators viewed this entire no-confidence drama as a sign
that Russian democracy was on the road toward political matur-
ity, citing Yeltsin's last-minute dismissals of Federal Security
Service Director Sergei Stepashin, Internal Affairs Minister
Viktor Yerin, and Deputy Prime Minister Nikolai Yegorov.
But, in truth, very few of the 48 deputies who changed their
votes seemed to have been moved by these dismissals, and
Pavel Grachev (the Duma's least-favorite minister) was kept
on, casting doubt on the causal relationship between Yeltsin's
ministerial purge and the survival of the cabinet. In the end,
parliamentary lack of confidence in the government remains
just as politically inconsequential as public lack of confidence in
both legislative and executive branches of government. (See
the article by Richard Rose in this issue.)

On July 21, continuing to wage a purely symbolic war
against the executive, the State Duma passed, by a constitu-
tional two-thirds majority of its members, three federal consti-
tutional laws, aimed at amending Arts. 101 through 103, 83,
and 117 of the Constitution. This was the first time since 1993
that Parliament attempted to amend the Constitution (if we
ignore the failure of a group of deputies of the Federation
Council to prolong, from 14 to 30 days, the time-limit during
which bills must be considered by the upper chamber, as set
down in Art. 105.4). These latest amendments, if ultimately
enacted, would have changed, in the assembly's favor, the sys-
tem of power established by the existing Constitution. The
principal aim of the proposed amendments was to strengthen
the role of the State Duma in the process of forming the gov-
ernment. Proposed amendments to Arts. 83 and 103, for
instance, would have required the president to obtain State
Duma approves only the appointment of the prime minister—defense, internal affairs and intelligence). Moreover, under Duma consent for his appointments of the minister of foreign affairs, such as proceeds from gold sales, are off-budget), neither branch can afford to ignore the upcoming elections. Indeed, the anticipated legislative and presidential elections continue to animate all Russian political life. The ultimate stakes, of course, are the presidential elections slated for June 1996. Back on April 21, the Duma passed a version of the law governing presidential elections, which was then accepted by the Federation Council on May 4, and signed by Yeltsin on May 17. Candidates must gather one million signatures in order to register for the presidential elections, and no more than seven percent of the signatures can come from any single component subject of the Federation. Individual citizens may contribute no more than around six hundred dollars (50 times the minimum wage) to any candidate, “legal entities,” i.e., private enterprises, no more than around sixty thousand dollars (5000 times the minimum wage), and no campaign fund may exceed three million dollars (250,000 times the minimum wage). State-owned firms, religious and charitable organizations, the military and all foreigners (including private firms which are more than 30 percent foreign-owned) are wholly prohibited from making campaign contributions. These campaign-financing rules are apparently intended to help Yeltsin, and for that matter, any candidate who can reach a wide public through television coverage without having to rely on paid advertising. The first three candidates to register for the presidential race were Vladimir Zhirinovsky, Alexander Rutskoi, and Gregori Yavlinski.

On June 9, over initial objections by the president and the Federation Council (see EECR, Russia Update, Vol. IV, No. 2, Spring 1995), the 450-member Duma passed an electoral law, “On the Election of Deputies to the State Duma,” stipulating a 50/50 ratio between deputies elected on party lists and those chosen directly in 225 local constituencies. On June 15, this law was approved by Federation Council. But the path leading to this solution was tortuous, and its consequences on election day remain uncertain. Yeltsin had vetoed an earlier draft, also based on the 50/50 formula, on May 23. After this initial veto, the articles which provoked disagreement were slightly amended by a conciliation commission of parliamentary and presidential representatives. The ratio between deputies elected along party lists and deputy elected by majoritarian method in one-seat districts was not changed, remaining 225/225, but the law now specifies that most of the candidates included in the party lists shall represent not Moscow but other regions of the country. Chapter VI.37.4 of the law reads: “The electoral association or electoral bloc deciding the order in which candidates will be listed on the ticket will break the ticket down either completely or partially into regional groups of candidates (by Russian Federation members or groups of Russian Federation members), with no more than 12 names in the portion of the ticket listing (Moscow-based) candidates not included in any regional group. They must specify which Russian Federation members or groups of Russian Federation members correspond to each of the listed regional groups of candidates.” Chapter VI. 37.5 of the law makes it possible for the same candidate to run...
Council. In their view, regional bodies of power must be in some form of appointment, Yeltsin is openly hostile to election, as is Vladimir Shumeiko, chairman of the Federation Council. Favoring "the Federation Council consists of two representatives from the Federation on July 27, was immediately denounced by the president as unconstitutional, on the grounds that the Constitution explicitly distinguishes the Duma, which must be elected, from the Federation Council, which is merely "formed" (Art. 96.2). The proposed law provides for the election of representatives to the upper chamber by direct suffrage in each of the constituent subjects of the Russian Federation. Candidates for the Federation Council could be proposed by regional legislative and executive bodies, in an effort to obtain simple majority mandates. Yeltsin's team, in any case, was plainly seeking a political advantage by weakening the proportional half of the Duma, generally viewed as a product of television campaigning rather than local patronage and therefore difficult to control by means of under-the-counter bargaining. And, indeed, Chernomyrdin's new OHR bloc will probably outperform liberals and nationalists in the single-member districts. The principal question, however, is whether a "bloc" designed principally as an elite network rather than a party, aimed at seducing regional leaders rather than the electorate, will ultimately compete well in the provinces against communists and agrarians.

Creating a law to regulate the selection of representatives to the next Federation Council turned out to be even more complicated than settling on a law for the Duma elections. The draft federal law on the elections to the upper house, adopted by the State Duma on July 5 and approved by the Federation Council on July 27, was immediately denounced by the president as unconstitutional, on the grounds that the Constitution explicitly distinguishes the Duma, which must be elected, from the Federation Council, which is merely "formed" (Art. 96.2). The proposed law provides for the election of representatives to the upper chamber by direct suffrage in each of the constituent subjects of the Russian Federation. Candidates for the Federation Council could be proposed by regional legislative and executive bodies, in an effort to comply with Art. 95.2 of the Constitution, which stipulates that "the Federation Council consists of two representatives from each subject of the Russian Federation; one each from the representative and executive organs of state power." Favoring some form of appointment, Yeltsin is openly hostile to elections, as is Vladimir Shumeiko, chairman of the Federation Council. In their view, regional bodies of power must be granted the right to delegate directly their representatives to the upper chamber. (This is how the US Senate was formed prior to 1912). This method of "formation," as opposed to election, would ostensibly give the leadership of Russia's 89 republics and regions a direct voice in the federal government. Most sitting members of the Council, however, would apparently rather be elected once again, as they were under the exceptional circumstances of December 1993.

Yeltsin nevertheless vetoed this draft law on August 12, and the Duma's same-day attempt at an override failed by 18 votes. The president's own draft of a federal law on the formation of the upper house, according to which Federation Council members would be appointed by local executives and legislatures, has been collecting dust in the State Duma since May. Ultimately, the president may be compelled or allowed to establish by decree his own preferred rules for the selection of the new Federation Council members next December.

Among recent signs that freedom of the press, especially the outspokenness of private television, is becoming intolerable to certain authorities is the investigation conducted by the Procurator General's office against Yelena Masyuk, an NTV journalist who interviewed Chechen commander Shamil Basaev in late June. Possible charges include harboring a criminal and concealing information about a crime from public authorities. In another case, moving from investigation to indictment, the Prosecutor General's office pressed criminal charges on July 14 against the authors of the NTV television program "Kukly" ("Puppets") for libel of the president under Art. 131.2 of the Penal Code. On the air for the last six months, the program resembles satirical French and British political puppet shows, featuring irreverent caricatures of weighty actors on the Russian political stage (Yeltsin, Grachev, Kozyrev, and others). The Procurator General's office claims that the humorous content of one program in particular constitutes libel and an insult to the honor of the president and of some ministers. The offending broadcast showed rubber effigies of Yeltsin and Chernomyrdin, the former begging at the local train station and the latter selling parts of a gas stove. The criminal charges raised a storm of derision from Russian journalists and politicians. In the meantime, at the beginning of August, revealing the true stakes in the game, the Central Electoral Commission proposed banning all campaign advertising from privately-owned channels such as NTV.

According to Art. 92.3 of the Constitution, "In all instances where the president of the Russian Federation is unable to perform his duties, they are temporarily carried out by the chairman of the government of the Russian Federation." At the beginning of July, Yeltsin suffered heart difficulties and was immediately hospitalized. After dubious officials statements were issued to the effect that Yeltsin was still hard at work, many observers noted the lack of a reliable procedure for ascertaining, in such instances, if the president is genuinely capable of carrying out his duties. The 64 year-old Yeltsin was finally released from a suburban Moscow sanitar...
This formula, it turns out, encouraged defectors. Several run-of-the-mill election qualifying petition were forged. This led to several signatures on the opposition Democratic Union’s file at Attorney General Michal Valo’s office. This is an increasingly common tool in Slovak politics. A recent complaint filed at Attorney General Michal Valo’s office claimed that several signatures on the opposition Democratic Union’s (DU) 1994 election qualifying petition were forged. This complaint prompted police officials to spend the last three months validating the signatures of the 14,929 citizens whose names appeared on the DU’s nomination petition. If many forgeries are discovered, the attorney general is committed to prosecuting responsible DU members. The composition of Parliament should not be affected. He also stressed that citizens whose signatures were forged on the lists will not themselves be prosecuted.

Slovakia

If this past quarter’s events are any indication of the future, agents of the police will become an increasingly common tool in Slovak politics. A recent complaint filed at Attorney General Michal Valo’s office claimed that several signatures on the opposition Democratic Union’s (DU) 1994 election qualifying petition were forged. This complaint prompted police officials to spend the last three months validating the signatures of the 14,929 citizens whose names appeared on the DU’s nomination petition. If many forgeries are discovered, the attorney general is committed to prosecuting responsible DU members under the electoral fraud provisions of para. 177 of the Criminal Code. However, Valo announced on Slovakian radio that the composition of Parliament should not be affected.

A new “petition scandal” emerged in June as an ironic twist to the on-going investigation of DU. Two former members of the Associated Workers of Slovakia (AWS), a government party, claimed that approximately 2000 names on the AWS election lists were copied by current AWS parliamentary deputy Jan Garaj from a list of unemployed people at the district labor office in Nove Zamky. Ivan Duris, chairman of the extraparliamentary Republican Party (RP), announced that his party has requested the attorney general to investigate the allegations.

A recent amendment to Art. 48 of the electoral law grants additional power to national party chairmen to wage their partisan battles. The electoral formula in Slovakia allows each voter to select four individuals from a single party list. In the past, when a seat in Parliament became vacant for whatever reason, a substitute was chosen by determining which candidate from the departing MP’s party received the next highest number of votes on the party list. This formula, it turns out, encouraged defectors. Several run-up candidates who originally ran on Slovak National Party (SNP) and Movement for Democratic Slovakia (MDS) lists transferred to the DU after they were chosen as substitutes later in the parliamentary term. Under the new system, the national party chairman will choose replacements for departing deputies except in cases where a run-up candidate on the party list received an extraordinary number of votes.

Shadowy connections between security forces and political parties are not restricted to parliamentary politics. On May 28, the Special Control Agency (SCA) convened in camera to examine allegations that President Michal Kovac employed the Slovak Intelligence Service (SIS) last year to monitor the activities of Vladimir Meciar and other members of the MDS. The SCA was established pursuant to security law No. 46/1993 as an agency of Parliament to monitor and check government institutions which protect “the Constitution, internal order, and security of the Slovak Republic.” The SCA Board has five members who are appointed by parliamentary vote. At present only government parties are represented on the Board. The SIS is the national security agency of the Slovak Republic, and until Parliament transferred the power over the agency to the government last March, the president appointed the SIS chief. (See EECR, Slovakia Update, Vol. 4, No. 2, Spring 1995.) The SCA now retains supervision of the SIS, and Ivan Lexa, an MDS representative elected to Parliament last fall, currently heads both the SIS and the SCA.

Two Slovak dailies, Narodna obroda and SME published a secret report of the SCA allegation claiming that Kovac had used the SIS last year for improper purposes.

The allegations against the president prompted a no-confidence motion initiated by SNP Deputy Vitazslav Moravcik. The motion was approved by the 80 deputies representing the government coalition. One deputy from the MDS abstained, while 40 opposition deputies voted against. The vote has no legal consequence, as the president may be removed from office only for activities “against the sovereignty or territorial integrity of Slovakia” or against the country’s “democratic and constitutional system” (Art. 106 of the Constitution). In such cases, removal requires a three-fifths majority or 90 votes out of 150 in the National Council. (See the article by Spencer Zifcak in this issue.)

Kovac condemned the no-confidence motion as unconstitutional and stressed that he would not resign. He explained that his conflict with Meciar is based on differences of opinion over how politics “should be applied in a parliamentary democracy and a free, open society.” The majority of the deputies representing the government coalition left the parliamentary chamber prior to his speech. The president maintains the right to address Parliament according to Art. 102 of the Constitution.) Representatives of the opposition have confirmed their support for the president and initiated a resolution claiming that the SCA violated P4, 46/1993, by interrogating members of the SIS and by examining confidential documents in SIS files. Unpalatable to the majority, this resolution did not pass.

Slovak citizens themselves may also encounter heightened police scrutiny of their political activities if a recently proposed government-sponsored bill makes its way through the National Council (Parliament). The SNP and MDS propose to amend the criminal law on the protection of the republic to include punishment of anyone who undertakes anything that could “endanger the country’s constitutional order, territorial integrity, defense capability, or autonomy of
the Slovak Republic." The definition of criminal activity would also be expanded to include the dissemination on Slovak territory or abroad of any information menacing the security of the republic.

The ruling coalition persists in its campaign to curb President Kovac's powers as the trend towards monocratic government in Slovakia continues. The vehicle for this power grab is Art. 102.g of the Constitution which ambiguously grants the president the power to appoint and dismiss "the heads of central bodies and higher state officials in cases specified by law." Last March, the Constitutional Court interpreted the provision to allow Parliament itself, by a simple majority, to determine which government agencies are "central bodies." (See EECR, Slovakia Update, Vol. 4, No. 2, Spring 1995.) In the wake of that decision, Parliament has redefined which agencies are "central bodies" and the president has lost his power to appoint the director of the SIS. On May 2, the government submitted a draft law transferring to itself the power to name the chief of the general staff of the army. The holder of that post is currently nominated by the defense minister and approved by the president according to Art. 102.g of the Constitution.

On May 8, the MDS presented a declaration stating that Kovac's two years in office demonstrate that "he is not capable of conducting his duties" because he has polarized society, his actions are not impartial, he has failed to respect the "democratic decisions" of Parliament, and he has consequently flouted the will of the majority of Slovak citizens. For these reasons, MDS explained, Kovac should resign from his post. On June 17, MDS demanded the resignation of the president. The party criticized a recent interview Kovac gave to the Austrian weekly Profil, in which he allegedly questioned Slovakia's democratic system and thus "damaged Slovakia's interests abroad." MDS claims that Kovac has made a habit of such antinational actions.

During the second of its now famous "night sessions," on November 4, Parliament canceled the direct sale of 54 state-owned enterprises negotiated and approved by the Moravcik government (No 370/1994 [November 1994]). The cancellation was pushed through by the parties of the governing coalition, that is, MDS, SNP, and AWS. (See EECR, Slovakia Update, Vol. 4, No. 1, Winter 1995.) Miroslav Pacula (AWS), who sponsored the bill, claims that Premier Moravcik had promised the speaker of Parliament that his government would forego any sales of state-owned enterprises. Moravcik broke his word, argue the AWS and SNP, when he moved forward with the 54 direct sales and also violated the "good moral habits" provision of the Civil Code, para. 39. This bill passed in the National Council even though Premier Meciar and Speaker Ivan Gasparovic voted against it. President Kovac used his suspensive veto to return the law to Parliament, which nevertheless passed it again.

Pursuant to constitutional Art. 130, a group of 40 opposition deputies petitioned the Constitutional Court in January to review the privatization law, claiming that the law violated the ban on retroactive legislation and the constitutional protection of private property contained in Art. 20. In a ruling hailed by many as another demonstration of the growing independence of the Slovak judiciary, the Constitutional Court struck down the cancellation on the grounds that it violated the enumerated powers clause of the Constitution, the separation of powers doctrine, and the fundamental rights of the purchasers of state-owned enterprises.

Article 2.2 mandates that "State bodies may act only on the basis of the Constitution, within its limits, and to the extent and in a manner set down by law." In addition, constitutional Art. 86 does not grant Parliament the right to cancel a government resolution. The Court held that Parliament's cancellation of the government's resolution to sell certain industries violated Art. 2 as it operates in tandem with Art. 86. Furthermore, the Court determined that Parliament had also usurped judicial functions by holding the former government culpable under the Civil Code when only courts may rule on violations of the law.

The Court also found that the cancellation constituted unlawful expropriation of private property without compensation and in the absence of any overriding public interest. Constitutional Art. 20 guarantees that "everybody has the right to own property" and that "expropriation or restrictions of property rights shall be imposed only to the extent legally justified for the protection of the public interest and shall be justly compensated." The Court held that the law violated Art. 20 in connection with Art. 12.1 which mandates that "All people are free and equal in their dignity of rights. Their fundamental rights and freedoms are inherent, inalienable, imprescriptible and indissoluble." Parliament had failed to demonstrate that any important public interest was protected by the cancellation and had offered the buyers no compensation for the taking of their property rights. Put simply, the buyers' fundamental rights were violated by the cancellation of the sale.

The Court's ruling drew many comments. Stefan Gavornik, president of the National Property Fund's Presidium, maintained that Parliament's annulled decision had been "in the interest of society," but he stressed the necessity of respecting the Court. SNP Chairman Jan Slota regrets the Court's ruling and believes that it could damage Slovakia. Peter Weiss, chairman of the opposition Party of Democratic Left (PDL), said that "If the governing coalition were not so arrogant, our republic could have spared the needless damage to its reputation." Leader of the Christian Democratic Movement (CDM), Jan Carnogursky, said the Court's decision confirms that, despite many shortcomings, "democracy still functions" in Slovakia.

Under constitutional Art. 152, Parliament has six months to bring the privatization resolution into conformity with the
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currently committed to winning SNP assent. In the meantime,\n
the ratification of the treaty might be postponed owing to the negative\nresult of his coalition partner and hinted that ratification may\nbe delayed due to SNP opposition to the treaty. He is apparently\committed to winning SNP assent. In the meantime,\n
Meciar has sought support for the bi\ntreatment from the three Hungarian parties represented in Parliament, meeting for the first time since 1992 with Hungarian party representatives on June 19. The agenda of this meeting focused on the\nratification of the Framework Agreement on the Protection of Minority Rights, and on the Slovak-Hungarian basic treaty.

Hungarian Civic Party Chairman Laszlo Nagy said that the Hungarian deputies supported the ratification of both documents, while Meciar announced that he believes that the basic treaty will be ratified "even if no one from the opposition supports it." Areas of continued dispute include the question of "alternative" (bilingual) education, the funding of minority cultural activities, and a draft law on the state language.

Shortly following the meeting, in a move that does not bode well for future negotiations, the government approved a draft law limiting the use of minority languages in schools, state institutions, and in the media. This law also provides for the establishment of so-called "language police officers," who would serve as inspectors under the Ministry of Culture—an SNP ministry—to ensure that public events are conducted in the Slovak language only.

While relations between members of the so-called "great coalition"—consisting of the Liberal Democratic Party (LDP), the Slovenian Christian Democratic Party (SCDP), and the United List of Social Democrats (ULSD)—have been uneasy ever since its formation, the removal of SCDP President Lojze Peterle from his post as foreign minister on October 31, 1994, was viewed as a positive change by other coalition partners. In the beginning of May, the SCDP suffered yet another defeat when Peterle ran unsuccessfully for the presidency of the parliamentary Commission for International Relations, with 27 votes in favor and 32 against. Although Peterle's failure to win the necessary votes provoked speculation about such a move, SCDP spokesmen stated that the party did not intend to quit the coalition. Instead of proposing a new candidate for the post, moreover, SCDP decided to compensate for its losses by accepting the position of state secretary in the Ministry of Education and perhaps also an ambassadorial post in either Vienna or Bonn.

In spite of tensions within the coalition, the coalition partners succeeded in coordinating a budget proposal by March 26. The government passed a budget with expenditures set at 510.4 billion tolars, and revenues envisaged at 521.7 billion tolars. The anticipated 11.3 billion tolars surplus will be applied to the 41 billion tolars foreign debt which Slovenia is obliged to pay by the end of the year. The budget passed despite opposition from the ministers of science and technology, of culture, and of agriculture, who complained that their ministries' requests were not met.

Relations among other political parties have remained relatively stable during the past several months. In preparation for the fall 1996 elections, the set of possible future coalitions is starting to take shape. On May 6, the National Democrats (ND) merged with the Social Democratic Party (SDP). On May 27, SDP President Janez Jansa urged the cooperation of other parties of the "Slovene spring" which, he argued, is the only viable means to challenge successfully the "ruthless liberalism" of the Liberal Democracy Party (LDP)/United List of Social Democrats (ULSD) alliance. In response, the ND adopted the agreement on uniting the two parties and continue to discuss both the new party statutes and the election of the new party leadership.

Also significant was the unsuccessful vote of no-confidence attempted against Meta Zupancic, minister of judicial affairs. During the nominations procedure, the had prevented Sergej V. Majhen from becoming a notary public. Majhen attempted to appeal her decision to the appellate court and even went on a hunger strike. As a result, SPP threatened to call for a no-confidence vote in Zupancic unless the resigned or Prime Minister Janz Drnovsek took suitable action. (Article 112 of the Constitution stipulates that either Parliament or the prime minister may dismiss ministers from office.) Zupancic refused to resign from her post and, in the last week of March, the motion was submitted, accusing Zupancic of abusing her position, neglecting duties, and breaching the Act on the Notorial Service, the Constitution, and the Declaration of Human Rights. Drnovsek left the decision to Parliament. Zupancic received support from the LDP and the ULSD, while the SCDP and most of the opposition were against her. This partisan line-up was no surprise, as the
SPP and the SDP had publicly announced their intentions of joining the coalition of the "Slovene Spring" parties, consisting of the SPP, SCDP, and others. Zupancic received a strong show of support among the MPs (41 voted against the no-confidence motion, while only 25 voted in favor). This sequence of events corroborated Drnovek's initial comments that the dispute itself had resulted from intensified tension among parliamentary parties. He nevertheless concluded that elections would still be held, as slated, in autumn 1996.

Debate continued to rage over a possible amendment to the second paragraph of Art. 68 of the Constitution, which prohibits foreigners from acquiring title to land except by inheritance, and only when reciprocity of such rights of acquisition are recognized. Such an amendment has long been demanded by Italy as the price of full integration into the European Union (EU). Many Slovenians fear that if the amendment is adopted, Italian citizens or other foreigners will purchase land in the northern, Slovenian part of Istria (most of which presently belongs to Croatia), which was part of Italy after WWII.

In speeches in late June, President Milan Kucan called the EU requirement "unfair" and several members of the Constitutional Court publicly declared their opposition to the amendment. Tone Jerovsek, president of the Constitutional Court, remarked that the present Constitution does not prevent foreigners from acquiring real-estate in Slovenia under certain conditions and added that Slovenia should be allowed to integrate with the EU gradually. The Constitution itself states that "Foreigners may acquire title to property affixed to land only under such conditions as are determined by statute" (Art. 68). In fact, it is currently possible for foreigners to acquire ownership of real estate (e.g., buildings, factories) but not of land as such. Unimpressed by such a concession, the EU continues to call for changes to Art. 68. On May 29, the government proposed an amendment allowing foreign ownership of land under restrictions to be determined by statute and, on June 23, the government announced that Parliament had initiated the procedure for changing the Constitution and drafting property-rights legislation to satisfy EU standards.

On April 6, negotiations began in Brussels between Slovenia and the EU on an Association Agreement (to replace the 1993 Cooperation Agreement). EU spokesmen stated that agreements with Slovenia would resemble those already signed by the Visegrad Group and those currently being negotiated with the Baltic states. Regarding past disagreements over agricultural policy, the Association Agreement envisages a "reciprocal" exchange of products, which means that Slovenia will have control over the rate at which it opens its market and be able to do so at its own discretion. The Association Agreement was initiated on June 15 and must be signed and ratified by members of the EU, the European Parliament, and Slovenia before it comes into force.

Relations between Italy and Slovenia continued to be tense, but some progress was recorded. A storm of accusations followed an April speech by President Kucan in Venice, which Italian politicians interpreted as revealing Slovenian irredentist claims on Italian territory. Despite this mild scandal, however, the two states resumed bilateral negotiations covering all outstanding property disputes on July 10.

These disputes mainly concern Istria, a region which, over the past two centuries, has been governed by Austria-Hungary, Italy, Yugoslavia, and the South Slav successor states. While Slovenia negotiated with Italy and the EU, Istrian politicians called for regional autonomy. Naturally, these calls have been stoutly rejected by the Ljubljana government. At the World Istrian Congress in April, the Slovenian foreign minister called Istrian autonomy a "foolish" idea. The question of Istrian autonomy, it should be noted, remains an even greater problem for Croatia, because only the northern part of Istria presently belongs to Slovenia.

The government continued its efforts to regulate the economy by legislative means. A law establishing maximum and minimum wages was passed by Parliament in late May. The Slovene employers' association berated the law as "absurd," and a report written by the IMF in June criticized the lack of wage flexibility in Slovenia. The government also submitted a bill on corporate raiding designed to protect Slovenian companies from hostile takeovers. If passed, this law would require state control of companies in which a foreign investor acquired more than a one-quarter share. It would also give Slovenian investors preference over foreigners for five years. Several privatized companies have announced that they plan to list on the Ljubljana stock exchange once this takeover bill becomes a law. The government also prepared an amendment to the pension law which would reduce increases in pension payments. Pension funds for the aging Slovenian population (0.9 wage earners for each pension recipient in 1994, down from 2.5 in 1985) currently engross 31 percent of all salaries.

A bill on returning nationalized property to the Church divided Parliament (May); and politicians were divided over the denationalization law (April). The principal question in both cases was whether former property owners should retrieve their confiscated property or only be compensated monetarily by the government.

The old scandal over a shipment of smuggled arms discovered at the Maribor airport in 1993 recently reemerged in a new form. Janez Jansa, head of the SDP, is among those suspected of being involved in the arms smuggling deal. Jansa was minister of defense when the shipment was discovered, and is believed by some to have engineered the scandal to compromise President Kucan. Jansa—a political enemy of President Kucan and a reformer of the Slovenian Communist Party—claims that the charges against him are part of a political purge designed to discredit him before the next elections.

Another player in the Maribor events, Silvo Komar, was appointed an advisor to the government in April. A week
June 8, President Kuchma canceled his March decree. The Parliament's Presidium was also postponed. Meanwhile, on and consideration of the new constitution by the Crimean referendum was tabled, thus postponing it indefinitely, Crimean legislators complied. On June 15, the plan to hold a decision on holding the referendum. On May 31, the assembly called on the Crimean Parliament to rescind its intention to go through with the plebiscite. A month later, the national Parliament, with a group of deputies loyal to Kiev, led by Refat Chubarov (leader of the Tatars), distancing themselves from the separatists. A month later, he was dismissed from that post and appointed to advisor to the chief of the Security and Intelligence Service. A former communist and close friend of President Kucan, Komar was head of the Maribor secret police in 1993. He was tried in 1994 for "abuse of mandate" (not reporting the arms shipment) in connection with the Maribor case and resigned his post, but was eventually acquitted.

Some settlements were also reached on disputes outstanding with other former Yugoslav states. In early June, Slovenia agreed to issue bonds covering 18 percent of former Yugoslavia's debt. Also in June, Slovenia and Croatia reached an agreement resolving most of their remaining disagreements, including the location of 98 percent of the border dividing the two states. The remaining border issues mainly concern the Gulf of Piran and Slovenian access to international waters. Financial disputes, including the question of Croatian deposits in the Ljubljanska Banka, continue to strain relations between the two countries.

Ukraine

If the nationalist trident (tryzub) is now the official symbol of Ukraine, and the Archangel Michael is soon to become the official symbol of the capital, Kiev, then the symbol for the country's politics should rightfully be the seesaw. The second quarter of 1995 was nothing if not a series of reversals between the principal antagonists on the constitutional scene: the governments of Ukraine and Crimea, and the president and Parliament in Kiev. Maybe Ukrainian politicians are learning the art of compromise.

In the three months since President Leonid Kuchma suspended both the Crimean government and its Constitution, the tension eased progressively with each swing of the pendulum. On April 4, the Crimean Parliament appealed to the Ukrainian Verkhovna Rada (Parliament) to strike down the presidential decree, but backed away from the threat made earlier to hold a referendum on separation in conjunction with local elections scheduled for June 25. Two days later, the Crimean Parliament formed a commission to draft a new constitution. The new draft was duly presented to the Ukrainian Parliament on June 2. On April 25, however, the Crimean deputies reversed themselves and again voted in favor of the referendum. This climbdown caused a split in the Crimean Parliament, with a group of deputies loyal to Kiev, led by Refat Chubarov (leader of the Tatars), distancing themselves from the separatists. A month later, the national assembly called on the Crimean Parliament to rescind its decision on holding the referendum. On May 31, the Crimean legislators complied. On June 15, the plan to hold the referendum was tabled, thus postponing it indefinitely, and consideration of the new constitution by the Crimean Parliament's Presidium was also postponed. Meanwhile, on June 8, President Kuchma canceled his March decree. The local elections scheduled for June 25 were held according to the Ukrainian, rather than the Crimean, electoral law.

More serious, politically and constitutionally, than this interparliamentary jousting, however, are the status and rights of the Crimean Tatars. If no one was paying attention before, this issue was forced upon public attention by violent clashes at the end of June between Tatars and alleged criminals. The Kiev government was blamed for not providing adequate security. Earlier, on April 6, the Ukrainian Parliament restored the rights of deported Crimean peoples to special representation in local elections. President Kuchma has proposed that the Tatar language be given official status alongside Ukrainian and Russian in the autonomous republic, but it will take more than constitutional tinkering to cool that cauldron.

In Kiev, the executive-legislative "breakfast war" wore on. The government, headed since June 1994 by Vitalii Masol, resigned on April 4, following a no-confidence vote in Parliament. This resignation cleared the way for President Kuchma to appoint a government entirely of his own choosing. He waited, however, until passage of his "Power Bill" which would give him a freer hand in the government's formation. This opportunity appeared within sight on May 18, when an amended version of the controversial bill was passed in Parliament, by 219 votes against 104. Immediately thereafter, Kuchma asked Yevhen Marchuk to form a new government; he also made it clear that he will have the last word on the composition of the new government.

The passage of the new law on presidential powers was made possible by a compromise on its most difficult aspects. In a tit-for-tat, the provisions allowing Parliament to impeach the president, and for the president to dissolve Parliament, were dropped. The new law, however, contains provisions which conflict with 56 of the norms of the current Constitution. This incompatibility necessitates the enactment of a constitutional amendment, whereby the constitutional norms in question would be suspended. The leftist majority in Parliament was apparently reluctant to make that move. To get around this blockage, the president decreed on May 31 that a consultative plebiscite would be held on June 28, asking voters in which institution they had confidence: president or Parliament? Immediately, Parliament, by a vote of 232 to nine, vetoed the presidential decree, calling it unconstitutional and, moreover, unaffordable. It also directed the president to submit a draft constitutional accord and, by June 8, his nominees for the new government as well as for the Constitutional Court. Declaring the parliamentary veto itself unconstitutional and an intrusion on his authority, President Kuchma reaffirmed his intention to go through with the plebiscite.

By one of those miracles which are beginning to give the otherwise lackluster Kuchma the sense that he is leading a charmed life, a "Constitutional Accord" between the president and Parliament was reached and duly signed by Kuchma and

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parliamentary Speaker Oleksandr Moroz in a ceremony on June 8. The constitutional status of the accord seems unclear. The vote was 240 to 81, although a majority would have been sufficient if the accord were regarded as ordinary legislation. But since the accord in effect leads to a suspension of several constitutional provisions, it might also be considered an amendment to the Constitution, which, according to Art. 171, may take effect only if supported by two-thirds of all deputies (according to Art. 98, Parliament has 450 members).

Following the terms of the agreement, the plebiscite scheduled for June 28 was canceled. The accord, embodying the amended (as of May 18) version of the “Power Bill,” would serve in place of the Constitution temporarily, and would suspend those constitutional provisions with which it conflicts. A new constitution is to be agreed upon within a year and submitted for public ratification. The president can now appoint the cabinet of ministers and prime minister without parliamentary approval, although Parliament may pass a vote of no-confidence in the cabinet, collectively or individually, a move which would necessitate the cabinet’s or minister’s dismissal. The president is empowered to veto parliamentary legislation and Parliament can veto presidential decrees. Thus, Leonid Kuchma now has a constitutional basis for the kind of presidential regime that, he seems to believe, will enable him to accomplish his program of economic reform.

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Russia as an Hour-Glass Society: A Constitution without Citizens

Richard Rose

A constitution is not only about political institutions; it also makes assumptions about the relations between the state, society, and citizens. These can take very different forms.

In a completely totalitarian system, the relation between the state and citizens is simple: all activities of individuals are meant to be integrated under the direction of the party-state. The distinction between state and society is insignificant, given the unifying role of the Communist Party. Soviet election results illustrate the support the state could officially mobilize; in 1984, 99.99 percent of adults voted, and 99.94 percent of the votes were cast as the party directed.

A civil society integrates individuals and the state, but it does so through intermediary social institutions that are independent of the state. A civil society requires that the state be a Rechtsstaat, that is, governed by a rule of law that recognizes the integrity of social institutions independent of it, such as churches, farmers' cooperatives, businesses, trade unions, universities, and cultural institutions. Individuals are not required to participate in politics or accept the pre-eminence of the state in their everyday life. The modern state developed as a Rechtsstaat, but until the twentieth century such states usually allowed only a small percentage of their citizens the right to vote or participate in government.

In a civic democracy individuals are not only integrated in intermediate social institutions but also these institutions can influence the state. Robert Putnam, in an innovative study of the relation between individuals, civil society, and the state, *Making Democracy Work* (Princeton, 1993, p.87), characterizes a civic community as a democracy in which individuals actively participate in public affairs. Individuals participate through a variety of social institutions free of state control, some directly political in nature, such as political parties, and some non-political in purpose, such as choral societies and sports clubs. Putnam advances the argument that cooperation in "horizontal" (that is, local, face-to-face) groups creates social capital that can then be used to exert influence on the state, for people who learn how to work together have the skill and the networks to represent their views and voice demands upon government. This conclusion follows the argument advanced by Gabriel Almond and Sidney Verba in *The Civic Culture* (Princeton, 1963), that social trust and cooperation create a sense of civic competence that enables individuals to use their votes to elect a government and hold their representatives accountable.

But what happens if the state is not "citizen friendly," because rulers believe that either they or the party know best what the people ought to want and how they ought to be governed? In such circumstances citizens are likely to have an "uncivic" objective, minimizing contact with the state and relying on dense horizontal networks of friends to...
insulate themselves from the state. A character in a novel by Vladimir Dudintsev describes Russians as living like two persons in one body, the “visible” person, saying and doing what the state commands, and the “hidden” person, thinking and doing what he wants in the privacy of the home or among a trusted circle of friends. Stephen White described the result as “institutionalized hypocrisy.” Insofar as contacts with the state are necessary, people will not expect to exert influence through democratic channels; the only hope of benefit will be if a citizen can find a way to “exploit the exploiters.” While the regime that created such behavior has fallen, the legacy of what the French call incivisme remains strong today.

The hour-glass society
In an hour-glass society there is a rich social life at the base, consisting of strong informal networks relying on trust between friends, relatives, and other face-to-face groups. Networks can extend to friends of friends, too. At the top of the hour-glass, there is a rich political and social life, as elites compete for power, wealth, and prestige. In the vast Russian state, cooperation within and between elites and institutions is the normal way for individual officials to secure their own goals. Such a society resembles a civil society insofar as a number of informal and even formal institutions are tolerated and now legally recognized by the state. Yet the result is not a civic community but an hour-glass society, because the links between top and bottom are very limited.

The narrow mid-point of the hour-glass insulates individuals from the influence of the state. If the institutions on which they rely for their everyday welfare are free of state control, as well as having little chance of influencing the state, then citizens can be described as “negatively integrated,” and insulated from the demands of an undemocratic and potentially oppressive regime. The state can tolerate such institutions as long as activities are confined to looking after small-scale individual concerns and do not concern affairs of state.

Late nineteenth-century Imperial Germany was a classic example of negative integration. There was legal recognition of trade unions and a social democratic party; the new mass of industrial workers thus had their own subcultural institutions in the lower half of the hour-glass, dealing with the immediate needs of workers, such as help in sickness or old age. The state constituted the upper half of the hour-glass, with a government that was not accountable to the electorate or to Parliament but to the Kaiser. For workers, involvement in sub-culture institutions was a substitute for democratic politics. The Wilhelmine Reich tolerated a dense and heterogeneous range of institutions of civil society because, as Guenther Roth explained in his classic study of The Social Democrats in Imperial Germany, negative integration of workers “provided an important means for the controlled expression and dissipation of conflict and thus contributed to the stability of the Empire” (Bedminster Press, 1963, p.315).

Northern Ireland offers a contemporary example of negative integration, for Catholics alienated from the British government have always maintained a very dense network of social institutions that they themselves controlled including, church, schools, pubs, and Irish sports clubs that banned members from playing “English” games such as cricket. Catholic political parties advocated secession from the United Kingdom and integration in a united Republic of Ireland. Classic Irish nationalists ignored the politics of the top half of the hour-glass, controlled by Ulster Unionists who won every election since Protestants were a big majority of the electorate. Since 1969 the strength of insulation from the state has been demonstrated by the Irish Republican Army’s ability to maintain a violent armed campaign, seeking to force Britain out of Northern Ireland and subsequently to present itself to the British government, in the guise of Sinn Fein, as capable of delivering peace to a “top down” security force that was incapable of controlling the bottom half politically or by force.

Russia is an hour-glass society, because much of everyday life is organized to insulate people from the negative effects of a state that is not regarded as benevolent. Yet it has not been negatively integrated, for communist ideology did not recognize the right of institutions to exist independently of the party-
state. As Vladimir Shlapentokh has shown in *Public and Private Life of the Soviet People* (Oxford University Press, 1989, p.9ff), in the Soviet Union, civil society was not weak but illegal. In a totalitarian state the dense network of associations connecting individuals and institutions at the bottom of the hour-glass had to remain informal in order to neutralize the political implications of autonomy. If informal associations were recognized officially, they would have been classified as illegal or, even worse, anti-state.

In the Soviet Union, citizens were “negatively atomized,” for the institutions into which they were integrated were not large, impersonal bureaucratic institutions with a legal status, like the German Social Democratic Party, which has contested every election since 1871. Russian citizens have relied on atomistic units that depended on face-to-face informal ties that lacked legal recognition. Atomization was intensified by the geographical scale and the massive population of the Soviet Union.

The Soviet Union left a double legacy: individual Russians are likely to have a high degree of trust in their immediate social network, and a high degree of distrust in the Russian state. The result is a Constitution without citizens, because most Russians do not see their everyday concerns as integrated with the government established by the Constitution of the Russian Federation.

**Informal trust abounds**

The Russian proverb, “A hundred friends are worth more than a hundred rubles,” epitomizes the importance of informal networks. Today, it is not necessary to rely upon anecdotes and allegory for asserting the importance of social networks. Instead, we can use normal social science methods to collect data about informal and formal networks through sample surveys. The data presented here, unless otherwise indicated, is drawn from *New Russia Barometer (NRB IV)*, supported financially by the British Know How Fund, the fourth in an annual series of nationwide Russian surveys directed by the author as part of a program to monitor mass response to the transformation of postcommunist societies. For *NRB IV*, VCIOM interviewed face-to-face a stratified random sample of 1943 Russian adults, representing Asiatic as well as European Russia, and rural as well as urban populations.

At the material level, social cooperation is necessary for people to secure enough to avoid becoming destitute. When Russians are asked whether they earn enough from their official job to meet their basic needs, only one in eight report they do. Yet three quarters say that they have been able to get through the past year without borrowing money or spending savings. The majority get by because, in addition to the official economy, they rely on a multiplicity of unofficial economies, such as growing food to eat, exchanging help with friends and relatives, going to friends of friends for favors, having a second job, or relying on tips and bribes or earning foreign currency.

The rise of a Russian Mafia to exploit cash-rich individuals has distracted attention from cash-free economies that depend on social cooperation. Most Russians do not grow cucumbers and potatoes for sale, but to eat at their own dinner table. If a friend is asked to help with a house repair or look after children, that person would be insulted to be offered money in return, for Russians value friendship more than rubles. When immediate friends cannot help, people often turn to friends of friends for a favor. In many cases strangers will oblige without being paid any money, thereby enlarging their own network of people on whom they can call for help some day.

The *NRB IV* shows that virtually every Russian family relies on two types of economies, the official economy in which a wage or pension is paid in rubles, and social economies in which goods and services are produced, exchanged, and consumed without money changing hands. Less than a third of all Russian households are also active in the “uncivil” economy, drawing a second cash income from work in a shadow economy or other extra-legal or illegal forms of remuneration.

To get by, Russians can combine resources from a multiplicity of economies. Just as investors in market economies diversify investments, so households trying to cope with the transformation combine resources from official, social, and uncivil economies. When the *NRB IV* asked people to
identify the two most important economies for their household, 61 percent relied on a defensive portfolio in which a social economy, such as producing home-grown food, is important along with an official wage. When official income is inadequate for a family, earning money in the shadow economy or on the side is a logical supplement. But when Russians are short of money, today, it is not always easy to get work in an uncivil economy, because supply greatly exceeds demand. Hence, only 17 percent of Russian households rely on an enterprising portfolio, combining money incomes from the official economy and uncivil economies. The vulnerable are distinctive because they rely solely on the official economy. Whatever their current standard of living, this group is especially at risk in the transformation. Only 11 percent are marginal, subsisting on the fringes of society through social economies.

Many Westerners assume that the best way to deal with the social problems of Russia today is to promote social protection through the state. This can be done by adopting universalistic income-maintenance politics along the lines of the Scandinavian social democratic welfare state or through means-tested state income-maintenance programs of a kind in use in Britain. But either type of welfare state can be recommended only if it is trusted, effective, and honest.

The Russian Federation today is unable to guarantee Russians an income. The 1995 NRB IV found that one in seven of the labor force has been unemployed in the past year, but only a third of those received any unemployment benefit while without work, and usually for only a fraction of the period of their unemployment. The ineffectiveness of the state to help the unemployed is compounded by the inability of employers to pay wages on time. More than half of Russian workers report that they have been paid late or not at all for at least one month during the past year.

In Scandinavia's civic democracy, citizenship is deemed an entitlement to social benefits as well as to political rights. But people in an hour-glass society do not look to the state for protection. In a negatively integrated society such as the Kaiser's Germany, trade unions provided social protection through mutual benefit funds. Bismarck calculated that administering funds that represented the savings of workers made unions more responsible and less revolutionary.

In a negatively atomized society, however, people do not trust any large, impersonal organization to provide for their welfare. The NRB IV demonstrates that the great majority of Russian workers see trade unions as remote from themselves (Table I). Even though there is a trade union at almost everyone's place of work, a third are not members. A majority who are trade union members distrust their union officials. Inasmuch as the administration of welfare benefits by trade unions normally takes place at the national level, it is particularly noteworthy that only 15 percent of Russian workers say they trust their national union officials.

The Soviet enterprise remains formally important as a source of welfare benefits. The 1995 NRB IV found that more than two-thirds of Russian workers receive some social benefits at their place of work, such as medical care, housing, holidays, or child care. But nearly half of those eligible to receive benefits said that they were not worth anything at all, and only three percent say that benefits received through employment are first or second in importance in the portfolio of resources upon which the family relies.

When Russians are in trouble, they turn to their friends—and the great majority of Russians are con-

<table>
<thead>
<tr>
<th>TABLE I</th>
</tr>
</thead>
<tbody>
<tr>
<td>RUSSIAN WORKERS DISTANCE THEMSELVES FROM UNIONS</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Union officials</th>
<th>At workplace</th>
<th>National Union</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trust</td>
<td>27%*</td>
<td>15%</td>
</tr>
<tr>
<td>Distrust</td>
<td>38%</td>
<td>50%</td>
</tr>
<tr>
<td>Not Union Member</td>
<td>35%</td>
<td>35%</td>
</tr>
</tbody>
</table>

*percentages refer to persons in the labor force

Source: Centre for the Study of Public Policy, University of Strathclyde, New Russia Barometer IV (1995), a nationwide representative sample of 1943 persons; fieldwork by VCIOM.
theory of an hour-glass society postulates that strong ties between the “atoms” in Russian society are a substitute for political participation. Given the history of undemocratic “top down” mobilization by the Soviet state, cooperation in face-to-face primary groups reflects distrust of the top half of society. Russians trust people whom they know but not people in general. When asked whether most people can be trusted or whether you cannot be too careful in dealing with people, 75 percent choose the distrustful alternative.

Even though Russians rely on a dense social network for economic survival, the great majority do not work through formal institutions to solve local problems. Three-quarters said that they never participated in institutions of this kind, and only one in ten sometimes or often participates in local community associations. The very idea of locally initiated community associations appeared unfamiliar to many respondents socialized in a community in which the Communist Party was the guiding force. When Russians are asked to characterize what kind of people participate in local groups, as many as a third reply that they have no idea.

When people in postcommunist societies are asked their views about a variety of institutions of governance and civil society, the median response normally shows skepticism. By contrast, in Russia the median response normally registers distrust. Political parties, a central institution of representative democracy, were actively distrusted by 83 percent of respondents in the 1994 NRB, with ten percent neutral and only six percent positive. The level of distrust of Parliament, 72 percent, was almost as high. Distrust in institutions of authority, such as the police, courts, and civil servants, was similarly high; an average of 71 percent held negative views of these two groups. The “highest” (sic.) level of trust was shown to two traditional institutions, the church (51 percent) and, before the attack in Chechnya, the army (41 percent).

Even in a civic democracy, institutions of national government are remote from the lives of most people. Local government and local institutions are familiar, because these are the institutions that deliver the majority of public and private services in every modern society, whatever the mix between public and pr-
TABLE III

EXPECTATIONS OF FAIR TREATMENT

<table>
<thead>
<tr>
<th>Question: If you went to see about something would you expect fair treatment from:</th>
<th>Yes</th>
<th>No</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Post office</td>
<td>78%</td>
<td>22%</td>
<td>56%</td>
</tr>
<tr>
<td>Doctor</td>
<td>67%</td>
<td>33%</td>
<td>34%</td>
</tr>
<tr>
<td>Bank</td>
<td>67%</td>
<td>33%</td>
<td>34%</td>
</tr>
<tr>
<td>Grocery shop</td>
<td>55%</td>
<td>45%</td>
<td>10%</td>
</tr>
<tr>
<td>Social Security office</td>
<td>49%</td>
<td>51%</td>
<td>-2%</td>
</tr>
<tr>
<td>Municipal office</td>
<td>30%</td>
<td>70%</td>
<td>-40%</td>
</tr>
<tr>
<td>Police</td>
<td>30%</td>
<td>70%</td>
<td>-40%</td>
</tr>
</tbody>
</table>

Source: Centre for the Study of Public Policy, University of Strathclyde, New Russia Barometer IV (1995), a nationwide representative sample of 1943 persons; fieldwork by VCIOM.

vate provision of market and social services. The local post office, grocery shop, doctor's office, and police are familiar in every local community—and Russians can draw upon firsthand experience in judging how well or badly they are treated by these institutions.

The good news is that the majority of Russians expect to be treated fairly by a number of institutions in their community (Table III). The post office, a paradigm of bureaucracy, has the best reputation for fairness. Whatever the slowness of delivery of mail, postal clerks are seen as treating everybody the same and there is no shortage of stamps. Two-thirds reckon that doctors, a traditional helping profession, treat people fairly. Previous NRB surveys have found a negative image of businessmen, as hardworking, intelligent, dishonest, and dependent upon political connections. Nonetheless, locally, a majority expect that they would be treated fairly by a bank and by a local grocery shop. The higher rating given a bank is likely to reflect the fact that whenever the command economy created shortages, grocery shops often exploited their control of stocks to discriminate between customers.

The bad news is that a majority of Russians expect major public institutions to treat people unfairly. The local social security office is not viewed as a haven for people wanting help, but as treating unfairly people who seek their assistance. Municipal offices have a reputation for unfairness as great as the police. In contemporary Russia people enjoy freedom from oppression, but they cannot enjoy the positive benefits of citizenship so long as public institutions closest to them are not treating citizens fairly.

Implications for the Russian Constitution

In postcommunist countries throughout Central and Eastern Europe, a common pattern occurs when people are asked to evaluate the old communist regime, the current system with free elections and competing parties, and what they expect the regime to be like in five years. The New Democracies Barometer of the Paul Lazarsfeld Society (Vienna), finds that a majority have a negative view of the communist regime and a positive view of the current regime. A positive view is not a reflection of good government in Romania, but a rejection of the old regime. Expectations of how the new democracy will evolve in the next five years are even more positive.

Russia is different, for a majority consistently give a positive rating to the regime before the start of perestroika (Table IV). The new Russian regime is viewed much less favorably than the old,

TABLE IV

RATING OF RUSSIAN REGIMES—PAST, PRESENT AND FUTURE

<table>
<thead>
<tr>
<th>New Russia Barometer</th>
<th>Before perestroika</th>
<th>Today</th>
<th>In five years</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. 1992 (January)</td>
<td>50%*</td>
<td>14%</td>
<td>50%</td>
</tr>
<tr>
<td>II. 1993 (June)</td>
<td>62%</td>
<td>36%</td>
<td>52%</td>
</tr>
<tr>
<td>III. 1994 (March)</td>
<td>51%</td>
<td>35%</td>
<td>49%</td>
</tr>
<tr>
<td>IV. 1995 (April)</td>
<td>67%</td>
<td>26%</td>
<td>40%</td>
</tr>
<tr>
<td>Change, 1995-1992</td>
<td>17%</td>
<td>12%</td>
<td>-10%</td>
</tr>
</tbody>
</table>

*number indicates % giving a positive rating to system of governing

Source: Centre for the Study of Public Policy, University of Strathclyde, New Russia Barometer nationwide representative sample surveys, I (N: 2106); II (N: 1975); III (N:3353); IV (N: 1943).
regime. When the first NRB went into the field in January 1992, only 14 percent of Russians gave the new regime a positive rating, a reflection of disgust with the breakup of the Soviet Union. Approval has risen since, but not by much. In the fourth NRB, only 26 percent gave the regime a positive rating. Hopes for the regime in the future are higher than the present, but expected future improvements do not produce an endorsement as favorable as that given the Brezhnev era regime.

The trend is up in evaluations of the old regime, an indication that experience with the turbulence of the present makes the past look better in retrospect than it did at the time. Endorsement of the current regime has been fluctuating, and falling in the past two years. An even stronger warning signal is that hope for the future is falling. In the first three years of the NRB surveys, half were positive about the future of the new form of government and about a quarter were neutral; pessimists were in a shrinking minority. In 1995, however, the position reversed. Only 40 percent are optimists about the future and the pessimists have increased to 31 percent of the total. The median shows that Russians do not know what to expect in the future.

The discrepancy between a negative evaluation of the regime and the 1993 referendum results is more apparent than real. A referendum is a very blunt instrument; an individual has only three choices, to vote yes, no, or abstain. By contrast, a public opinion survey can offer individuals a broad range of choices: one, two, or three cheers for a government initiative, a less or more emphatic thumbs down, or a shrug of the shoulders. It can thus show what people were thinking when forced to wield a ballot or abstain.

The bluntness of a referendum ballot was exploited by the Russian government in both 1993 votes. The April ballot was a plebiscite, Russians were not asked to vote on a constitutional amendment or a legislative bill. They were asked simply whether or not they had confidence in President Boris Yeltsin, and whether or not they had confidence in unspecified socio-economic policies of the president and the government. Every student of public opinion polls in a democratic society knows that there are very big fluctuations in the popularity of presidents and prime ministers within each incumbent’s term of office. The result one gets depends greatly on the month in which the question is asked, and this is true of an “opinion poll” referendum as well as of an opinion poll.

In June 1993, the second NRB asked people the degree of confidence that they had in the Russian president (Table V). The answers showed that 70 percent had reservations, with some relatively positive and others relatively negative. Subsequent trends in many opinion polls indicate that many of those who were trustful to a degree at the time of the referendum have subsequently become negative.

The December 1993 ballot on a constitution for the Russian Federation was held in less than ideal circumstances. The text was not prepared by a popularly elected deliberative body and it was only published a month before the referendum. This was also a

| TABLE V |
| DIFFERENT WAYS OF READING THE YELTSIN REFERENDUM, APRIL 1993 |

<table>
<thead>
<tr>
<th>Referendum</th>
<th>Opinion survey</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vote: Yes</td>
<td>31% na</td>
</tr>
<tr>
<td>Opinion: A lot of confidence</td>
<td>na 4%</td>
</tr>
<tr>
<td>Opinion: Some confidence</td>
<td>na 30%</td>
</tr>
<tr>
<td>Vote: Abstain, invalid. Opinion: No answer</td>
<td>47% 1%</td>
</tr>
<tr>
<td>Vote: No</td>
<td>22% na</td>
</tr>
<tr>
<td>Opinion: Not much confidence.</td>
<td>na 40%</td>
</tr>
<tr>
<td>Opinion: No confidence at all</td>
<td>na 25%</td>
</tr>
</tbody>
</table>

Source: Referendum result: Officially published figures. Public opinion survey: Centre for the Study of Public Policy, University of Strathclyde, New Russia Barometer II, (June, 1993), a nationwide representative sample of 1975 persons; fieldwork by VCIOM.
month after the violent confrontation between the president and Parliament which led to several hundred deaths. The officially reported referendum results showed 45 percent of the electorate were non-voters, 31 percent voted in favor of the new Constitution, 22 percent voted against it, and two percent of ballots were invalid. Since more than half of the registered electorate was reported as voting (a finding disputed by some), the Constitution was declared adopted, because 59 percent of the valid ballots were counted in favor. More people registering an opinion favored the Constitution than opposed it—but the median Russian elector was a "don't know" or a "difficult to say."

To probe what the whole of the electorate thought of the Constitution, the third NRB asked in April 1994 if the new Constitution were expected to ensure a lawful and democratic Russian state. The replies showed the median Russian a skeptic, and a majority replied "don't know" when asked to evaluate the impact of the Constitution (Table VI). Shallow support was registered among those with an opinion. Among those who voted for the Constitution, less than half were optimistic about its chances of creating a lawful and democratic state. Among those who voted against the Constitution, a majority were convinced that it would not ensure a lawful state.

In an hour-glass society, people do not want to know what the state is doing, as long as the state cannot determine what they do. Russians in the bottom half of the hour-glass continue to enjoy negative freedom. When the 1995 NRB IV asked people about the influence of the central government where they lived, 67 percent said they thought it had little or no influence on their everyday lives.

The ability of Russians to build strong social networks to keep the state out is historically understandable. In an inflationary era, 100 friends are worth far more than ten million rubles. However, the result is that the Russian Federation today has a Constitution without citizens, as citizenship is understood in a civic democracy. More than that, a significant portion of the electorate appear to be "anticitizens," actively wanting to protect their well-being by keeping the center of the hour-glass as narrow as possible in order to limit what the state can do to them.

A constitution without citizens cannot be an effective government. It cannot offer social protection to people who have had their lives temporarily disrupted by economic transformation, nor can it collect all the taxes that are legally due it. It cannot be effective in fighting crime in the streets, protection rackets in the economy, nor can it prevent favoritism and the acceptance of bribes by public employees.

Events since the 1993 referendum ballots are ambiguous about the prospects for making the Constitution effective. No coup has been attempted, although President Yeltsin's health makes him increasingly dependent on his entourage. The Chechen war was launched, but it is not being pursued as in Afghanistan. This year Parliament held a vote of no-confidence in the government, to which the president responded by reshuffling his government. The gov-

### TABLE VI

<table>
<thead>
<tr>
<th>ONE CHEER FOR THE CONSTITUTION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Optimistic supporters</strong></td>
</tr>
<tr>
<td>(voted yes, expect lawful state)</td>
</tr>
<tr>
<td><strong>Uncertain supporters</strong></td>
</tr>
<tr>
<td>(voted yes, don't know what to expect)</td>
</tr>
<tr>
<td><strong>Pessimistic supporters</strong></td>
</tr>
<tr>
<td>(voted yes, but won't ensure lawful state)</td>
</tr>
<tr>
<td><strong>Uncertain</strong></td>
</tr>
<tr>
<td>(didn't vote, don't know what to expect)</td>
</tr>
<tr>
<td><strong>Uncertain opponents</strong></td>
</tr>
<tr>
<td>(voted no, don't know what to expect)</td>
</tr>
<tr>
<td><strong>Convinced opponents</strong></td>
</tr>
<tr>
<td>(voted no, because won't ensure lawful state)</td>
</tr>
<tr>
<td><strong>Apathetic and pessimistic</strong></td>
</tr>
<tr>
<td>(didn't vote and don't expect lawful state)</td>
</tr>
<tr>
<td><strong>Miscellaneous</strong></td>
</tr>
</tbody>
</table>

Source: Referendum result: Officially published figures. Public opinion survey: Centre for the Study of Public Policy, University of Strathclyde, New Russia Barometer III, (April, 1994), a nationwide representative sample of 3535 persons; fieldwork by Mnenie Opinion Service.
ernment barely survived the second, and final, no-con-
fidence vote, a process familiar to anyone observing
President Bill Clinton or Britain's John Major.

The parliamentary election in December 1995
will almost certainly be inconclusive. The fragmenta-
tion of votes among many parties will make it difficult
to form any clear picture of what the people want. A
disproportional electoral system would reduce the
number of parties but increase the gap between voters
and those who claim to represent them. The median
elector will cast a ballot but have only a shallow, tran-
sient preference for the party favored on the day.

If the inertia of institutions continues through
a summer 1996 presidential election, the Russian
Federation will have made a big step forward in
comparison with the past. But it would be unreal-
istic to regard Russia as a civic democracy. The
largest bloc of electors will not be the supporters
of the party winning the most seats in Parliament,
but those who do not vote and those who do not
want the state to interfere with their attempts to
get by in the bottom half of an hour-glass society.

Richard Rose, director of the Centre for the Study of Public
Policy, University of Strathclyde, Glasgow; leads a pro-
gram of survey research about mass response to transformation in
postcommunist societies of Central and Eastern Europe and
the former Soviet Union. With Stephen White and Ian
McAllister, he is co-author of How Russians Vote,
Chatham House, Spring 1996.
Parliamentarism in Central Europe

A speech by Bronislaw Geremek

I am delighted to introduce our keynote speaker this evening Bronislaw Geremek. Professor Geremek, as many of you know, is one of the world’s foremost medieval historians. I mention this not simply to emphasize that academics are often engaged with the real world, but also to point out that he continues a great tradition that we have seen for example, in Winston Churchill and Woodrow Wilson, whose work as historians is still much admired. We can also go back to our own period of constitutional formation and find such statesmen-scholars as Benjamin Franklin and Thomas Jefferson. In addition to being perhaps the world’s most eminent medieval Polish historian, Bronislaw Geremek was an early leader in Solidarity, and he is one of the important forces in modern Polish statehood, twice nominated as Poland’s prime minister. Most important for us, Professor Geremek is one of the architects and thinkers of the problem of constitutionalism in Poland and in Eastern Europe. Before I invite Professor Geremek to speak this evening, I want to emphasize why our Center for the Study of Constitutionalism in Eastern Europe is so important to us and why we listen to statesmen-scholars like Bronislaw Geremek so closely. As Americans, we ourselves are constantly struggling to understand our own constitutional experience. Even though it began 200 years ago, it’s something we don’t completely understand and it’s also something we’ve always felt a need to understand. Our own constitutional convention took place in Philadelphia in the summer of 1797. Our framers spent many hot days in Carpenter’s Hall with the windows shut, writing our Constitution. (Coming from Philadelphia I know something about the summers there and how they must have felt.) When the framers finally came out at the end of the Convention, someone in the crowd shouted out: “What kind of government have you given us?” Benjamin Franklin responded: “A republic—if you can keep it.” One of the things we would very much like to do, and as scholars we hope we are doing, is to try to both understand and keep our Constitution. We hope that by trying to understand the constitutional experience in Eastern Europe we can better understand what we are about here. And therefore, it is with great pleasure that I introduce tonight’s speaker, Professor Bronislaw Geremek.

Dean Douglas G. Baird

Thank you very much, Dean Baird. I have to say that I am very happy to be in Chicago and also to have an opportunity to say how important for us, as a young democracy in Central Europe, is the Center for the Study of Constitutionalism in Eastern Europe at the University of Chicago Law School. We think that from your Center we can obtain very important assistance.

Being asked to speak on the emergence of the parliamentary system in Central Europe, I understand very well that I am here first of all as a witness. I am a very peculiar witness. First, I am a historian and I would say that my engagement in politics still seems to me like an interruption in my normal professional life as an historian. As an intellectual, engaged in the fight for freedom. I know that this is a very rhetorical phrase, but it is also true. Finally, I will make some remarks as an amateur politician, as an amateur on his way to becoming a professional politician.

First, as a historian. We have, in Central Europe, a long and powerful parliamentary tradition. Some ten to 12 years ago, the Hungarian historian, Jeno Szucs, suggested that we can discover in the history of Europe three patterns of evolution, indeed, that we can identify three Europes. The first, Western Europe, is characterized by a separation between church and state, a civil society and parliamentary institutions. The second is Eastern Europe, without civil society, without parliamentary institutions, and where the church was a part of the state. And between these two Europes—
one Catholic and Protestant, the other Orthodox—there was a third Europe, Central Europe, in which these two traditions were mixed.

Poland, in the sixteenth century, was not only one of the European powers but also one of the first democratic, parliamentary systems. It was parliamentary, but still a kingdom, a kingdom that was called a republic. And in this old Parliament of the first Polish Republic, the principle of liberum veto was treated as a Polish specialty. The principle of liberum veto meant that each voting representative present—at a meeting of the diet—could bring the work of the diet to a halt. The voice of a single member could paralyze the activity of Parliament as a whole. Thus, this Polish institution of liberum veto is very often treated as an example of Polish disorder or of the anarchist temptation. But we should also see that for 200 years this principle of liberum veto in the Polish Parliament worked well. For 200 years, in line with this principle of liberum veto, the Polish Parliament functioned and the Polish Republic had a working parliamentary institution. I am emphasizing this fact because we often encounter the stereotype of a lack of parliamentary traditions in Central Europe or in Poland, and because I think that the long history of the Polish parliamentary system represents a tradition that was restored in 1989.

Admittedly, in Central Europe, after WWI, parliamentary institutions were exceptionally weak. And in the context of the authoritarian temptation, genuine parliaments in Poland, Romania, and Hungary disappeared from the political scene. Czechoslovakia provided the only example of a working parliamentary system. Given this long but interrupted parliamentary tradition, one could say that Central Europeans today can appeal to past experience, but so far, we are not sure that this political culture can be transferred, can be transmitted, by genetic code. It is coming, rather, by experience.

In our countries, for half a century, we had no experience with parliamentarism. Rhetorically, the communist system accepted democracy, calling it popular, but that system needed a kind of consensus, which was a consensus of fear. In the communist system, based on a consensus of fear, Parliament had its role, but this role was to serve as a conveyor belt for the ruling party power. In the history of parliamentarism in communist Central Europe, we sometimes had “happenings,” short bursts of liberalization, openings. That was the case in Czechoslovakia and in Poland in 1956 and also in 1968. In 1956, a political “happening” was organized in Parliament to demonstrate the liberalization of the system and, in 1968, to signal to the population that the voice of a few Catholic deputies in Parliament was isolated and ought to be ignored. And, it was also meant to manifest the strength of the communist majority. But one should not forget that, although the parliamentary institution existing under communism was boring and without importance, it was nevertheless accepted by society. And in each election, in the majority of elections, the Communist Party (CP) obtained, in the normal way, the support of the population. The passivity of the population guaranteed the reproduction of the CP’s monopoly on power.

When Solidarity began its work on reforms in 1980, its initial plan was to work with the existing constitution. The democratic opposition in Poland repeated very often that the constitution was brand new, very good, but never used. So the only problem was to implement a constitution which, on paper at least, defined the rights of the people and rules of institutions. But this constitution was also an authoritarian manifesto and it was a law, the basic law of an authoritarian regime. Solidarity, in its first discussions, I mean during August 1980, in the Gdansk shipyard and at the first Solidarity congress in Gdansk, tried to define what was meant by a self-governed society. Roughly speaking, a self-governed society would be a society in which the distinction between “them” [the party] and “us” [society] would be clear and where we would have institutional guarantees. In such a conception of the self-governing society, Parliament had no role. For we could not imagine at the time that the CP, deeply entrenched in power, would yield to genuine parliamentary representation. Instead, we tried to obtain room for freedom in trade union activity. We thought that we could also obtain some rules promoting freedom in various intellectual and academic associations, but not real political freedom.

During the 1980 negotiations with the government and with the CP, the Polish Parliament played
a role. The social contract which Parliament declared between the workers and the government was a kind of constitutional institution. Parliament's declaration at that time could be understood as an offer to assume a new more active political role. But this lasted only a few days and, after that, Parliament was again reduced to a shadow institution.

In 1989, when negotiating with the government and with the representatives of the army to determine how political reform should begin, we also tried to introduce the reform of Parliament as a subject for negotiation, and our partners at the Roundtable Talks were able to decide what role Parliament should play. The ten representatives of the army and the government decided how the deputies in the Sejm should vote after the Roundtable Talks. Until 1989, the Sejm was organized and managed by the Central Committee of the CP. The Central Committee had a special bureau for parliamentary work with a few people responsible for parliamentary speeches and decisions.

Out of the Roundtable Talks, we obtained a senate, a new second chamber to be freely elected. And for the Sejm, the only chamber wielding real political power, 35 percent of the seats were to be filled in a free election. We began the electoral campaign with a feeling of weakness. An historian, accustomed to addressing tiny audiences on the French, Italian and German middle ages, had, in June 1989, to speak to 50,000 Polish peasants in one rural district of Poland in the Suwalki Voivodship. I was there with my friend Andrzej Wajda, and my first reaction was, “Wajda, you know how to do these mass happenings and I do not know how to do them.” His answer was: “I do know how, but I am not an actor.” So, it was better that an historian of the middle ages should do it. At the very beginning, we had 12 agents of the secret police listening to us and nobody else. But after five minutes, 100 people had gathered, after fifteen minutes, some thousands. Finally, it turned into a feast with 50,000 Polish peasants, but palpably frightened by the provocation, by people speaking in a free manner, speaking on the role of Russia in Poland, speaking about events in the Katyn region. That was the beginning. But if I try to recollect this moment, I have a feeling that for me it was not a matter of electing a parliament. We were in the midst of a campaign, but Parliament, the reference to Parliament, did not exist.

The Communist Party proposed that 35 percent of the seats in the new Parliament be filled in a free election. Of the remaining 65 percent, five percent were given to the so-called Catholics or Catholic groups and 60 to the CP, Peasant Party (PP), and the Democratic Party (DP). The CP had the courage, I would say, and also the will to take a risk. For themselves, they reserved 38 percent of the seats. Thus, they accepted for the first time, after taking power in Poland, to be in political minority in Parliament. But they were so sure that their allies, the PP and the DP, would stick with them, that this minority situation seemed to them relatively safe. But, after a mere one or two weeks they learned that they in fact had no more allies. Their allies were loyal, but only to a strong party wielding power and not to a party which was losing its grip on the state.

The change across Central Europe is very often called the Velvet Revolution, because Czechoslovakia was in essentially the same situation as Poland, Hungary, and Bulgaria. The same principle of change was accepted in all these countries. One should see, first of all, that the CP offered no resistance to the revolutionary process. And from the side of the democratic opposition there was a will to abstain from violence. So, the Velvet Revolution was not only an image and a metaphor, but also a practical political strategy. How to take power? What solutions to propose to the new government? But first of all, should we punish members of the Party? members of the secret police? or forgive them? How could we change the personnel in the administration, in the army, in the police? How were we to apply law in a normal way to people who violated the law? What were we to do with the privileges enjoyed by these people during years and years?

This morning [December 1, 1994] I voted in the Sejm on a bill concerning the retirement rights of secret police agents and also of some soldiers in the Red Army. Five years after the revolutionary change, this question was raised and, in the current situation, with the ex-CP and the PP now forming a majority, they were able to renew the same privi-
leges which secret police agents had enjoyed before 1989. And so practical questions, practical issues, which had to be debated and resolved concerned, first of all, the idea of the status and function of law. Should we, in 1989, at this moment of change, simply apply the law and adopt the principle of the rule of law? Or did we rather, first of all, have to introduce moral order into politics, which means punishing people responsible for the communist regime? In all the lands of Central Europe, a decision was taken neither to forget, nor to forgive, but simply to preserve our countries from civil war. One should not forget that in 1989 there were people with guns on one side, while the democratic opposition had no instruments of power and no means to fight for power. So, the opposition's philosophy of non-violence was, to some extent, an expression of a weakness. The only weapon which the weak have available, as Vaclav Havel put it, is moral justice.

The decision not to use violence against the communist regime and also not to introduce trials and repressions against responsible members of the communist regime also had some consequences for the evolution of the political systems of Central Europe. In the new Polish Parliament, formed in 1989, we had the feeling of being, first of all, a new people in a very old building. I entered the Parliament building for the first time in my life as an elected deputy. I had never been interested in seeing what was happening in Parliament. Reading newspapers, I knew perfectly well that anything reported concerning Parliament was boring and without importance. In 1989, the situation was completely new. Parliament became an arena of struggle. But an arena of struggle where people could also debate and work together. Our first task was to understand the principle of political pluralism in the parliamentary context. We had the feeling that we were united against the communists. On one side "them," and on the other side the Solidarity camp. We won all of the freely elected seats in the Sejm (35 percent) and 99 of 100 Senate seats. We believed that we represented the nation, but our camp, Solidarity, which had had the idea to fight for freedom against communism, was in contradiction to the principle of political pluralism which we were aiming to foster. We fought for political pluralism but, in practice, in the 1989 Parliament, we were a unique party arranged against a unique party, the Communist Party. We represented a modern united front, an anticomunist coalition, the Solidarity camp.

For a while. After some months, as is well known, the Solidarity camp split. Different political parties formed and Poland even earned the right to be entered into the Guinness Book of World Records. We had 250 political parties. In the second Parliament, elected in 1991, we had 30 political parties; and we had a government based on a coalition of seven political parties. You cannot find another example of such pluralism. At the beginning, by contrast, in 1989, the very principle of political pluralism had been understood as, I would say, an ideological task, but it was not yet realized in practice in the first democratic Parliament. So, first, political pluralism had to be built.

The second issue was how to write laws. Should experts draft legislation? Or should politicians, members of Parliament, write the laws? Most experts were compromised by their cooperation with the regime. And so we tried to find able people in the academic world to help us because the university had been a place of relative freedom under the communist regime. Academia gave us reliable people to write the laws.

But the third question was the most difficult. How to cooperate? How to exist? How were we to work together with our enemies, with people we hated? We had to work together on standing committees, in various parliamentary institutions, and we had to participate together in plenary debates. So plenary debates were a kind of political circus. And we were happy to tell the truth against the enemies of our Solidarity camp. But after these public debates, we had to work together. Solidarity representatives and CP representatives, for example, had to work together on the Constitution. We had also the problem of convincing our enemies to work with us on a constitution and even convincing our constituents. In the end, I would say, we learned quite well how to achieve political pluralism. We learned quite well how to work together with our
enemies in Parliament and how to write laws with them. But we did not learn how to convince the people that we were right. We knew that we were right, but how to convince our constituents that we were fulfilling our mandate? I have the feeling that this was the principal source of weakness of the democratic opposition in the Central European countries and also of the new regime's representatives.

One could say that, during this first parliamentary experience, we had a confrontation between the politics of hatred and the politics of solidarity. When I say the "politics of hatred" I don't use the phrase simply in a pejorative sense. I would even say that we had a moral obligation to practice this hatred against the communist representatives. And they displayed the same attitude and the same behavior toward us. And if you observe the political scene from the outside, you can clearly see that in the young Central European democracies, the politics of hatred is played upon by demagogues and populist leaders with success, because this is a very easy way to mobilize political support. It is a way to obtain support "against" an enemy. But to obtain political support by creating a tie of solidarity is a different matter.

In the 1980s, Poland was a country in which a civil society was being built, a civil society with an underground press, underground institutions, and a fine university. It was an empire of freedom and independence. But it was a civil society strong only in opposition to the regime. After 1989, this adversarial civil society was unable to manage the new situation, was unable to participate in the political game and in normal political democratic institutions. We had to learn how to build a tie of solidarity between the citizen and his representative, and how to build such a tie of solidarity not only at the beginning, at the moment of election, but how to produce it during parliamentary work.

In all these emerging democracies, this is a real question. An authoritarian regime, given the circumstances, would be more rational, more logical. Parliaments put everything in doubt—programs, reform proposals, political declarations. And so, parliaments can also become a barrier to the process of change. Parliaments are slow because parliaments have structures, procedures which must be followed and which can gum up the decision-making process. Parliaments can also, in our situation, introduce a kind of populist rationality. Parliaments, parliamentary elections, and parliamentary debates have introduced in these countries painful reforms which, in turn, open the door for miracle workers, who promise everything immediately and are thereby able to obtain popular support. It can be proposed to the people that only an authoritarian regime can assure the transition process. The process of transition is painful and thus asks for, invites, a strong power. In the young democracies, the authoritarian temptation works against the parliaments. The 1989 parliaments in all our countries, were institutions of hope, with popular support. After four or five years of experience we now witness a near universal lack of confidence in parliamentary institutions. What then did the parliaments offer to the young democracies emerging in Central Europe after 1989?

Parliaments gave citizens an opportunity to be engaged, to have a role in politics, and to be active in public life. Parliament is a concrete realization of the idea of freedom. I would say that one of the greatest obstacles in my work with my rural constituents was going from the idea of freedom to the idea of democracy. Freedom is beautiful and democracy is boring. To explain that we need freedom is easy; to explain that we need a well-organized chamber of deputies which must first discuss rules of order, what to do and in what way to do it, is not easy. And after that, we still have to have a drawn-out debate, in which everybody will say something. How to explain this to the public? We need to do so, for the problem is that no freedom is possible without the existence of this boring democratic institution—Parliament.

The very fact that Poland now has a growth rate of 4.5 percent a year is a sign that "shock therapy"
worked in Poland. But the initial price of this transformation was a 20 percent decline in the standard of living. One cannot find an example of such a painful process, after the fall of the Berlin Wall, in peacetime or wartime, in modern European history when such a decline was accepted by a people without uprisings and riots. It was accepted in Poland because there was hope. The enthusiasm of a new beginning was there. But after this first wave of enthusiasm had passed, in the routine of politics as usual, people could not find a source of hope and could not engage themselves in public life. Is Parliament a place to provide such possibilities? I think so. And I think that the introduction of television in the parliamentary chambers gives such an opportunity to see how political decision-making takes place. This gives the citizen at least some opportunity to be engaged in public life.

But still, the principal problem, which concerns not only constitution-making in Central Europe, but also ordinary politics in Central Europe, is the authoritarian temptation. My only argument for parliament and for parliamentary systems against this authoritarian temptation is a very personal one. I would not be so frightened by enlightened absolutism. But I know very well that, if absolutism were introduced in Central Europe, it would not be enlightened. And that is the only reason I prefer democracy as realized in a boring parliament.

Ladies and gentlemen, what I was trying to do this evening was to tell you my personal experience as an amateur politician, as a witness of a process. I still have the capacity to be astonished and, perhaps, it is sometimes important to be astonished.

Professor Bronislaw Geremek delivered his speech at the University of Chicago Law School on December 1, 1994.
Parliamentary Rules and Judicial Review in Romania
Stanley Bach and Susan Benda

In May 1994, the Constitutional Court in Bucharest invalidated a substantial number of parliamentary rules. The Court’s decisions and Parliament’s reaction to them provide a valuable opportunity to examine the Court’s exercise of its constitutional authority and the development of judicial-legislative relations in the emerging Romanian democratic order.

The jurisdiction of the Constitutional Court
Established by the 1991 Constitution, Romania’s Constitutional Court consists of nine judges who serve for a fixed term of nine years. The right to appoint judges is shared by the Chamber of Deputies, the Senate, and the president, each appointing three judges. The Court is similar to its Eastern European counterparts in that it has jurisdiction only over constitutional questions, and is distinct from the US Supreme Court for the same reason (“The New Courts: An Overview,” Herman Schwartz, EECR, Vol. 2, No. 2, Spring 1993).

Similar to the French Constitution on which it is modeled in part, the 1991 Romanian Constitution grants the Constitutional Court jurisdiction over both parliamentary standing orders and proposed laws. Indeed, like the French Constitutional Council, the Romanian Court is empowered to review the constitutionality of laws and parliamentary rules before they are implemented. The Romanian Court differs from its French counterpart in several important respects, however. While the French Constitutional Council must rule on the constitutionality of organic laws and parliamentary rules before they take effect, the Romanian Court has jurisdiction to review laws and parliamentary rules only when petitioned to do so. The Court also has jurisdiction to review the constitutionality of laws after promulgation should a lower court issue an interlocutory decree requesting that the Court resolve a constitutional issue. Finally, the Romanian Constitution provides that Parliament can override the Court’s ruling on a law’s unconstitutionality by a two-thirds vote in each chamber (Art. 145). Once Parliament overrules the Court’s decision, the Court cannot again review the statute in question. Thus, Parliament’s power to override the Court’s decisions significantly circumscribes the Court’s authority, distinguishing it from most other European and American regimes where the constitutional or supreme courts are the final arbiters of constitutionality.

Both the Chamber of Deputies and the Senate are directed by the Constitution to adopt their own standing orders (Art. 61), by an absolute majority (Art. 74). The president of the Chamber or the Senate, a parliamentary party group, at least 50 (of 341) Deputies or 25 (of 143) Senators, have the power to request that the Court decide on the constitutionality of parliamentary rules. The “Law on the Organization and Operation of the Constitutional Court” (May 18, 1992) also requires that either the Chamber or the Senate “re-examine” whatever provisions of their standing orders have been held unconstitutional “in order to bring [the rules into] agreement with the stipulations [provisions] of the Constitution.”

One of the most important aspects of the Court’s 1994 decision was its ruling that Art. 145, allowing legislative override of Court decisions, does not apply in the case of parliamentary rules, thus forcing Parliament to change rules which the Court finds unconstitutional. This decision has enhanced the Court’s power but it also increased the risk of judicial-legislative conflicts.
The Court’s rulings on Parliament’s rules
The Romanian Chamber of Deputies adopted its rules on February 24, 1994, and on March 1 the president of the Chamber, on his own initiative, requested that the Court review them. The president of the Senate followed suit six days later, although the Senate had adopted its own rules in June 1993.

The Court found 25 of the Chamber’s 213 rules and 29 of 184 Senate’s rules constitutionally objectionable at least in part. Although some MPs have disagreed with the Court’s decisions, the Court’s holdings generally have been accepted as binding. In June, the Chamber adopted a series of amendments to meet the Court’s objections. (A comparable package of rule changes awaits the Senate’s consideration.)

The Court’s decision and its reasoning generally are grounded in one or both of two contentions: that a rule of the Chamber of Deputies or the Senate exceeded the constitutional scope of that chamber’s rule-making authority or that the rule was otherwise inconsistent with the Constitution. Some of the Court’s rulings relate to technical matters, and at times the Court may have been unrealistically exacting. Other rulings, however, address fundamental issues, particularly the relations between Parliament and other governmental institutions.

Checking Parliament
The Court observed that the standing orders of either house may govern its members and employees, but “cannot establish any rights and in particular any obligations” affecting individuals outside of that institution. “Such provisions may be contained only in laws” that are adopted by both chambers and signed by the president or enacted over his veto.

In Art. 124 of its rules, for example, the Chamber empowered its president to “call the attention of media organizations to any strikingly inaccurate information . . . in media coverage of House proceedings or to any comments . . . [that] adversely affect the parliamentary institution.” This rule also stated that the president of the Chamber may require the media organizations to publish his statement in response to such comments. Should the media either refuse or “perpetrate the same kind of error for a second time,” the president, with the Chamber’s approval, could suspend the organization’s credentials. The Court invalidated this rule (and a similar Senate rule), holding that only a law can impose such a duty and the Chamber could not, by unilaterally adopting a rule, require a media organization to take some action. The Court marshaled more support for its holding by invoking the constitutional provisions protecting freedom of expression and the public’s “right to fair information on public business.”

A second example involved Art. 110 of the Constitution which empowers the president of either the Senate or the Chamber of Deputies, at the request of the body or one of its committees, to require that the “government and other agencies of public administration” provide requested information or documents. The Chamber and Senate extended this power through rules to authorize each of its members to request information and documents from local government agencies with jurisdiction over his or her constituency and required the agencies to comply within ten days. The Court struck down both rules, once again stating that only a constitutionally valid law, and not a parliamentary rule, can require local government officials to respond to information requests from Parliament.

Likewise, the Court struck down Art. 192 of the Chamber’s rules, requiring local and county councils to provide deputies with office space and furnishings on a rental basis. Not only did the Court decide that this would have to be imposed by law, but it also found that the article contravened the principle of local autonomy established in Art. 119 of the Constitution.

The Court also found several Senate rules unconstitutional because they purported to govern actions of the Chamber of Deputies. For example, the Court overturned a Senate rule governing how both chambers are to act on a bill that the president of Romania has returned for parliamentary reconsideration. Whether or not identical rules for this purpose may be desirable, the Court reaffirmed the principle that “parliamentary rules shall not establish any binding provisions for other bodies save for the house which has passed them.”

Furthermore, the Court found that both houses had exceeded the scope of their constitutional
authority when they adopted rules governing Parliament's ability to obtain information. The Senate and the Chamber had provided that, at the request of one-third of its members, either house could establish an investigatory committee (Senate rules, Art. 57; Chamber rules, Art. 70). Both rules also authorized such investigatory committees to require the attendance of "any person" summoned to testify and to require those persons to furnish requested documents or other information. The Court objected that parliamentary committees cannot compel the appearance of either any government official or any private individuals. While the Constitution refers to parliamentary committees—for example, Art. 110 provides that committees may make requests for information through the chambers' presidents—it neither explicitly defines the committees' roles nor circumscribes their authority.

First, the Court asserted that these rules would violate the constitutionally-established "legal relationship between public authorities" if either house of Parliament could enforce subpoenas against judges or the president. With respect to judges, the Court cited not only the general principle of separation of powers, but also the specific constitutional proposition that "judges shall be independent and subject only to the law" (Art. 123). The Court concluded that the constitutional provisions empowering the Chamber and the Senate, acting in joint session, to impeach or suspend the president established the "legal relationship" between president and Parliament. The Court held that a parliamentary committee could not summon the president to appear before it without violating this constitutionally established relationship between the president and Parliament.

Second, the Court's decision also precludes Parliament's investigative committees from requiring private citizens to appear before them and to produce documents. The Court appears to assert that an inquiry committee's only constitutionally legitimate role is to act as "a means to achieve parliamentary control." Under the Court's narrow construction of an inquiry committee's role, the committee has the authority to subpoena only individuals who are directly subject to parliamentary control. This limitation not only excludes the president and judges, it also excludes private citizens.

The result of these decisions is hard to measure. On the one hand, the Court's rulings protect individual citizens against parliamentary subpoenas that create the possibility of government coercion and invasion of privacy—an admirable result in a post-totalitarian state. On the other hand, the Court's decision may constrain Parliament's ability to oversee government activities and to conduct investigations. Indeed, in the United States and Western Europe, the authority of legislative committees to summon private individuals and compel their testimony can be central to the committees' ability to investigate the conduct of government officials. In Romania, where virtually no tradition of government accountability exists, the Court's ruling that parliamentary committees may invite but not summon individuals as witnesses also may hamstring Parliament's ability to serve as a counter-weight to an already powerful government.

In another ruling, the Court directly protected the government's prerogative in relation to Parliament. Article 110 of the Constitution provides that "members of the government are entitled to attend the proceedings of Parliament. If they are requested to be present, participation shall be compulsory." The relevant Chamber rule (Art. 48) provided that a "committee may decide that certain of its proceedings be conducted with no government member being present." The Court invalidated this rule, noting that deputies also may be ministers in the government. Under the Chamber's rule, therefore, deputies serving as ministers could be excluded from committee meetings but not, of course, from plenary sessions. Rejecting this, the Court interpreted the constitutional provision as referring not only to the plenary sessions of Parliament, but to "all its structures."

Finally, the Court invalidated some rules exclusively pertaining to Parliament's internal organization. For example, Art. 22 of the Senate rules provided that a member of its powerful Standing Bureau could be removed from that position at the request of his or her parliamentary group and with the approval of a majority vote of the Senate. The
Court held this rule unconstitutional, judging that each parliamentary group should have the right to remove its representative from the Standing Bureau without Senate approval.

In support of this conclusion the Court cited the constitutional requirement that “the standing bureaus and parliamentary committees shall be made up so as to reflect the political spectrum of each Chamber” (Art. 61). However, the requirement that seats on the Standing Bureau be distributed proportionately among parliamentary groups does not clearly carry with it a constitutional right allowing each group to select which of its members occupy the seats to which it is entitled. The Constitution addresses only the allocation of seats among parties, not the procedures for filling them.

More distressing to many deputies and senators were the Court's decisions that various rules of both houses were inconsistent with the Constitution's requirement that “the amount of [their] emoluments and other rights shall be established by law” (Art. 71). In their standing orders, both houses sought to provide their members with salaries, vacations, leaves of absence, staff, offices, and equipment. The Court invalidated these rules as attempts to provide emoluments or rights by unilateral action of only one house. The Court's ruling effectively makes the resources of each house and its members subject to approval by the other (the president wielding only a suspensive veto). By the same token, the Court objected to parliamentary rules prohibiting deputies and senators from receiving compensation from a foreign government or international organization, asserting, once again, that the Constitution (Art. 68) requires that laws, not rules, govern such issues.

Without question, the decision that proved most politically controversial within Parliament was the Court's ruling that both houses had acted unconstitutionally when they adopted rules discouraging party-switching among deputies and senators between elections. Under the Chamber's rules (Art. 18), a deputy who left his or her party's parliamentary group could neither affiliate with a different group nor join with other deputies to form a group on behalf of a party that had failed to elect members to the Chamber. The corresponding Senate rule (Art. 14) went one step further, prohibiting unaffiliated senators from forming a group of independents to take advantage of the benefits that accrue to formally-recognized parliamentary groups.

The Court held that such restrictions were an unconstitutional constraint on the free political choice of deputies and senators and their constitutionally-protected right (under Art. 61) to organize into parliamentary groups. The Court observed that “it is not the parties but MPs who are elected,” and “the political parties only act as mediators between the electorate and Parliament.” In support of its constitutional judgment, the Court referred to Art. 66, which states that “deputies and senators shall be in the service of the people” and that “any imperative mandate shall be null.”

The Court had previously ruled on this issue on August 10, 1993, upholding the right of an independent deputy to join an established parliamentary group. The deputy had been elected as a member of one party, but having become an independent, then decided to affiliate with a different party. The Chamber's Standing Bureau interpreted one of its rules as prohibiting such a change in party affiliation. The Court, however, ruled that the deputy's action was protected by the Constitution: it was the Standing Bureau's interpretation of the rule, not the rule itself, that was constitutionally objectionable. Yet, even after this ruling, the Chamber adopted a new rule against party switching. (The Senate had adopted its rule shortly before the Court's 1993 decision.) Although the Court's decision to invalidate the prohibition against party-switching could not have come as much of a surprise, the holding still generated considerable dissatisfaction in Parliament.

Parliament's response to the Court's rulings
It took more than a year for the Chamber of Deputies to respond formally to the Court's rulings, and the Senate has yet to do so. The Chamber's Judiciary Committee issued a report in November 1994 that proposed conforming the Chamber's rules to the Court's decisions in most respects. On one fundamental issue, however, the Committee continued to disagree with the Court.

As already mentioned, one of the Constitutional Court's most important rulings was its decision inval-
idating the Chamber's rule (Art. 118) outlining the procedure for responding to the Court's constitutional objections to laws and standing orders. Article 118 and the corresponding Senate rule (Art. 113) provided for the Chamber or Senate to overrule, by a two-thirds vote, the Court's objection to either a law or a rule. The Court held that Parliament's authority to overturn Court decisions applies only to laws, not to parliamentary standing orders. By a vote of nine to two, the Judiciary Committee disagreed, asserting that the Chamber's authority to set aside Court decisions extends to both laws and rules. Furthermore, the Committee proposed that the Chamber exercise this authority with respect to several rules, in particular its controversial rule prohibiting party-switching and requiring any deputy leaving his or her party group to remain an independent.

When the Chamber acted on the amendments to its rules in June, however, it evidently changed them to satisfy all of the Court's objections. In the process, the Chamber rejected its Committee's position that the Chamber could overturn a Court decision invalidating the Chamber's standing orders. Instead, it adopted a new procedure to reconsider and revise rules that the Court holds unconstitutional, and preserved only the provision of the rule prohibiting deputies from forming parliamentary groups on behalf of parties that had not won seats in the elections. In its 1993 decision, the Court stated that the formation of such groups as a result of party switching "would obviously be contrary to the Constitution." Therefore, this narrower rule is likely to survive the Court's scrutiny.

Conclusion

The political history of post-Ceaucescu Romania is still too brief to allow for a definitive analysis of the import of the Court's rulings on Parliament and on legislative-judicial relations. Nonetheless, the Court has clearly taken its role seriously, issuing decisions that reflect its understanding of the Constitution and that were not inspired by any obvious political motive. Moreover, the Chamber has amended its rules in ways that should satisfy all of the Court's concerns. The Chamber deliberately avoided the prospect of a constitutional confrontation with the Court over which institution makes the final decisions about the constitutionality of Parliament's rules. By accepting the Court's ruling that it is the final arbiter of such questions, the Chamber accepted a significant limitation on its discretion and autonomy.

Like the other new institutions of Romania's government, both Parliament and the Constitutional Court are in the process of establishing the parameters of their own authority. The Court's rulings on Parliament's standing orders provide some evidence of its desire to fulfill its mandate to interpret and apply the Constitution. The Chamber's response to the Court's rulings may demonstrate its commitment to the constitutional order, even at some immediate cost to its own institutional preferences and prerogatives. The resolve of both institutions to accept and enforce the constraints of the Constitution may also be an encouraging sign for the supremacy of the rule of law in Romania. As the Romanian system evolves, all three branches of government may ultimately recognize that mutual respect among them will prove essential to the stability and success of Romania's new, and still developing, constitutional order.

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Can Albania Break the Chain?  
The 1993-94 Trials of Former High Communist Officials  
Kathleen Imholz

Sporadic news reports of the seemingly systematic trials and convictions in 1993 and 1994 of the former Albanian Politburo members, Nexhmije Hoxha (the widow of dictator Enver Hoxha), and Fatos Nano, the head of the Socialist Party (SP), are sometimes interpreted as exceptions to the general failure of decommunization throughout Eastern Europe. This interpretation accords with our expectation that citizens of such a repressive regime would burn to bring former malefactors and exploiters to justice. In the same vein, the trials and mass dismissals have been said to demonstrate the new government's commitment to join Europe after decades of isolation.

But such interpretations disintegrate when the trials and government measures in question are examined closely. Far from unique, the Albanian experience of coping with the communist past is quite similar to the experiences of neighboring countries. Like their counterparts elsewhere in Eastern Europe, including Germany, Albanian prosecutors have learned the difficulty of gathering and marshaling stale evidence against even the most obvious targets. In Albania, too, trials for financial misconduct or corruption, rather than for the brutal crimes of a totalitarian system, have dominated the process. And along with their neighbors, Albanians drew back from decommunization when the net was cast too wide. Here, too, for instance, mass firings were seen as haphazard, unjust, and pointless.

No doubt, more Albanians were tried and many more lost their jobs in the name of decommunization than in other countries. But the facts on the ground nevertheless diverge from the legend. Rather than being ways of punishing the crimes of the former regime, trials and dismissals were used to demobilize lawful opposition to the present regime or, quite simply, as a method to exact personal revenge. Even where justice seemed to be at stake, moreover, the Albanian public took little interest in, and gained little satisfaction from, the decommunization trials.

The last domino and the first arrests

Dramatic changes first came to Albania in 1990, including the re-establishment of the Ministry of Justice and the legal profession, permission to practice religion, decrees encouraging foreign investment (technically illegal under the 1976 Constitution), and amendments to the Penal Code dealing with political crimes, among other things. The legalization of political opposition in December 1990 was followed by the first pluralist elections, on March 31, 1991 in which the Party of Labor (PL, since renamed as the SP) won two-thirds of the seats. The Democratic Party (DP), a newly-formed opposition party, made an impressive showing, especially in urban areas. Ramiz Alia, who had ruled the country since the death of Enver Hoxha in 1985, failed to win a parliamentary seat, but was elected president by Parliament. The first government, headed by Prime Minister Fatos Nano, was forced to resign at the beginning of June. A coalition government then ruled the country until it, too, was forced to resign in December 1991. It was replaced by a caretaker or "technical" government, which held power until the elections on March 22, 1992 which the DP handily won.

Throughout, Ramiz Alia continued as president. Under Albania's transitional constitutional law (which replaced the 1976 Constitution in April 1991) his term would have continued for four more years, but he resigned just after the 1992 parliamentary elections. The new Parliament elected DP leader Sali Berisha as president a short time later.

Even while the SP was still in control in 1991, the country's move away from communism was
clear and decisive, although, as everywhere in the
region, those who had been in power previously
hoped to remain in office under the new system.
The strict, isolationist, and Stalinist communism
that had touched virtually every Albanian family
with its totalitarian control—imprisoning many,
sending their families into internal exile, and
squelching all dissent and most independent think-
ing—seemed to evaporate overnight.

Shortly after the March 1991 elections, Genc
Ruli, the DP minister of finance in the coalition gov-
ernment, launched an investigation into certain
past abuses by PL leaders and their families. The
Ruli Report, presented to the People's Assembly in
July, became a crucial piece of evidence in almost all
the subsequent trials of former communist leaders.

At the beginning of September 1991, Manush
Myftiu, a former Politburo member and close asso-
ciate of Enver Hoxha, was arrested. A few other
arrests (but no trials) occurred while Alia was still in
power, most notably that of Nexhmije Hoxha, in
December 1991. Alia may have hoped to forestall
his own arrest by early action. Possibly he felt that
his role in shepherding the country though a rela-
tively bloodless change of system would protect
him. Perhaps he was willing to sacrifice a few for-
er associates to distance himself and other socialist
leaders from the past.

In any event, his gamble failed. In early
September 1992, Alia was placed under house
arrest. His detention was converted to imprison-
ment in August 1993. While it is difficult to get
accurate information about Albanian criminal
indictments, according to the US State Department
the initial charges involved corruption, improper
personal expenditures, and conflict of interest based
on Alia's simultaneous service as chairman of his
party and president. Even if the latter charge had
been true, which it apparently was not, we would
be looking at a blatant case of ex post facto punish-
ment. The transitional Constitution had been
amended to prohibit such dual service only after
Alia was no longer party chairman. This charge was
quietly dropped, but further charges of human
rights violations were then added to the indictment.
Furthermore, the corruption charges were convert-
ed to "abuse of office in collaboration," suggesting
that the new government was trying, in good faith,
to expose the abuses of the prior regime.

As powerful symbols of the old regime, Manush
Myftiu and Nexhmije Hoxha were obvious targets.
Hoxha had exercised considerable power before
and after her husband's death and faithfully tended
the flame of his memory, although she was never a
Politburo member. Myftiu was the first to be arrest-
ed because, among other things, he had headed the
committee that had sent the families of arrestee
s and suspicious persons into internal exile. This was
a particularly brutal part of the Albanian commu-
nist system, although the committee's activities had
obviously not been illegal under the laws of the
time. Both Myftiu and Hoxha also were charged
with corruption. By the end of 1992 most living for-
er Politburo members had also been arrested.

The trials of Nexhmije Hoxha and former
Politburo members
The first trial, against Nexhmije Hoxha and Kino
Buxheli, began in January 1993. Buxheli had not
been a Politburo member, but he had figured promi-
nently in the Ruli Report as a supplier of special
goods for senior communists and their families. It
seems clear that his trial came first because it was
meant to symbolize decommunization and
Albania's commitment to a democratic future. But
while it received some international coverage and
was watched by Albanian expatriates on videotapes
delivered to the United States, it was not perceived
as an important anticommunist statement within
Albania. Why?

First, Hoxha was tried on relatively minor
charges, involving procurement of less than
$100,000 worth of commodities such as coffee. No
one doubted that the Hoxha family had lived well
and enjoyed goods unavailable to other Albanians,
but making these charges the sole subject of a crim-
inal proceeding seemed to trivialize the more seri-
ous abuses of the Hoxha regime. Second, since she
had not been a high state official nor involved in the
procurement chain, Hoxha could not actually be
said to have "procured" anything. But this legal
technicality was brushed aside. The Albanian pub-
lic, in any case, saw the Hoxha trial as little more than a distraction.

At the end of January 1993, Hoxha and Buxheli were convicted of corruption, although some of the charges were dropped for lack of proof. The 72-year-old Hoxha was sentenced to nine years imprisonment; Buxheli to four. Both were ordered to repay their ill-gotten gains to the state. In May, their convictions were upheld by the Court of Appeals, which in fact ratcheted up Hoxha’s sentence to eleven years. Albania’s highest court, the Court of Cassation, affirmed her sentence in August, while reducing Buxheli’s sentence to three years. Due to a partial general amnesty in honor of the fiftieth anniversary of the country’s liberation at the end of WWII, as well as some technical provisions of Albania’s new Criminal Code, Hoxha’s term has only a few years to run. Buxheli was released over a year ago.

While the trial of Hoxha and Buxheli may have attracted some interest, the first trial of former Politburo members, which occurred later in 1993, received little attention inside or outside the country. Indeed, many Albanians have forgotten that it ever took place, and few can name the defendants. Manush Myftiu, who had been in jail for over two years, was not one of them, nor was Ramiz Alia, arrested more than a year before. A decision had been made to try the less prominent members of the group first. The charges were reportedly limited to abuses set out in the Ruli Report, that is, misuse of between one and two million dollars in state funds to obtain personal goods and benefits. At the end of 1993, after a three-week trial, all ten defendants were found guilty and given sentences of five to eight years in prison and required to repay the misused state resources.

The convicted politicians were Qirjako Mihali and Llambi Gjegjefiti (eight years each), Pali Miska and Lenka Cuko (seven years), Besnik Bekteshi, Hajredin Celiku and Foto Cami (six years), and Vangjel Cerrava, Prokop Murra, and Muho Asllani Artunda (five years each). All had been Politburo members for varying periods, some as long ago as 1975. Cuko was the only woman in the group. Cami was perhaps the best known, having held important positions in the central committee’s propaganda sector. Like Hoxha, these sentences have been reduced by a 1994 partial amnesty and the new Criminal Code. Mihali was released from Tepelenë prison on June 1, the day the new Criminal Code went into effect. Although his release suggests that all of those convicted at the 1993 trial should be set free, since his was the longest sentence, about half of them remain in prison.

The final trial of important personages from the communist regime began in April 1994. The defendants were Ramiz Alia, Manush Myftiu, four former Politburo members, and four others. This trial had been delayed by the prosecution’s attempts to include charges beyond the misuse of state funds. These efforts focused on three areas: the aftermath of the bombing of the Soviet embassy in Tirana in 1951, which led to a number of summary executions; the prohibition of religion that began in 1967; and various killings along Albania’s borders. Indeed, one of the ten defendants, Veiz Haderi, was the former chief of internal security in the southern town of Sarande, three miles across the straits from the Greek island of Corfu. The only charge against him was complicity in the deaths of several persons who tried to swim to freedom across the Corfu straits.

Most of the defendants had been involved in the communist regime from its early years. Enver Hoxha and many of his closest associates were dead, but most of the group assembled for this trial had held senior positions and participated in Hoxha’s activities. The trial was clearly intended to be a collective trial of the communist regime itself, an expose of its brutalities and human rights violations. It did not achieve this effect, however, although all ten defendants were convicted of violating fundamental human rights.

There were at least four major reasons for this failure. First, the delay: the disillusionment apparent during Nexhmije Hoxha’s trials had grown more palpable by 1994. Widespread corruption remained in the judicial system and elsewhere under the DP government, despite progress in some areas. In this context, events of what seemed to be a remote past did not attract much public attention.

Second, in contrast to the lack of sympathy displayed for Hoxha, many Albanians appreciated
Ramiz Alia's role in steering the country through a basically non-violent transition. Some even looked on the five years of his rule with a nostalgia—a phenomenon that has parallels in other parts of East and Central Europe amid the dislocations that followed the fall of communism. It is interesting to observe that the DP is currently laboring to prove that the 1990 transition was, in reality, violent, with many deaths and disappearances.

Third is the trial of the relatively young chairman of the SP, Fatos Nano. This did arouse a public reaction. Nano was arrested in mid-1993 for events that took place not in the remote communist past but in the transitional year of 1991. The Albanian government was forced to bring him to trial in early 1994 by international pressure. A few weeks before Alia's trial began, Nano was sentenced to 12 years in prison, a term even lengthier than Hoxha's. This draconian sentence undermined the government's endeavor to highlight communist abuses. Whether or not they sympathize with Nano, virtually all Albanians recognize that his situation is essentially different from that of the former Politburo members who had wielded power for so long.

Finally, assembling evidence about communist-era abuses was no easier in Albania than in other Eastern European countries. The flimsiness of incriminating proof made all the trials legally weak and less convincing than they might have been. The Soviet embassy affair occurred over 40 years ago. Reliable evidence about it is probably impossible to obtain. In dealing with the border killings, Albania followed the model of the Germans and the last Berlin Wall killing. But even the experienced and well-financed German justice system has not found it easy to succeed with criminal prosecutions in such a case. Among other things, thorny issues of vicarious liability and the retroactive application of criminal laws are raised. Leaving the country without permission was considered treason under the Albanian law of the time (repealed only in 1990). While all defendants were reportedly found guilty as charged, their convictions seemed to have little impact on the public at large.

Alleged violations accompanying attempts to stamp out religion were more cut-and-dried. They also roused strong feelings, at least among the people who had suffered from the policy. Legally, however, while freedom of religious belief and practice may be an internationally recognized human right, it was not protected by Albanian laws of the time. Indeed, the 1976 Constitution prohibited religious belief explicitly. The repressive activities in question, therefore, were of questionable illegality. For this and other reasons, convictions of former Politburo members for their role in religious repression, too, made little public impact.

The trial of Alia and the other nine had ended by late June 1994, but the announcement of the sentences was delayed until July 2, the fourth anniversary of the 1990 storming of foreign embassies in Tirana by young men who wanted to leave the country (one of the harbingers of the end of the communist system). That night, the announcement of the guilty verdicts was juxtaposed on Albania's single state-controlled television channel with footage of the 1990 events. But popular attention had not been focused on the trial, and it did not focus on the convictions either. Even the newspaper of the ruling DP, Rilindja Demokratike, gave more prominence the next day to a visit by German Christian Democrats than to the verdicts, although the trial received a small front page story captioned simply "Alia and the others receive punishments," accompanied by a picture of Ramiz Alia looking old and thoughtful.

Alia was given a prison sentence of nine years. Manush Myftiu, who had already been in jail for almost three years, received a five year suspended sentence, primarily because of his health and age (he was 75 at the time). Adil Carcani, the last communist prime minister, also received a five year suspended sentence. Rita Marko and Simon Stefani were sentenced to eight years in prison, Aranit Cela seven years, Zylyftar Ramizi six years, Hekuran Isai to five years, Rrapi Mino to four years, and Veiz Haderi to three years. On appeal, some of the sentences were reduced slightly (most notably, Alia's to five years), but the convictions were otherwise affirmed. Alia, Myftiu, Carcani, Stefani, and Isai were also ordered to repay various sums to the state.

Hekuran Isai, Llambi Gegprifti and Besnik Bektushi were released from jail within a year. Rita Marko was freed on June 1, the day the new Criminal
Code became effective. Ramiz Alia’s lawyer argued that Alia, too, should have been freed immediately because of the new Criminal Code. Prison officials countered that he must remain in prison until next March. Several factors enter into the calculation of the remaining time of his imprisonment, and it is not clear what the exact date of his release should be. The present government would doubtless prefer that Alia stay in prison during the upcoming electoral campaign, although in fact his release would probably make little difference to the elections. On July 7, the Court of Appeal agreed with the Alia’s lawyer and ordered Alia’s immediate release.

The politics of decommunization
Among its first acts upon taking power, the DP passed law #7562, which added two short paragraphs to the Labor Code. This piece of legislation permitted the “competent organ” to transfer or fire any state employee for the good of “the reform,” a word not defined in the law. Tens of thousands of people lost their jobs during 1992 pursuant to this law. Since the law provided no criteria for firing or retaining individuals, favoritism and arbitrariness marked the process. During this same period, judges who rendered decisions the government did not like were removed, as was the first attorney general of the DP, the latter in flagrant violation of the transitional Constitution. A number of the leaders of the DP, including its co-founder, were expelled at the end of the summer of 1992, primarily because of their attempts to foster debate within the party. Many ordinary Albanians, not only those who lost their jobs in the “reform,” became disillusioned with the government of the DP. They saw that many former PL members, including President Berisha and almost half of the DP’s parliamentary representatives, were flourishing under the new regime, and they perceived that “decommunization” was being used as a tool by government party leaders to tighten their control over the political process.

Nano’s arrest and trial in 1993 certainly consumed far more public attention than the first consolidated trials of former Politburo members and as much or more as the second set of trials, including Alia’s. Nano’s trial is sometimes lumped with the others, especially by outside observers, but in fact, it had little if anything to do with them. While there was at least some attempt to expose the abuses of the communist regime in the Politburo and Hoxha trials, the same cannot be said about Nano’s case.

The offenses of which he was accused occurred only in 1991, the transition year. Now in his early 40s, Nano had been an economist at the Institute of Marxism-Leninism in the late 1980s. An interview with the Voice of America in 1990 about the market economy raised his visibility and, as the last PL government maneuvered to stay in power, its members turned to him. Named general secretary to the Council of Ministers around the beginning of 1991, then vice prime minister to Adil Carcani, he was appointed prime minister after the pluralist election of March 31, 1991, a position he held for almost two months before his government was forced to resign early in June. He was offered another ministerial post in the coalition government but decided instead to focus on the newly-renamed SP, of which he became chairman at its June 1991 congress. He was elected to Parliament in the March 1992 elections.

In 1992, the SP made a substantial comeback in local elections. This evidence of voter support set the stage for the attack on the leader of the party that began in the spring of 1993. Waving documents in front of the television camera in a manner reminiscent of Senator Joseph McCarthy, the head of the State Control Commission began to attack Nano in Parliament in April 1993, claiming that the documents in question proved major corruption by Nano and others (including Ramiz Alia) in the administration of Italian food aid.

At the end of July, Nano was stripped of his parliamentary immunity and was immediately thrown in prison, where he remained for some time. At one point, the case against him was considered so weak that the district court sent the case back for re-investigation. International pressure led to a trial at a time when the government probably would have preferred to finish the Politburo trials. The case inevitably became confused with those trials in some respects.

At the beginning of April 1994, Nano was convicted of embezzlement of state property largely
"for the benefit of third parties" and also of falsification of documents. He was sentenced to 12 years imprisonment. The 1991 food aid may well have been maladministered and perhaps members of the Albanian government were in fact implicated, but the evidence presented did not show any siphoning off of the aid for Nano's personal use or benefit. Nevertheless, by the end of 1994, his conviction and 12-year sentence had been affirmed by both levels of Albania's appellate court system.

This case has damaged Albania's postcommunist reputation and was for a long time considered to be one of the reasons that the Council of Europe hesitated to accept Albania as a member. Albania was, however, admitted to the Council on June 29, without any explicit reference to the Nano case. Nano's sentence has now been reduced by several years because of the amnesty and the new Criminal Code, but he remains in prison. As with Alia, the prison administration declined to free him under the new code, and his lawyers turned to the courts, seeking to reopen his case. The government could conceivably use the new code as an occasion to end quietly the situation, and there have been some signs that this may occur.

That attempts by the present Albanian government to punish people connected with the past regime are largely or wholly devoid of ideological content is underlined by the recent conviction of Enver Hoxha's son Ilir for remarks made this April in Modeste, a small-circulation newspaper. (See Albania Update in this issue.) Upon the appearance of the first installment of the interview, Hoxha was placed under house arrest on the charge of inciting hatred among "parts of the population." The interview, however, did not seem particularly inflammatory. Out of a fairly long text, the phrases "these vandal bands" (apparently referring to the present rulers), "blind tools" (referring by name to several government officials), and "there will come a day when accounts will be settled" were cited as criminal.

Some commentators suggested at the time that the purpose of putting Hoxha under house arrest was to keep him from attending May ceremonies in Moscow on the occasion of the fiftieth anniversary of the end of WWII, where he might have accepted an award on behalf of his father. After that event passed however, the government went ahead with the trial. One June 8, Hoxha was found guilty under the new Criminal Code and sentenced to one year's imprisonment. His appeal is pending.

Hoxha is said to have been the first person sentenced under the new Criminal Code, and it may have been that the government thought the conviction of a member of his family would be an appropriate way to launch the new code. While Hoxha was arrested under the old code, the charge against him was not retroactive. Amendments of November 1993 to the prior code had established a number of "speech crimes," and the original (pre-June 1) indictment charged him with one of them. Even if legally in order, however, the charge lacked substance, and the application of the relevant article of the penal law to this situation was of questionable constitutionality under Albania's transitional Constitution, which contains a fine-looking set of human rights provisions.

If the interview had been truly criminal, its publication would have been a violation of Albania's October 1993 press law, resulting in liability to the editor who permitted it to be published in his newspaper. But the mere enactment of the press law, not to speak of the subsequent arrests of several journalists under it, has caused so much negative reaction from world-wide human rights and press protection groups, that Albania seems to be shying away from using it. The editor of Modeste was questioned by the Albanian police to verify the publication of the interview, but he himself was not arrested.

As in the case of their mother, there seems to be little personal sympathy for Hoxha's children among the Albanian public, and the case has not attracted particular interest inside the country. It is seen as just another example of revenge-taking by the present government, in this case of a rather minor kind, possibly with the upcoming elections in mind, but certainly not as a form of "decommunization."

**The past and the future**

When Albanians are asked about the trials of Nexhmije Hoxha, Ramiz Alia, and other high communist officials, they often reply, with weary cyni-
cism, that it is always the same: governments change, and new rulers take predictable revenge against their predecessors. Albania's history since the declaration of independence from the Ottoman Empire in 1912 bears this out. The first ten years of independence were chaotic. The country was occupied by the forces of several different countries during WWI, although it had remained neutral. A tribal chieftain from Northern Albania, Ahmet Zogu, gained power during the early 1920s, but was overthrown in June 1924 in what is often called the "Democratic Revolution." A Harvard-educated orthodox archbishop, Fan Noli, headed Albania's government for six months before Zogu, with help from Yugoslavia, was reinstated. Even in that short time, Noli's government managed to bring criminal cases against Zogu and his main collaborators, although wide-scale purging was avoided.

When Zogu took over again, Noli and most of his major advisors fled the country. Several were assassinated in various European countries within the next few years, reportedly by Zogu's men. Noli himself returned to Boston, where he finally died in 1965. Zogu made himself king in 1928 and ruled until the Italian occupation of April 1939, when he too fled the country. After WWII, the Communist Party (CP) systematically persecuted not only pre-war elements from Zogu's time but successive waves of CP members, imprisoning or liquidating them, especially after the successive breaks with Yugoslavia (1948), the Soviet Union (1960-61), and China (1978). The grave of King Zogu's mother was moved from its position of honor at the beginning of the communist era, and the grave of Enver Hoxha was similarly moved from its position of honor next to the statue of Mother Albania on a hill overlooking Tirana at the beginning of the postcommunist era. That people might now be cynical about the political use of retroactive justice is easy to understand.

In the past few years, a genuine transfer of power has taken place in Albania, but progress has been marred by corruption, undemocratic or questionable actions of the new regime, massive dismissals of competent people under the pretext of removing those tainted by the communist past, (without removing all of them) and a regional bias.

Even a socialist victory in the next elections would not bring back communism, Stalinism, or what the DP often calls "Enverism." There is no other country of the region where the communist system left behind such total economic ruin. But the danger that other groups who obtain power might continue with revengeful attacks is of intense concern to those who want a better future for Albania. No one knows how the socialists would respond to the actions that have been taken against their chairman if they gain power. In the interview that led to his arrest, Ilir Hoxha said that when the accounts are settled, it will not be for revenge, but to see justice established. Unfortunately, the line between justice and revenge is sometimes difficult to draw.

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The Battle over Presidential Power in Slovakia

Spencer Zifack

On May 5, pursuant to Art. 106 of the Constitution, Slovakia’s National Council (Parliament), moved a no-confidence motion against President Michal Kovac. The motion received 80 votes in favor, 40 against, with 30 abstentions—a clear majority, but short of the three-fifths required by the Constitution for the motion to pass. Thus, President Kovac refused to resign, declaring that Parliament’s vote was unconstitutional and meaningless. Prime Minister Vladimir Meciar accused President Kovac of acting contrary to the state’s and the democratically-elected Parliament’s interests. Meciar renewed his call for Kovac to vacate the presidency. The prime minister characterized the conflict as a battle of wills between the democratically-elected government and the president, deprived of his mandate and authority. Meciar and Kovac then traded insults in vitriolic exchanges, capturing the attention of the press and the public. In recent Slovak political life, invective has unfortunately replaced debate as the modus vivendi of political and journalistic discourse. Beneath these exchanges, however, lay more fundamental political and constitutional issues. For the impasse that was reached in May would not have occurred had the institutional and constitutional structure of Slovakia been different. Without a clear appreciation of these latter difficulties, therefore, the political brawling that has recently taken place cannot be seen in its proper perspective.

The curious constitutional relationship between president, government, and Parliament

The Slovak Constitution establishes a parliamentary democracy (see “Of Presidents and Parliaments,” Matthew S. Shugart, EECR, Vol. 2, No. 1, Winter 1993). That is, it provides that the government is drawn from Parliament which is directly elected by the people. The government is then responsible to Parliament and through Parliament, the people. The government, headed by the prime minister, is designated as the principal repository of state power. It is the government, therefore, which has stewardship of the affairs of state.

The president is the head of state and performs a number of important but essentially residual functions. The president is elected by a three-fifths majority in Parliament to a five-year term. The president is empowered both to appoint and recall the prime minister, members of the government, and heads of important state authorities. The president may convene and, under specific conditions, dissolve parliamentary sessions. Also, the president signs all laws and may return them to Parliament for comment, thus exercising a mild or “suspensive” veto.

In addition to these standard presidential duties, the Slovak presidency also possesses some rather unusual features setting it apart from its Hungarian and Czech counterparts. Unlike the Hungarian and Czech constitutions, the Slovak Constitution does not distinguish clearly between the powers the president exercises independently and those which he exercises only on government request. Under the Slovak Constitution, with the notable exception of declaring war, the president may exercise all of his powers independent of the government’s recommendation. Therefore, the president has the potential to assume considerable political importance.

The strength of the presidency is further enhanced by a number of other constitutional provisions. For example, the president may submit reports on the state of the nation and other serious political issues to Parliament and may also submit bills and other decrees for its consideration (Art. 102.o of the Constitution). More extraordinarily, however, the president has the right not only to attend sessions of Parliament (Art. 102.p) but also to attend and chair
This latter provision, so far as I am aware, has no counterpart in Central Europe. Such an allocation of powers to the president makes the positions of president and prime minister difficult to distinguish and injects an immediate element of conflict between them.

Although the president's position in relation to the government is strong, his position in relation to Parliament is weak. The president can dissolve Parliament only if the government's program is rejected by Parliament three times within six months of its assuming office. Once the government's program is accepted, however, Parliament may not be dissolved until the next election. More importantly, Parliament may remove the president from office at any time during his term. The president may be recalled if he or she "undertakes activities directed against the sovereignty and integrity of the Slovak Republic or if [the president's] activities undermine the democratic order of the Slovak Republic" (Art. 106).

A three-fifths vote from Parliament is necessary to remove the president from office. This provision is inconsistent with traditional understandings of parliamentary democracy under which the presidency exists to guard the Constitution, to act as a counterweight to the government's abuse of power, and to provide the means through which governmental and parliamentary crises may be resolved. It is incompatible with each of these roles for the president to be removable on broadly defined grounds at the will of either the government or Parliament. The current political turmoil surrounding the presidency is best understood against this curious constitutional background.

The president and the prime minister
In 1993, Prime Minister Meciar accused Foreign Minister Milan Knazko of treachery, claiming that Knazko had persuaded some members of the governing coalition to vote against Meciar's preferred candidate for the presidency. Knazko denied the charges and counterattacked, asserting that Meciar conducted the government in an authoritarian manner and failed to consult sufficiently with Parliament and the public. In retaliation, Meciar advised newly-elected President Kovac to recall Knazko from his ministerial post. At first, Kovac equivocated, petitioning the Constitutional Court to determine whether he was under a duty to follow the prime minister's advice when appointing and recalling ministers. Undeterred, Meciar threatened to resign unless Knazko was removed. To defuse the situation, Kovac recalled Knazko from office before the Court had ruled on his petition.

In June, the Court issued its decision in favor of the president. After an extensive examination of the relevant constitutional provisions and an exploration of the political and constitutional history of the office of president, the Court decided that the president was not obliged to follow the prime minister's recommendations (Vol. 1 C.5 of the Decisions of the Constitutional Court of the Slovak Republic). The Court remarked that the Constitution had created a presidency possessing considerable power. Further, it observed that Art. 111, which provides that the president appoint and recall ministers on the prime minister's recommendation, was cast in discretionary rather than imperative terms. For these and other reasons, the Court ruled that the president exercised his powers of appointment and recall independently.

This decision had no impact in the Knazko case but engendered renewed conflict in November 1993 when Prime Minister Meciar submitted a new cabinet for the president's approval. Meciar submitted seven names, indicating that the president must either appoint every person nominated or appoint no one at all. Kovac, however, took exception to the appointment of Ivan Lexa as minister of privatization, claiming Lexa was unqualified for the position and that a conflict of interest rendered him unfit to hold the post. Kovac, therefore, refused to appoint Lexa, calling the prime minister's bluff and provoking a hostile government response.

Three months later, Meciar's government came to an end after he promised to amend privatization laws in a manner that would have concentrated all power over privatization in his own hands and slowed the privatization program significantly. Kovac publicly criticized Meciar, warning that the prime minister's dictatorial style would impede Slovak democracy. With Kovac's tacit approval, a
number of opposition parties banded together and passed a vote of no-confidence in the government. Meciar resigned, and five days later Kovac installed the new government led by Josef Moravcik.

New elections were held in September 1994 and, despite the setback, Meciar's Movement for a Democratic Slovakia (MDS) emerged with the largest single block of votes. MDS deputies were infuriated, however, when President Kovac failed to appoint Meciar as prime minister, preferring instead to allow the new parliamentary deputies to explore different government configurations. A Meciar-led coalition was finally appointed, however, and Parliament reconvened on November 3.

After the first formal parliamentary session, the governing parties reconvened Parliament immediately for a second sitting, which lasted throughout the night. During that night, the new coalition partners moved a motion of no-confidence against two former Moravcik government ministers and dismissed a number of government officials, including board members of Slovak radio and television, members of the National Property Fund, and the chairman and vice-chairman of the Supreme Auditing Office (see EECR, Slovakia Update, Vol. 4, No. 1, Winter 1995). The coalition also attempted to introduce retrospective amendments to privatization laws instituted by the previous government, but this initiative met with a presidential veto a few days later. Shortly afterwards, Parliament responded by halving the president's office budget.

After this parliamentary session, the relationship between the prime minister and the president sank to an all-time low, making it only a matter of time before political and personal animosity would surface.

Parliament's vote of no-confidence in the president
Without notice, on May 5, deputies from Parliament's governing coalition offered a motion of no-confidence in President Kovac. The party statement which accompanied the motion declared that after two years in office, the president "is not capable of carrying out his duties because he is causing a polarization of society, his actions are not impartial and he has failed to respect the seriousness of the democratic decisions approved by Parliament, and, thus, the will of the majority of Slovak people."

The no-confidence motion was based on a confidential report produced by the Special Control Agency, the parliamentary committee responsible for overseeing the operation of the State Intelligence Services (SIS). This committee was headed by Ivan Lexa, whose appointment as privatization minister the president had rejected one year before.

Neither the contents of the report nor the nature of the parliamentary discussion of the report are known, because the government and some opposition party members voted to close the parliamentary session at which the report was considered. The Constitution permits such a closure if three-fifths of Parliament's deputies vote in favor of doing so (Art. 83.4).

Parliament voted in favor of the no-confidence motion but failed to achieve the required three-fifths majority to remove President Kovac from office. The president did not receive a copy of the report and was only permitted to deliver his defense to Parliament six days after the report was presented. When the president stood to address Parliament, every member of the governing coalition left the chamber, leaving Parliament in tatters. In his address to the remaining members, the president denied the rumored charges against him, which included the allegation that he had requested that the SIS produce confidential security reports on his political opponents. He criticized the Meciar government's tendency to concentrate power in its own hands. He argued that Parliament's resolution conformed neither to parliamentary standing orders nor to the terms of the Constitution. He concluded by reaffirming that he would not be driven from his position. The following day, the prime minister asserted that his own re-election had brought President Kovac's mandate to an end. In light of Parliament's no-confidence vote, therefore, Meciar proposed that the only principled action Kovac could take was to resign.

Constitutional travail
The marriage between former political allies Kovac and Meciar has broken down irretrievably,
But to say this is to tell only half the story. The constitutional breakdown is just as important and far more interesting. I will conclude by describing its principal dimensions.

1. The Constitution itself established the preconditions for the current political debacle. It juxtaposes a strong government with a strong presidency, leaving it quite unclear, therefore, how the respective roles of president and prime minister should properly be reconciled. In certain key respects, the constitutional text is uncertain or indefinite. The problem of whether and when the president should exercise his or her designated constitutional functions independently provides the clearest and most pressing example of this textual ambiguity. This lack of clarity is aggravated by the absence of established constitutional conventions governing the relationship between the offices of the president and the prime minister. In the absence of either mutual respect or good will between the officeholders, the political traditions now being established are likely to create even greater conflict and uncertainty in the future.

2. Furthermore, the stability of the presidency and hence the effective operation of the separation of powers is undermined completely by Parliament’s power to remove the president from office. Such parliamentary power is justly absent from comparable constitutions in the region. Symbolically, the role of the president is to unify the nation and to protect its democratic institutions. In practice, the president can check the government before it either abuses its own power or denies other institutions and individuals the capacity to exercise their rights. The president represents the continuity and certainty of constitutional values, and therefore most constitutions provide that the president serve a term exceeding that of any one government. The Slovak Constitution lacks such a stabilizing provision. Instead, it creates an irreconcilable tension between a president empowered to check the actions of the government and a parliament capable of removing the president at the behest of the government. (For an earlier analysis to similar effect see “The New Slovak Constitution: A Critique,” Pavol Hollander EECR, Vol. 1, No. 2, Fall 1992.)

3. Article 106, which gives Parliament the power of removal, is itself fundamentally flawed. It casts the grounds for the president’s removal in such broad terms that it is difficult to attribute a precise meaning to them. In fact the form of words used resembles the definition of treason contained in some other Central European constitutions. But Art. 107 of the Slovak Constitution deals separately with treason, leaving the scope of Art. 106 quite unclear. Further, Art. 106 provides no indication as to how Parliament should proceed in determining whether the president meets the grounds for dismissal. To prevent Parliament from engaging in a political witchhunt, one might have expected that any charges against the president would have been referred to an independent body, for example the Constitutional Court. But no such procedure is set down and no such independent body was called in aid during the recent fracas.

4. By failing to make clear which of the president’s powers should be exercised independently and which should be exercised only on government advice, the Constitution provides an avenue for presidents with pretensions to greater power to interfere significantly in the day-to-day affairs of state. When combined with personal animosity between leaders and a marked lack of respect for the institutions of government, such a possibility of presidential expansion of powers allows for just the kind of escalating political conflict that Slovakia is currently facing.

5. Article 83.4, which allows the National Council to hold closed sessions in circumstances defined by law or where three-fifths of the deputies agree that sessions be held in secret, is a flat denial of fundamental democratic principle. When combined with Art. 106, its effect is to permit a president to be removed from office in secret without the opportunity to defend himself against the allegations made. Moreover it deprives the courts, the media and the public of any opportunity to assess the validity of such allegations and, therefore, to hold either the president of Parliament responsible for their actions.

Conclusion
Little good has come out of the recent battle over presidential power. The intensity of the conflict has left Slovak politics more divided than at any time
since 1989. The dangerous flaws in the Constitution are more apparent than ever before.

Not long after the president delivered his defense to Parliament, however, two of the major opposition parties staged a protest rally attended by more than 30,000 people, making it the biggest political demonstration since the 1989 revolutionary rallies. In his speech at the rally, Jan Carnagoursky, the leader of the Christian Democratic Party, declared that neither he, nor any of the participants, should let the current government “steal the Slovak nation from its people.” Carnagoursky’s appeal for the new Slovakia to be identified not only as a national but also as a democratic and constitutional entity met with great applause. (Carnagoursky’s remarks are published in more detail in The Slovak Spectator Vol. 1(8), June 7-28 1995.) Part of the problem with the fabric of Slovak constitutionalism and politics has been that the people themselves have taken so little interest in it. Perhaps this rally might mark the beginning of a new, more active and more democratic awareness.

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The Pains of Growing Together: The Case of the East-German Spies

David P. Currie

Spying is a hoary and equivocal profession. The ancient Egyptians developed a sophisticated system of espionage; a Chinese treatise devoted an entire chapter to the subject as early as 500 BC. Nathan Hale became a hero in the United States by spying on the British during the Revolutionary War, and the British hanged him unceremoniously without trial. Just a few weeks ago the German Constitutional Court was called upon to decide what to do about spies when the countries for and against which they had worked became a single nation.1

The political branches of the Federal Republic had given a clear answer. Klaus Kinkel, who had directed espionage activities against East Germany, became foreign minister. Markus Wolf, who had engaged in similar activities against the West, was tried for and convicted of treason.2

The West, after all, won the Cold War.

The Constitutional Court saw it differently and reversed the convictions of several high-ranking intelligence officers of the former East German regime on constitutional grounds.

If former adversaries are to live together in harmony, there is much to be said at the policy level for forgiving past offenses.3 After the Civil War, President Andrew Johnson issued a general amnesty for those who had made war against the United States, including Jefferson Davis, president of the so-called Confederate States of America, who had been indicted for treason.4 But as both the majority and the dissenters in the German decision pointed out, the negotiators of the Unification Treaty and the Parliament of the reunited nation had decisively rejected pleas for amnesty for East German spies,5 and it was not so easy to find such a requirement in the Constitution.

One is reminded, of course, of Nürnberg. Allied trials of Nazi officials for alleged war crimes were widely criticized as ex post facto, and Art. 103.2 of the German Basic Law provides in no uncertain terms that "an act may be punished only if it was defined by law as a criminal offense before the act was committed."6 But the Court rightly rejected any suggestion that punishment of East German spies offended the ex post facto provision; spying against West Germany had always been a crime under West German law, even if the offender never left East Germany.7

Nor did the Court conclude that spying was such a respectable business that, like birdwatching, its penalization inherently offended the constitutional principle that punishment may be inflicted only when the offender is guilty of some moral wrong (Schuldprinzip).8 Prohibiting espionage, the opinion conceded, served to promote the overriding interest in protecting the free democratic order of the Federal Republic, which alone made possible the enjoyment of fundamental rights.9 The same considerations, the Court said, justified extending punishment generally to those who caused injury to West Germany by directing espionage activities from outside its borders—which as the Court added was fully consonant with standard principles of international law.10

The Constitutional Court did not hold, as had one of the courts below,11 that punishing East German but not West German spies offended the equality principle of Art. 3.1 of the Basic Law.12 That was certainly a plausible argument. Once Germany became a single country, it was not clear why it was any more reprehensible to have spied for one of its component parts than for the other.13 For the Court the decisive fact was that the Federal Republic had survived and the Democratic Republic had not: It was perfectly reasonable not to prosecute one's own spies.14

Article 25 of the Basic Law makes international law a part of German law and gives it precedence over domestic statutes, but the Court explicitly
denied that prosecution of East German spies was contrary to international norms.  

Finally, the Court did not hold that all East German spies were immune from prosecution after unification. Only East Germans who had confined their activities to East Germany or to other countries where they were safe from extradition were entitled to constitutional protection. The big fish who pulled the strings were to be left in freedom; the little fish who carried out their orders could be put or kept behind bars.

The Court based its decision on the principle of proportionality (Verhältnismäßigkeit). The Basic Law says nothing about proportionality. The doctrine has its roots in an eighteenth-century codification of Prussian law, which without purporting to limit legislative competence authorized the administration (Polizei) to take necessary measures (die nöthigen Anstalten) to protect the public peace, order, and security. The Constitutional Court from the first found it an implicit constitutional limitation on the powers of all branches of government. Even those fundamental rights which are subject to statutory restriction—such as the right to freedom from bodily restraint guaranteed by Art. 2.2—or which find their limits in “the constitutional order” i.e., the general freedom of action (“allgemeine Handlungsfreiheit”) the Court has perceived in the right to free development of personality protected by Art. 21—are safe against any limitation that does not pass the proportionality test.

Not surprisingly, there has been some uncertainty as to where the proportionality requirement is found in the Basic Law. The prevailing view is that it is one aspect of the general principle of the rule of law (Rechtsstaat) which itself (insofar as the central authorities are concerned) is merely implicit in the various structural provisions of Art. 20.

Proportionality is the German counterpart of the American doctrine of substantive due process.

As the Court said in the present case, the proportionality test has three parts. Any limitation of fundamental rights must be adapted (geeignet) to the attainment of a legitimate purpose, necessary (erforderlich) to that end, and not overly burdensome (unzumutbar) in comparison to the benefits to be achieved.

The Court had no difficulty with the first two requirements, which are concerned with the relation between ends and means: punishment for spying was the only way to achieve the statutory goal. It was the third prong of the test, the relation between costs and benefits (sometimes referred to as “proportionality in the narrower sense”) on which the spy prosecutions foundered.

East German spies, the Court acknowledged, had offended West German law; but they were safe from prosecution, both practically and legally, so long as they remained in the East. Against persons in that protected position, said the Court, the West German laws could have little deterrent effect; to subject them to proceedings made possible only because unification had extended the Federal Republic’s authority would impose upon them a particularly heavy burden. The fact that West German spies escaped punishment for similar activities, while not enough to offend the equality provision, enhanced the harshness (Schärfe) of this burden; and it was detrimental to the unification process to continue to treat East Germany for this purpose as a foreign state. Any remaining contribution of such prosecutions to national security, the Court concluded, was “clearly outweighed” by these considerations.

Three dissenting Justices argued that the Court had undervalued the interest in national security; prosecution would help to deter both others and the defendants themselves from committing further acts of espionage against the Federal Republic. There is little profit in haggling here over who had the better of this debate, for we have left the domain of legal analysis. Whether one interest outweighs another is an essentially political decision on which reasonable minds obviously can differ, and they did.

Precisely therein lies the dissenters’ principal objection. Whether to grant a general amnesty, they argued, was a political decision to be made by the political branches of government; the Court had overstepped the boundary between judicial and legislative authority.

But the distinction between adjudication and legislation always blurs when a court undertakes to determine whether a policy decision is arbitrary, or disproportionate, or unreasonable. It is the essence of constitutional doctrines like these that courts retrace the same paths of decision that the political branches
have followed, giving more or less deference to their conclusions. We have seen this in the United States with decisions striking down legislative attempts to prohibit slavery, to limit working hours, and to forbid abortion. The German Court is no stranger to this process; its reports are studded with cases second-guessing legislative judgments, in matters ranging from sex-change operations and limitation of the number of drugstores to the romantic question of hunting with falcons.

The dissenters did not challenge the proportionality principle itself; they argued that it had been misapplied. Prior decisions, they said, suggested that proportionality should be determined case by case, not for a whole category of persons; and the only factors that could properly be weighed against the interest in security were a diminished degree of blameworthiness and the possibility that sanctions might no longer serve their purpose. And of course the dissenters added that the majority had not given sufficient deference to the views of the political branches.

My own reading of earlier proportionality cases in the Constitutional Court does not suggest any very high degree of deference to legislative or executive conclusions. Nor does there appear to be any shortage of precedent for the Court's authority to find that political decisions offend the proportionality principle as to whole classes of people. As a historical matter there seems to be more to the dissenters' objection that extraneous factors such as the effect of spy prosecutions on the integration process ought not to be considered, for conventional statements of the proportionality principle speak of balancing the interests served by a challenged measure against the burden it places upon the complaining parties.

It is typical of judges to discover that constitutions that appear to be silent on the subject give them power to strike down unreasonable legislative or executive actions. It is also typical for them to look for formulas that limit, or ostensibly limit, the discretionary nature of their decisions. Thus the US Supreme Court in administering its homemade doctrine of substantive due process tends to hedge it about with legalistic categories like "fundamental rights" or businesses "affected with a public interest," and the Constitutional Court divides proportionality into three parts, the last of which the dissenters in the spy case insisted should be interpreted narrowly. For, as the dissenting justices observed, the more open-ended the constitutional standard becomes, the harder it is to distinguish what the judges do from that which is done by those to whom the Constitution trusts the task of making policy; and the harder it is to explain why it is appropriate for it to be done by politically irresponsible judges in a democracy.

The difficulty is compounded when, as is the case with substantive due process in the United States and proportionality in the Federal Republic, the judges are applying principles that they themselves have read into the Constitution. For what Justice Byron White said not long ago about the Supreme Court of the United States is equally true of courts in other countries blessed with a republican form of government: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." The East German spy decision was by no means the first to raise this question in Germany, and it will surely not be the last. But one may perhaps be forgiven for wondering whether, whatever good it may have done in the individual case, such a decision will serve in the long run to strengthen or to weaken the crucial institution of judicial review.

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Notes:


2. See New York Times, June 6, 1995, Section A, p 11. Treason is commonly limited to betraying one's own country, but the German definition extends to anyone who reveals state secrets to a foreign power, § 94.1 StGB (the criminal code). The charges against Wolf and against the parties to the cases before the Constitutional Court also included violations of § 99.1 StGB, which forbids espionage against the Federal Republic on behalf...
of any foreign power. Wolf himself was not a party to those cases; his appeal to the Federal Court of Justice was pending at the time of the Constitutional Court’s decision. See Süddeutsche Zeitung, May 26, 1995, p 4.

3 See dissenting opinion of Justices Klein, Kirchhof and Winter at 14-15.


5 See slip opinion at 11-13; dissenting opinion at 1.

6 Arguably this provision permits prosecution for acts that violated generally accepted principles of international law, which Art. 25 makes a part of German law: but spying is not an offense against international law. See slip opinion at 66.

7 See id at 60-63; §§ 5.4, 9.1, 94.1, 99.1 StGB.

8 See 20 BVerfGE 323, 330-36 (1966); 45 BVerfGE 187, 228 (1977). See also slip opinion at 66: “Generally the state imposes criminal sanctions on activities that fall short of an ethical minimum.”

9 Id at 51-53. See also 57 BVerfGE 250, 262 ff (1981); 28 BVerfGE 175, 183 ff (1970).

10 Slip opinion at 63. These principles are conventional learning in the United States. See Restatement Third, Foreign Relations, § 402.c (1987) (affirming that, subject to certain exceptions, a state has legislative jurisdiction with respect to “conduct outside its territory that has or is intended to have substantial effect within its territory”); cf Restatement, Conflict of Laws, § 377 (1934): “The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”

11 See slip opinion at 22-23. See also the argument of counsel in id at 31-32.

12 “All persons shall be equal before the law.”

13 See slip opinion at 66 (noting that international law draws no distinction between spying for good states and spying for bad ones.) Of course there may have been differences in the methods employed by East and West German spies that might justify differential treatment, but the charges before the Court were based on the generic act of spying. See id at 23, 67-68.

14 See id at 53-54.

15 See id at 55-59.

16 See dissenting opinion at 26, 28-29 (understandably suggesting that this distinction itself raised a serious problem under the equality clause).

17 See slip opinion at 62.

18 Allgemeines Landrecht für die Preußischen Staaten, pt II, tit 17, § 10 (1794).

19 See, e.g., 2 BVerfGE 266, 280-81 (1953).


21 See e.g., slip opinion at 62.

22 The constituent states (Länder), on the other hand, are expressly required to conform to the Rechtsstaat principle. See Art. 281 GG. For a more detailed look at the Rechtsstaat and proportionality principles see Currie, The Constitution of the Federal Republic of Germany at 18-20, 307-09 (cited in note 20).

23 See id. at 274-75, 305-21.

24 See slip opinion at 63.

25 Id.

26 See id. at 68-69 (noting that East Germany would not extradite its own spies and that the 1972 treaty between the two Germanies, by requiring each state to respect the autonomy of the other, forbade West German authorities to take action in East Germany).

27 “Durch so eine Strafverfolgung werden sie in besonderem Maße betroffen.” Id. at 70.

28 Id. at 71.

29 Id. at 73. The balance of interests was different, the Court added, for those who had acted within the original Federal Republic or in a third state that did not protect their activities, for they could have had no expectation of immunity from apprehension and thus were more susceptible to deterrence. The permissibility of punishing them, the Court said, would have to be determined by balancing the competing interests case by case. Id. at 70, 75-77 (suggesting also that in some cases their offenses may have been more serious).

30 See dissenting opinion at 2, 11-12 (noting that it would also serve the interest in retribution for past offenses). On the other side of the balance, the dissenters added, with considerable force, the defendants’ reliance on the continued existence of a separate East German state to insulate them from prosecution was not worthy of
constitutional protection. Id at 6-7, 22-23.

31 Id. at 1, 14, 33.

32 Dred Scott v Sandford, 60 US 393 (1857); Lochner v New York, 198 US 45 (1905); Roe v Wade, 410 US 113 (1973).

33 49 BVerfGE 286 (1979); 7 BVerfGE 377 (1958); 55 BVerfGE 159 (1980).

34 See dissenting opinion at 3, 7-9. The dissenters conceded, however, that the consequences of unification might require some amelioration in applying criminal provisions to individual East German agents. Id. at 26-28, 31-32.

35 Id. at 24.


37 The famous falconry case, cited in note 33, is only one of many examples.

38 This is how it was put, for example, in the recent decision, 90 BVerfGE 145, 185-92 (1994), invoked by the dissenters at p. 8 of their opinion, in which the Court laid down criteria for determining when punishment for possession of small amounts of marijuana would impose a disproportionate burden. It is also consistent with the original formulation of the doctrine. See Carl Gottlieb Svaerz, Vorträge über Recht und Staat 486-87 (Hermann Conrad & Gerd Kleinheyer, eds, 1960). Indeed the prevailing opinion in the spy case itself twice said the test was whether the means employed would lead to an undue intrusion upon the rights of the affected party. See slip opinion id. at 63, 64.

39 See Roe v Wade, 410 US at 154, 162-64; Munn v Illinois, 94 US 113, 126 (1887).

I am not an expert on the formerly communist states of Central and Eastern Europe. What I bring to this conference is a theoretical model (cost-benefit analysis) of general applicability to problems in social ordering, some knowledge of the history and practice of rights enforcement in the Anglo-American legal culture, and my experience as a federal judge involved in such enforcement.

The organizers of this conference asked the participants to concentrate on five specific rights, and I will discuss each of these but only after discussing the general issue of rights and their enforcement. I will not discuss the bearing of the European convention on human rights, which, I understand, nations must sign, submitting to the jurisdiction of the court of human rights in Strasbourg, in order to be accepted as members of the European Union.

1. I take “right” to mean simply a claim or entitlement normally enforceable through courts or equivalent agencies; and I assume—more controversially, but consistently with taking an economic approach to the issue—that rights are instruments for promoting social welfare rather than things of value in themselves. This is not to deny the existence of moral rights, or even to treat them, in defiance as it were of Kant, as mere instruments. It is obvious that the law does not enforce all moral rights, but only a subset; and the selection of the subset is decisively influenced by instrumental considerations.

Isaiah Berlin distinguished in a famous essay between positive and negative liberties. I offer a version of that distinction to help frame my analysis. A positive liberty is a right to demand a service from the government. A negative liberty is a right not to be interfered with by the government, or, more broadly, by anyone. Positive liberties are associated with the modern welfare state, negative liberties—most compendiously expressed in Brandeis’s famous phrase as “the right to be let alone”—with classical liberalism. Negative liberties are less of a burden on the public fisc. Indeed they are often assumed, especially in theoretical analyses, to be costless, unless one is discussing national defense. Consider the basic right of property: if I own a good, say my automobile, you (private person or government official) cannot take it without my consent. To make my property right meaningful, about all that is—or at least that seems—necessary is a simple registration system for automobile titles, a criminal penalty severe enough to deter theft, and appropriate remedies against governmental takings. Not only do the costs of negative liberties seem slight, but the benefits are immense, rights being the cornerstone of a system of free markets and democratic political governance. Positive liberties are more costly, and their benefits often elusive. Many
positive liberties, such as financial assistance to the poor, public education, and publicly subsidized health care, are largely redistributive in purpose and effect rather than directly productive of valuable output and they may affect incentives in a way that reduces productivity.

But on further reflection the distinction between negative and positive liberties blurs. Every negative liberty, especially when the term is understood to include liberty from private as well as public aggression or expropriation, can be seen to imply a corresponding positive liberty. The rights of property and of personal safety, which are negative liberties enforced by criminal and tort laws, imply a public machinery of rights protection and enforcement, a machinery that includes police, prosecutors, judges, and even publicly employed or subsidized lawyers for criminal defendants who cannot afford to hire their own lawyer. This implied right to government protection may or may not be legally enforceable (usually not, because it would require budgetary and administrative decisions that courts are poorly equipped to make), but without it the negative liberties may be largely ineffectual. It is true that much rights protection and enforcement is carried on privately rather than publicly; the role of arbitrators, mediators, and private lawyers and police is particularly important. But, with all due respect for the ingenious and forcefully articulated views of “anarchocapitalists” such as David Friedman, it is difficult to believe that the negative liberties could be made meaningful without intervention by the public sector.

The costs of the positive liberties have been studied extensively, but little is known about the costs of protecting and enforcing negative liberties in any society. The reasons for this ignorance are numerous:

First, the costs of law enforcement, adjudication, and the private legal profession are not broken down in existing sources of data according to the rights enforced. For example, today in the United States a large part—but no one is sure how large a part—of the total resources devoted to criminal law enforcement is aimed at suppressing the traffic in illegal drugs; and this suppression makes no obvious contribution to securing the negative liberties. Even in principle, it is difficult to allocate the costs of law enforcement across rights enforced, because many of their costs are joint; the same judges, police, prosecutors, and private lawyers enforce them.

Second, it is not clear what rights ought to be counted as part of the sphere of negative liberties. Consider the right, found in the Fifth Amendment to the U.S. Constitution, not to be compelled to be a witness against oneself. Is this a negative liberty, or an impediment to the enforcement of the negative rights of potential victims of crime?

Third (and related to the preceding point), some rights straddle the line between negative and positive. The right to counsel and the right to abortion are examples. For an affluent person, both rights are negative: they are rights against the government’s interfering with the hiring of a lawyer and of an abortion doctor respectively. But for a poor person, these have to be positive liberties, because without public assistance the poor person cannot hire a lawyer or purchase an abortion.

Fourth, many of the costs of rights are not public budgetary costs at all. They are such things as erroneous convictions and acquittals, police brutality and other abuses of power by rights enforcers, and, above all, private nonlegal expenditures on rights protection and enforcement, including such mundane but cumulatively expensive items as locks and car alarms.

Fifth, rights are a preoccupation mainly of wealthy countries, in which the purely budgetary costs of enforcing rights are not a significant factor.

Finally, there is a good deal of rights fetishism. We romanticize rights. We—and I am speaking now of almost the entire Western legal and political community—even sacralize them. The religious feelings of secular moderns have been displaced onto various aspects of “civic religion,” including the protection and enforcement of rights. Rights are treated as Platonic forms, universalized and eternalized. They are treated (in the famous expression of Ronald Dworkin’s) as trumps, rather than as tools of government and hence as subject to the usual tradeoffs. Who talks of the cost of a Platonic form?

All this said, it is pretty obvious that the benefit-cost ratio of the public and private machinery for the protection and enforcement of the basic negative liberties is much higher than one. A suggestive although
far from definitive statistic is that the total public expenditures on the administration of justice in the United States—expenditures on police, the courts, prosecutors, public defenders, and prison administration—are only $61 billion a year, which is less than one percent of the Gross National Product. So the question arises: why do any countries committed to the principle of free markets and democratic government not have effective systems for the protection and enforcement of the liberties that undergird a democratic free-market system?

II. Poverty cannot be the answer, or at least the complete answer. Few countries outside of sub-Saharan Africa cannot afford the relative handful of minimally honest and competent judges, lawyers, prosecutors, and police that is necessary to operate a legal system whose only job is to protect and enforce the fundamental rights to property, contract, and personal safety. Two other answers are more plausible. The first is the paradox of power. A government need not be large, but it must be strong, in order to protect and enforce rights, but strong government is a threat to those rights. Second, legal systems have become encumbered with so many functions besides the protection and enforcement of the essential negative liberties that they have become extremely costly, and some nations cannot afford the cost. In these nations the legal system is asked to do too much and fails at everything, including the protection of negative liberties.

A. An effective system of property and personal rights requires an apparatus for deterring crime, especially acquisitive crime. Not just theft, robbery, embezzling, the forging of wills, certain types of fraud, and other familiar acquisitive crimes, but also bribing officials, including judges, police, and officials in charge of registering titles to real or personal property, must be prevented, or, more precisely, must be kept within tolerable bounds. It is pretty easy to think up ways of maximizing deterrence: impose savage punishments, deny procedural rights to persons accused of crime, require citizens to carry identification papers, pay informers generously, place judges under the control of prosecutors (or dispense with judges altogether), and allow the police a free hand to use brutal methods in investigating crime. Some of these measures might be countereffective, but as a package modeled on military discipline culminating in the drumhead court-martial it would be an effective method of minimizing the crime rate and thus maximizing the protection of rights, provided that the judges, police, and other administrators of the criminal justice system acted competently and in good faith. That is the rub. The criminal justice system that I have sketched would be so powerful that it would be a threat to negative liberties. Innocent people would find themselves caught in police dragnets, arrested and detained on suspicion of crime, cavedroppes and informed on, occasionally even convicted.

To check these dangers it is necessary either to alter the incentives of law enforcers or to create countervailing rights, or to do both—and the countervailing rights may alter incentives. This process is visible in the history of English criminal procedure in the eighteenth century. By the beginning of that century (in fact earlier) very severe punishments for crime were in place, but there were no police forces, and the right of law enforcement officers to enter a person's home was severely limited ("a man's home is his castle"). These two features of the criminal justice system must have greatly undermined the protection of rights yet have seemed justified by the danger of abuse of power if the reins of the law enforcement authorities were loosened. Early in the eighteenth century judges were given secure tenure, emancipating them from control by the prosecutorial authority (the king and his ministers). Yet by the end of the century there were still no police forces and there was still no general right to search a person's home. At the same time there was no right of appeal by criminal defendants and they had no right to counsel either, so constraints on law enforcement were in effect offset by constraints on defendants. The state had limited power but defendants had limited rights. Criminal proceedings were short and cheap.

The criminal justice system of twentieth-century America furnishes parallel illustrations. By the beginning of the century there were large police forces, which frequently abused citizens. Prison conditions were often brutal. Indigent defendants often had no counsel, even though criminal proceedings were more complex than they had been in the eighteenth
Figure 1: Homicide Rate in United States per 100,000 Inhabitants, 1933–1990

The Supreme Court, beginning in the 1930s but accelerating greatly in the 1960s, took the lead in seeking to rectify these conditions by creating countervailing rights, including the right to exclude illegally seized evidence from a criminal trial, the right to effective assistance of counsel in all criminal cases, the right to invoke federal habeas corpus to obtain review of state convictions by federal courts, and the right to bring tort suits complaining of police brutality and inhuman prison conditions.

The creation of these countervailing rights made the criminal justice system cumbersome, expensive, and probably less effective in deterring crime. As shown in Figure 1, a great upsurge in crime rates accompanied the “Warren Court’s” adventurous rulings in criminal procedure, although the causality is deeply uncertain; there is some evidence that these rulings did cause crime rates to rise.

Legislators responded by expanding pretrial detention, authorizing more use of wiretapping and other electronic surveillance, extending the length of sentences, reducing judicial discretion in respect of sentencing, hiring more educated police, increasing the scope of pretrial prevention (that is, reducing the right to release upon the posting of a bond), and appropriating more money for prisons and for prosecution. Expanding the rights of criminal defendants, while in one respect fostering negative liberties, in another and possibly more important respect had impaired them by undermining the protection of property and personal rights that were threatened by crime and imposing large indirect costs by making the criminal justice system more costly.

These points are obscured by the historical origins of the rights of criminal defendants. The people who pressed for and obtained the rights of criminal defendants that were recognized first in English law and then in the American Bill of Rights were not poor people, let alone members of the criminal classes. They were businessmen, publishers, writers, and politicians. The rights they fought for were rights that a society needs in order to make property and political rights secure against abuse by government. In contrast, the rights that the “Warren Court” derived, by flexible interpretation, from the Constitution were rights that criminals, and mem-
bers of an underclass or lumpenproletariat most likely to be mistaken for criminals by overzealous police or prosecutors, want or need. For the most part the enforcement of these rights undermines property rights and personal security by making the punishment of criminals less swift and certain.

The difference is illustrated by the changing meaning of the Sixth Amendment to the US Constitution, one clause of which entitles criminal defendants to the assistance of counsel. The original understanding was that the clause entitled criminal defendants to hire counsel if they could afford to. Only in the twentieth century has the amendment been understood in addition to entitle indigent criminal defendants to the assistance of counsel furnished at the government's expense. To speak with perhaps brutal exaggeration, the twentieth century has witnessed a shift in the legal system of the United States from protecting the rights of the propertied to protecting the rights of the unpropertied who covet the wealth of the propertied.

The rights that are recognized in the United States today are not rights semper et ubique. They are the culmination of a specific historical process and they are relative to a specific legal and political culture, one shaped by a high level of material wealth. They are not equally well adapted to every society. It is not even clear—this is an especially neglected point in discussions of civil liberties—that the amplitude of criminal rights recognized in the United States today reduces the net costs of erroneous convictions. There is a tug of war between the courts, which are primarily responsible for the creation (as by flexible interpretation of the Sixth Amendment and other constitutional provisions) of new rights, and the legislatures. Legislatures can neutralize the effect of a new court-created right either by reducing the funding for the defense of indigent criminal defendants, thus making it easier to convict them, or by increasing the severity of punishments, with the consequence that even if fewer innocent people are convicted, those that are will serve longer sentences. The total suffering of the innocent will not be reduced, unless the courts invalidate statutes that impose severe punishments, or require generous compensation of lawyers for indigent criminal defendants, and American courts have been unwilling to do either.

The leaders of the postcommunist societies of Central and Eastern Europe, like the leaders of the American Revolution, have, of course, a lively sense of the danger of governmental oppression of the respectable classes. That lively sense may lead to the creation of a costly system of rights invoked primarily by members of the criminal class, as has happened in the United States.

B. The other factor that I want to emphasize in the costs of protecting and enforcing rights is the overextension of the legal system. Suppose that at time \( t \) a nation is communist. Its system of law enforcement will presumably be operating at or near its capacity to enforce the society's existing laws, many of which will be devoted to the enforcement of positive liberties. Suppose that at time \( t+1 \) the nation converts from communism to capitalism and it wishes to devote resources to the protection of negative liberties, which have greater importance in a system of free markets. Many of the old laws will remain intact, so it will not be possible simply to reallocate enforcement resources from positive to negative liberties. What is more, since the transition from communism to capitalism will often involve an initial drop in net public revenues and an initial increase in criminality because of the disappearance of the police state and the greater inequality of income and wealth in a capitalistic compared to a communistic system, the nation may be unable to maintain, let alone increase, the existing level of resources devoted to law enforcement.

Reallocation will be particularly difficult for two reasons. The first is that the benefits of effective enforcement of negative liberties, as distinct from positive ones, often are diffuse. This makes it difficult to marshal an effective interest group behind the enforcement of negative liberties. Second—a point I mentioned earlier—negative liberties are costs as well as benefits. The rights of criminal defendants are the clearest illustration of this point. Anything that strengthens those rights is apt, by doing so, to weaken the protection of property rights by reducing the expected punishment cost of theft and other acquisitive crimes. The net benefits of a wholesale
reallocate enforcement resources from positive to negative liberties may be small.

One implication of this analysis is that property rights are cheaper to protect than other negative liberties, and in particular the rights of criminal defendants. Expanding the rights of those defendants, or enforcing them more effectively, makes it more costly to protect property rights, but the reverse is not true; expanding property rights does not make it more costly to fight crime. Another implication is that deregulatory measures unrelated to the protection of rights—for example the removal of price controls, or of limits on an employer’s right to fire a worker—will promote the protection of rights by freeing up resources of the legal system for that protection.

A further point is that the borderline between positive and negative liberties is hazy, and not only because of the economic links that I have stressed. In principle, for example, antitrust laws and laws against fraud protect free markets from distortion. But the practice is often different. Since concepts such as monopolization and misrepresentation (and especially “misleading omission”) are vague, laws aimed at preventing or punishing these practices invite manipulation and expansion, and historically have often been used to punish efficient practices and express economic resentment. Antitrust laws and laws against any but the most flagrant forms of fraud appeared late in the development of Anglo-American law, implying that such laws are inessential to the achievement of a high level of prosperity. Nonwealthy countries should be cautious about adopting expansive prohibitions against these and other “economic” crimes, lest they deter aggressive but efficient economic activity.

III. If I am correct so far that negative liberties, especially when they take the form of rights for criminal suspects, defendants, and prisoners, may be costly for a nation that while not poor in the way that many African nations are poor is not wealthy the way the United States and Germany are, we should not be sanguine that these liberties are likely to be placed on a secure footing in the post-communist societies of Central and Eastern Europe any time soon. Nor is it clear that these societies should accord a high priority to securing all the negative liberties. Perhaps those liberties differ greatly among themselves in their value to a poor society. I shall illustrate this point with reference to the five rights focused on during the conference.

A. The first is preventing brutal police tactics directed against pretrial detainees. These tactics generally center on the use of third-degree methods to extract incriminating or otherwise useful information (such as identifying confederates) from a suspect before he is formally charged. This abuse, formerly prevalent in the United States, has been curbed by a combination of the exclusionary rule (coerced confessions are not admissible in evidence), tort remedies against the police enforceable in federal court, the Miranda warnings, and increased levels of police training, of police “professionalism,” implying good salaries. This combination would be difficult to implement in a poor nation. A rule of evidence against coerced confessions requires that judges be willing at times to credit criminal defendants over police, since rarely will be evidence of coercion other than the defendant’s say-so. Even in the United States, and even more in nations that do not have a tradition of civil liberties and that have an inquisitorial rather than an adversarial system of justice, judges hesitate to side with lawbreakers against law enforcers. The effectiveness of the Miranda warnings likewise depends on the willingness of judges to disbelieve police testimony. Without such willingness, the police will not give the warnings but will merely testify that they did. The provision of tort remedies against public officers implies, realistically, the indemnifying by the state of officers found liable. So the state must appropriate funds to compensate criminal defendants most of whom are in fact guilty of the crime to which they confessed, since most coerced confessions are truthful, though this depends in part on how much coercion is applied. Only in the last quarter century have tort suits provided a meaningful remedy to the victim of coercive interrogation in the United States.

The most effective method of reducing the role of coercion in the interrogation of suspects may simply be to pay police officers very well. That will
enable the hiring of educated and competent police, who being intelligent and competent will not need to rely so heavily on coercion to obtain evidence against suspects. And by making the job of a policeman more valuable, a high salary will make him more reluctant to jeopardize his job by engaging in misconduct. But it is difficult for a nonwealthy nation to pay its police high wages. Apart from the financial cost, the effect is to divert a disproportionate fraction of what is bound to be a smallish group of educated and able people from other urgent national tasks, such as entrepreneurship, administration, medicine and public health, and defense.

Probably the greatest cost of measures to prevent coercive interrogation is that it undermines negative liberties at the same time that it secures them. Much pious denial to the contrary, coercion, unless taken to the brutal extreme at which it will induce an innocent person to confess, is a cheap and effective method of criminal investigation. It is used routinely in situations in which the need for information is desperate. The idea that it brutalizes the interrogators and thus fosters abuses unrelated to interrogation appears to be unsubstantiated. The more that coercive interrogation is curtailed, the less secure are property and personal rights. This is an unpleasant tradeoff, yet any realistic regime operating in circumstances of poverty must face up to it. I abstract, as I said at the outset, from any constraints that the European convention on human rights may place on the freedom of a nation that wants to belong to the European Union to make such a tradeoff. And I emphasize that I am speaking of the relatively mild forms of coercion, such as protracted interrogation and false promises of leniency, that are unlikely to induce innocent people to confess.

B. The second right with which the conference is concerned is the right of patients in psychiatric hospitals not to be abused by the hospital staff. I take it that “abuse” is meant to comprehend neglect, which is the more serious problem. Instances of brutality toward patients are not unknown. But they are less common than in the parallel case of pretrial detention, since a hospital staff has less to gain from abusing a patient than the police have to gain from beating a confession out of a suspect. The problem of neglect is largely one of resources and so cannot be solved simply by giving patients legally enforceable rights, especially since an individual suffering from a severe mental illness is an unlikely candidate to win a lawsuit. So here is another example of the merger of positive and negative liberties: the right to be decently treated in a psychiatric hospital depends as a practical matter on the allocation by society of adequate resources for psychiatric facilities. But like the rights of pretrial detainees, a right to decent treatment in psychiatric hospitals is two-edged. Suppose that a nation’s budget for health care is essentially fixed. Increasing the resources devoted to psychiatric hospitals will reduce the resources available for other, and possibly as or more urgent, health-care needs. Once more a difficult tradeoff is inescapable.

A related problem, and one with a sinister resonance in the formerly communist nations, is that of improper commitment to mental institutions, or, what is closely related, that of failure to release a committed person when he has ceased to be a danger to himself or others. The difficulty, however, is that a generous construal of due process, designed to prevent improper commitment or retention, will also impede proper commitment and retention, resulting in more murders, other crimes, and suicides by the insane.

A similar tradeoff is required in the case of bail. Admitting criminal suspects to bail reduces the cost of jails and the costs to the innocent of being incarcerated mistakenly, but increases the amount of crime since many of the people released on bail are in fact criminals. As these examples illustrate, rights impose costs (not all of them monetary) as well as confer benefits. That, indeed, is the essential point that I make in this paper. It is a point that economists are not likely to ignore, but that lawyers, who reverence rights and are not professionally sensitive to cost, are likely to ignore. It illustrates the important role of economics in value clarification. By showing how much some much-desired good such as “rights” will cost in some other desired good forgone (all that the word “cost” means to an economist is what must be given up to obtain something desired), the economist forces society to decide how much it really values the good.

I have stated this as a normative point but it also has positive implications. The weak footing of rights
in the ex-communist states is typically thought a legacy of the totalitarian past. It may instead be a matter of economics—of cost, not culture.

C. The third conference topic is the provision of competent lawyers for defendants in criminal cases. For affluent defendants, there should be no problem; the market will provide competent counsel. Most criminal defendants, however, certainly in the United States and presumably to a far greater degree in most other countries, are indigent. The direct costs of providing lawyers for indigent criminal lawyers are unlikely to be high. In the United States, Congress appropriates some $400 million a year for retaining or employing lawyers for indigent defendants in federal criminal cases. Although only a small fraction of all criminal cases, federal cases are disproportionately complex, with the result that the total bill for the defense of the indigent, state and federal, is only $1.4 billion a year. This is little more than $5 per American. Granted, the figure of $1.4 billion is an understatement. Some lawyers are pressured by judges to “volunteer” their services to indigent criminal defendants at below-market rates. Others truly volunteer their services, but they do so either to obtain on-the-job training or as genuine charity, so in neither case is there a net cost to the volunteers. Nevertheless the total costs of defending the indigent are slight—and would be even slighter in a country with a lower crime rate or with an inquisitorial rather than an adversarial system of criminal justice (since lawyers play a smaller role in an inquisitorial system)—were it not for indirect effects of the sort that I have mentioned. A represented defendant is more difficult to convict than an unrepresented one, so the provision of representation to indigent criminal defendants makes the criminal justice system more costly, and possibly less effective in deterring crime.

I say possibly less effective because a system of criminal justice in which innocent persons are frequently convicted may actually reduce the expected punishment cost of crime, since that cost is net of the expected punishment cost of not engaging in crime. But it is not clear that denial of an automatic right to counsel in criminal cases would result in the frequent conviction of the innocent. When the crime rate is very high in relation to the resources allocated for prosecution, prosecutors will tend to select for prosecution only the strongest cases, and in general these will be the cases in which the defendant is least likely to be innocent. This selection effect will be weaker, however, in a nation that follows the German practice of mandatory prosecution rather than the U.S. practice of discretionary prosecution. It will also be weaker if the nation contains a disliked minority that has a high crime rate, such as gypsies in Hungary and Romania. It may be easier to convict an innocent member of that group than a guilty member of the majority. This was a serious problem in the southern states of the United States with respect to blacks as late as the 1950s and was an unacknowledged motive for the “Warren Court’s” program of expanding the rights of criminal defendants.

Notice that if criminal law and procedure were so simplified that a person could defend himself without a lawyer’s assistance, and if the resources allocated to prosecution were kept down so that prosecutors would be discouraged from pursuing (and were not required, by a principle of mandatory prosecution, to pursue) borderline cases, the overall costs of a criminal justice system might be extremely low yet the risk of convicting the innocent might also be low.

An extensive literature criticizes the current level at which the defense of indigent criminal defendants in the United States is funded as inadequate, noting the low quality of much of this representation. I can confirm from my own experience as a judge that indigent defendants are generally rather poorly represented. But if we are to be hard-headed we must recognize that this is not entirely a bad thing. The lawyers who represent indigent criminal defendants are probably good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or the state would have to devote much greater resources to the prosecution of criminal cases. Especially for a nonwealthy country (though possibly even for the United States), a “barebones” system for the defense of indigent criminal defendants may be optimal.
then paying lawyers too little to attract competent lawyers to defend indigent defendants may cost the system more in the long run by leading to retrials following a determination that the defendant's lawyer at his first trial was incompetent. But this observation is consistent with my suggestion that a non-wealthy nation may want to set a level of compensation generous enough to induce moderately, but not highly, competent lawyers to represent indigent criminal defendants.

A problem with the right to counsel that is unrelated to subsidization is that a wealthy defendant may be able to obtain an unjust acquittal by deploying a flock of pricey lawyers, overpowering a prosecutorial team that is underfunded. Poor countries often contain a number of very wealthy people—and have inadequate resources for prosecution.

Several participants in the conference emphasized the value of a criminal defendant's or suspect's lawyer as a witness to improper behavior by police or to substandard conditions in jails and prisons. This value is genuine but is largely independent of the lawyer's quality.

D. Delay in court is an old story, and a sad one; the slogan "justice delayed is justice denied" states an important truth. Remarkably, the enormous upsurge in case filings in the federal courts of the United States since 1960 has led to no increase in the court queue, even though the increase in the number of judges has been much smaller than the increase in the number of cases. There are three reasons why the queue has not grown: Judges work harder; they delegate more of their work to nonjudges, such as law clerks, and they have become more summary in their dispositions. These adaptations, though the last two have been widely criticized, appear not to have lowered significantly the average quality of federal judicial output; and they may provide a model for other countries that encounter an upsurge in litigation.

A qualification is necessary, however. Court queues are to some extent self-limiting. The longer the queue, the greater the demand for judicial services. The analogy is to adding lanes to a highway in order to relieve congestion. The resulting reduction in congestion will make the highway a more attractive travel route, drawing travelers from other roads and other modes of transportation. The net decrease in congestion may be slight. Similarly, a large investment in increasing judicial capacity in order to meet surging demand may have little effect on the court queue because the increase in capacity will attract people from other methods of dispute resolution into the courts.

A judiciary is pretty cheap, even for a nonwealthy nation. The federal courts of the United States are generously funded. Federal judges are well paid (especially when their pensions are taken into account as of course they should be), and have large offices, large staffs, modern equipment, and tolerable although heavy workloads. Nevertheless, at a cost of only $2.3 billion, the federal courts in 1992 handled some 320,000 civil and criminal cases (not to mention an even larger number of bankruptcy filings), which comes out to an average cost of less than $8000 per case. (Of course, these are only budgetary costs; the expense of lawyers is much more.) Court queues are short, except for civil jury trials in some of the larger cities; and the quality of the justice dispensed is certainly tolerable, and often distinguished.

E. The last specific right on which the conference has focused is the protection of health by public inspectors of restaurants and producers of food products. This example differs from the others in involving bureaucratic rather than judicial regulation. Here the danger of corruption is acute, because many inspectors are needed and they deal face-to-face with the managers of the establishments being inspected, which lowers the transaction costs of bribery. There are many techniques for dealing with the danger: Inspectors can be shifted about to avoid developing stable relationships with the establishments that they inspect. "Sting" tactics can be used to weed out dishonest inspectors (this is commonplace in the U.S. Postal Service). Severe punishments can be prescribed for both giving and accepting bribes. Standards of cleanliness can be set at minimum rather than optimum levels, so that it is easy for the establishments to satisfy them and therefore less
urgent to bribe the inspectors to excuse noncompliance. Generous tort remedies can be provided for victims of food poisoning. The discretion of inspectors can be minimized, since it is easier to detect the violation of a rule than it is to detect an abuse of discretion. The sale of tainted food can be made a strict-liability crime (as has frequently been done in the United States), so that the seller's intent or even negligence need not be proved and his lack of evil intent and even his due care are not defenses. Employees of food establishments can be hired, or rewarded, as informers. The number of restaurants and other food producers can be limited, in order to generate monopoly profits for them and thus increase the cost of being forced to close by a food-poisoning incident.24 The investigation of inspectors can be placed in a separate (and elite) agency from the inspectors themselves, to minimize fraternizing. And as in the case of the police, generous compensation, heavily backloaded, of inspectors can be used to increase the expected punishment costs of bribe-taking.

So many are the techniques for preventing the widespread corruption of food inspectors, and so obvious the social benefits from preventing lethal or epidemic diseases caused by bacteria in food,25 that failure to prevent such corruption would be difficult to attribute to hardheaded economic tradeoffs such as the ones I have discussed in connection with other rights. I add that unless a society is completely disorganized, a food inspector is unlikely to accept a bribe to overlook a lethal danger, since if the danger materializes he is bound to be in very serious trouble.

We should not confuse our consideration to lethal dangers, however. As Dr. van Rijckevorsel has emphasized in his paper for the conference,26 non-lethal food poisoning is responsible for many days of lost work, as well as considerable suffering, and these costs may justify a substantial program of public food inspections. At the same time, it is important to bear in mind that if the standards to which food producers are required to adhere are set far above what is necessary to avoid serious food poisoning, corruption will be a great, perhaps an irresistible, temptation. We have known at least since George Orwell's *Down and Out in Paris and London* that the kitchens even of distinguished restaurants are often filthy, yet without palpable harm being done to the clientele. And recent investigative reporting in the United States has revealed disgustingly unsanitary conditions in the processing of chickens, yet again seemingly with little danger to the public health. So it is possible that minimum standards of cleanliness, even when they are rather laxly enforced, in the production of food are adequate to protect the public health. In 1983, the most recent year for which I have the requisite data, the total cost, state and federal, of food inspection in the United States was only about $1 billion,27 which again is only $4 per American; and perhaps that is enough, though I do not know enough about the subject to express a confident opinion.

The protection of the water supply is a more urgent task. The water supply is at once more vulnerable and more integrated; the same water sources are shared by far more people than share the same source of food. But the protection of the water supply is also much cheaper by virtue of its greater concentration.

I have mentioned corruption but the real dangers of corruption to a nation's prosperity lie elsewhere than in food inspection. When corruption, for example of tax collectors, drains off public revenues—and incidentally makes it difficult for the government to pay tax collectors wages generous enough to discourage them from accepting bribes—or when essential licenses to conduct business can be obtained only by bribing a sequence of officials, any one of whom can block the license, substantial macroeconomic consequences are possible.28 The main solution to these problems is lower tax rates and less government regulation, which reduce the incentive to bribe public officials. The cost of this solution, political obstacles to one side, may actually be negative; reducing the size of government may stimulate output directly at the same time that it does so indirectly by reducing the amount of corruption. But that is a story for another day.

IV. I have said nothing about "culture" as a factor in the protection or enforcement of rights, except for a glancing reference to the U.S. civil liberties tradition. No doubt, despite my emphasis on the costs of rights, a nation's political and legal culture affects the extent to which rights are enforced, too. But as no one seems to know how to alter a culture, there is not much to be gained from dwelling on the point. This is not to say
that cultures do not change; obviously they do. They change with wealth; history teaches that civil liberties are a superior good in the economist’s sense, which is to say a good the demand for which grows with income. (This observation suggests that efforts to increase civil liberties without regard to their costs may impair those liberties in the long run.) My point is only that we do know how to intervene directly to change a nation’s political or legal culture. But within the limits imposed by a nation’s existing culture there is much that can be done—and much that should not be done—if careful attention is paid to the economics of rights.

I have also not addressed, at least directly, the question of the priority that the protection and enforcement of rights should enjoy in a country that has a desperate shortage of resources. I believe that the protection of property rights and of basic political rights (including the right to vote and the freedom of the press—and both are checks on abuse of official power) is very important, but I do not myself attach similar importance to three of the five rights that were the focus of the conference. Apart from the points I made in discussing each of them, I note that as recently as thirty years ago, these three rights (protection from police brutality in pretrial detention, protection from custodial abuse in public psychiatric hospitals, and provision of a competent defense attorney to indigent criminal defendants) were not securely established in the United States, yet the United States was on the whole (granted, an important qualification) prosperous and free. The fourth right (reasonably prompt justice) and the fifth (effective food inspections) were securely established, and they are both important. But they are also, I believe, feasible even for a relatively poor country.

I am giving my personal view on the priority to be accorded these various rights. Other people, having different values, may accord them a different priority. All that is important is that they proceed in full awareness that enforceable rights are not costless, or even cheap.

A more sophisticated analysis would consider not whether to recognize this right or that, but how much money to spend on each one. The fact that a right is relatively unimportant is not a good argument for spending nothing at all on it. Large social gains might be obtainable from very modest expenditures.29 I glanced at this issue in discussing the right to assistance of counsel in a criminal case. I pointed out that a modest level of assistance might be sufficient to attract lawyers competent enough to obtain the acquittal of the innocent, whereas a higher level might, by attracting lawyers skillful enough to obtain the acquittal of many guilty defendants as well, on balance undermine rights, since criminals are rights infringers. I glanced at the issue again when I distinguished between levels of coercion in interrogation.

Obviously, however, much more work must be done before the optimal level of enforcing either particular rights or rights in general can be pinpointed, whether for the United States or for the nations of Central and Eastern Europe. This conference will have served its purpose if it has helped to launch and to guide this work.

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Notes:
1 I mean in their philosophical sense. I am not referring to the concept of “moral rights” as it is employed in European intellectual-property laws.
2 They may be indirectly productive. Public education, for example, may overcome the unwillingness or inability of parents to invest optimally in the human capital (earning capacity) of their children.

3 Aggregate private expenditures on preventing crime in the United States have been estimated to be in the area of $300 billion a year, Amy Kaslow, “The High Cost of Crime,” Christian Science Monitor, May 9, 1994, p. 9, which far exceeds public expenditures, as we shall see. The importance of private self-protection against crime is emphasized in Tomas J. Philipson and Richard A. Posner, “Public
Health and the Natural Rate of Crime" (June 1995, unpublished).


5 It obviously would not pay to try to extirpate crime completely. Expenditures on criminal law enforcement must not be carried to the point where the last dollar of expenditures buys less than a dollar's worth of benefits (however benefits are computed) in reduced criminal activity.

6 See Isaac Ehrlich and George D. Brower, "On the Issue of Causality in the Economic Model of Crime and Law Enforcement: Some Theoretical Considerations and Experimental Evidence," *American Economic Review* 79 (May 1989). The source for Figure 1 is Figure 2 in Philipson and Posner, note 3 above, at 21, which is based on National Crime Survey (NCS) data. The increase in the homicide rate understates the increase in the propensity to commit homicide and in the total costs of homicide and its prevention, since an increased risk of criminal behavior induces increased efforts at self-protection by the potential victims of crime, dampening the increase in the actual crime rate.

7 A clue is the enormous increase in the educational level of police in the United States. Between 1960 and 1970—the heyday of the "Warren Court"—the percentage of police with some college education rose from 20 to 31.8 percent. U.S. Dept. of Justice, National Institute of Law Enforcement and Criminal Justice, *The National Manpower Survey of the Criminal Justice System, vol. 5: Criminal Justice Education and Training* 138 (1978) (tab. IV-1). The increased complexity of criminal procedure required more educated police, since they are the front-line administrators of the criminal justice system and their legal mistakes make successful prosecution of criminals impossible.

8 In economic terms, the expected cost of punishment, a measure of deterrence, is \( EC = pS \), where \( p \) is the probability of apprehension and conviction and \( S \) is the sentence. If a court-created right leads to a reduction in \( p \) for both innocent and guilty defendants (and that is the likeliest consequence, since a right that makes it more difficult to convict an innocent person will also make it more difficult to convict a guilty one), and the legislature wishes to maintain \( EC \) at its previous level, it can do so either by raising \( S \) through a law increasing the penalties for crime or by raising \( p \) through a reduction in funding for the defense of indigent defendants. Both have in fact been legislative responses in the United States to perceived judicial excesses in the protection of the rights of criminal defendants and to the increased crime rates that may be, in part, a consequence of that protection.

9 I mentioned the increased educational level of the police. See note 7 above. By 1974, the percentage of police with some college education had risen to 46.2 percent, compared to only 20 percent in 1960. U.S. Dept. of Justice, note 7 above, at 138 (tab. IV-1).

10 A requirement that all confessions be videotaped might alleviate this problem, though it would be an expensive requirement for a nonwealthy nation and might be ineffective, since the police might not begin the videotaping until they had coerced the suspect's agreement to confess. This of course is why requiring that a confession be signed is not a secure preventive of coerced confessions.

11 This compensation, as in the case of judges, should be "backloaded" to maximize the deterrent effect of the threat to fire the employee for misconduct. If the employee has generous pension benefits that are forfeited if he is fired for misconduct, then even in the last period of his employment, and even if the chance of his actually being detected (if he misbehaves) and fired is quite low, he will have a strong incentive to behave himself. See, for example, Gary S. Becker and George J. Stigler, "Law Enforcement, Malfeasance, and Compensation of Enforcers," *3 Journal of Legal Studies* 1 (1974); Richard A. Ippolito, "The Implicit Pension Contract: Developments and New Directions," *22 Journal of Human Resources* 441 (1987).


13 Id.

14 This is a less efficient measure than using tax revenues to hire lawyers to represent the indigent,
since it interferes with the allocation of lawyer time in accordance with the principle of comparative advantage. A corporate lawyer might find himself assigned to defend a criminal, even though he had no experience in criminal law.

15 The United Kingdom, for example, with a population almost a fourth the size of the U.S. population, has only one-twentieth the number of jail and prison inmates. A Digest of Information on the Criminal Justice System: Crime and Justice in England and Wales 56 (Home Office Research and Statistical Department, Gordon C. Barclay ed. 1991).

16 In the limit, if the probability of being convicted were independent of guilt or innocence, the prospect of punishment would not provide any inducement to avoid committing crimes.


18 See Annual Report of the Director of the Administrative Office of the United States Courts, various years.

19 Between 1960 and 1994, the percentage of federal judicial employees who were full-fledged ("Article III") judges fell from 101 percent to 3.2 percent.

20 As creating "assembly-line justice," I think it is wrong to denigrate the analogy of the assembly line, which marked a big advance over previous methods of production. On the resistance of the legal profession to modernization, see my book Overcoming Law, ch. 1 (1995).


22 Id. at 579.

23 The source for these statistics is, again, the Annual Report of the Director of the Administrative Office of the United States Courts for various years.

24 This is a parallel measure to "overpaying" police or inspectors in order to increase the penalty to them of being detected in misconduct and losing their jobs.


26 Jan L. A. van Rijckevorsel, "On Food Law and Its Enforcement" (June 16, 1995).


29 This is just the point in note 5 that expenditures on the protection and enforcement of rights should be guided by a comparison of marginal benefits and costs.
From Costs and Benefits to Fairness: A Response to Richard Posner

Janos Kis

In his keynote address to this conference, Judge Posner warns us East Europeans to proceed in a very cautious way with liberal rights. It may be counterproductive, he intimates, for postcommunist societies in transition to “accord a high priority to securing all the negative liberties. Perhaps those liberties differ greatly in their value to a poor society.” More specifically, “the protection of property rights and of basic political rights is very important,” while it would be bad strategy to “attach similar importance to three of the five rights that are the focus of this conference,” i.e. to police brutality in pretrial detention, to protection from custodial abuse in public psychiatric hospitals, and to the provision of competent defense attorneys to indigent criminal defendants. I will call this Judge Posner’s priority thesis.

The priority thesis presupposes considerations about the costs of rights enforcement. These admit a weak interpretation in which probably they command a very wide consensus. In this weak sense they amount to nothing more than the assertion that the enforcement of rights makes claim on society’s resources, that resources are given in short supply, and that, therefore, choice is unavoidable. Hardly anybody would deny this. As a guide to legal policy, however, this claim is empty. It does not tell us how to measure costs and how to order priorities. So Judge Posner has a much more muscular thought in mind than those who would agree with him on the ordinary understanding of the costs-of-rights idea.

His strong claim is of an analytical character. The issue of measuring costs and setting priorities for rights is handled most adequately with the help of standard cost-benefit analysis. Rights are to be understood as “tools of the government.” They are instruments whose value depends on the efficiency with which they serve collective goals. They exercise a pressure on society’s resources in two ways. First, in order to be effective, they need “a public machinery of protection and enforcement.” And, second, if they are effective, they act as impediments standing in the way of the pursuit of other valued interests, including other rights. Thus, rights compete for scarce resources with each other and with other kinds of value. They are unavoidable “subject to the usual trade-offs,” i.e., the government has to make hard choices as to “how much money to spend on each one.” Efficiency is the standard against which alternative distributions are to be evaluated. The best allocation of scarce resources between competing rights or between rights and other values is that one which maximizes social benefit. Let me call this the efficiency thesis.

The only information we need for the rank ordering allocation options is, according to the efficiency thesis, information on costs and benefits. Now, Judge Posner estimates that protecting property rights is a cheap and efficient way to increase aggregate good, while protecting the rights of criminal defendants is costly and may even be counterproductive. He makes the same estimation with regard to provision of a competent defense attorney to indigent criminal defendants and to securing the rights of the mentally ill. The priority thesis follows.

It would be hard to discuss these intimations because they are based largely on intuitive judgment. My judgments are very different, and I suspect that the conflicting claims we make are supported by very divergent moral convictions. There is not much hope that a bare confrontation of such judgments and convictions will lead to a narrowing down of the disagreements between us. But there is still room for a rational debate if, instead of
attacking Judge Posner’s judgments, I try to challenge the analytical apparatus in terms of which he formulates them.

Judge Posner offers his cost-benefit theory of rights as an alternative to “treating rights (in the famous expression of Ronald Dworkin) as trumps, rather than as tools of government subject to the usual trade-offs.” But he is quite elliptical on the content of the disagreement between the “tool conception” and the “trump conception.” He says, for example, that, under the trump conception, “rights are treated as Platonic forms, universalized and eternalized.” This seems to me unfair, because Dworkin is explicit on the historical and cultural embeddedness of the very idea of rights. Another possibility Judge Posner suggests is that the “trump conception” ignores the cost-dependency of rights enforcement. But this, again, seems to be inaccurate. The idea that rights work as trumps does not imply that social goals which conflict with individual rights are without value. On the contrary, it assumes that the practice of protecting rights makes the government’s job of promoting valuable goals more expensive. So the difference must lie elsewhere. I propose to seek it in the very interpretation of what a right is.

Rights are rules which protect interests. Property rights protect the owner’s interest that his or her control over some resource, for example, not be interfered with or denied altogether. Now the protection of interests can be given two kinds of justification. One consists in arguing that if the government secures the interest in question, the indirect result will be the promotion of some other good (the maximization of social wealth, for example). The “tool conception” treats rights in this instrumental way. The other type of justification is based on the belief that the interest protected by the right is itself of such a moral importance that it makes a compelling claim on society that it be respected and secured. The “trump conception” asserts that some of our rights are justified in this way. We do not expect the government to protect human dignity because securing dignity is conducive to maximization of social benefit but because individuals are to be treated with respect, and so on. Such rights, if there are any, can be called “moral rights.” They serve as trumps because their force is independent of the contribution they make to aggregate social benefit.

One could object that this idea of moral rights runs into a serious dilemma. As any other legal right, a morally justified right makes claims on society’s resources, and then it is based on a trivially false premise, or it is incoherent because it asserts both that moral rights both do and do not compete with other values for resources. But this is only a first impression. I will show that the objection can be met. Moreover, I will point out that the “tool conception” is not an alternative to the “trump conception.” If the second fails, the first fails too.

Suppose a distribution of resources D1 is transformed into another distribution, D2, through a series of exchanges. Economic theory claims that D2 is a better distribution in terms of aggregate social wealth provided that all the transactions are voluntary, because everybody is in a situation he or she prefers to the previous one. But the voluntariness condition implies that the bargaining relationships are fair: no party is physically forced to accept the terms set by the other, nobody is denied relevant information, nobody has any threat advantage over the others, etc. This means, among other things, that in order for efficiency to prevail, a set of rights necessary to secure fairness must be instituted. But these rights (and the idea of fairness itself) are not instrumental to the maximization of social benefit. They serve as structural constraints to the definition of the good. They cannot be traded off against greater efficiency because efficiency itself is defined in their terms. Obviously, securing fairness implies costs and these can be covered at different levels. So a legal order can be fair to individuals to different degrees. If society spends less money to secure fairness and moral rights, more money will be saved for other aims. Suppose that the total quantity of money in the system is constant, then the above relationship is a mere tautology. But this tautology cannot be meaningfully translated into the claim that less fairness combined with more goods makes greater or smaller advantage overall than more fairness combined with less goods. First, different
amounts of well-being related to different levels of fairness cannot be directly compared because structures of benefit vary with structures of fairness. Second, and more important, fairness is not a good among others. It is a constraint under which social benefit is determined and is permitted to be maximized. Thus, more money in a less fair system is not more (or, perhaps, less) well-being. We are left with a lexical ordering of different legal structures depending on the degree of fairness they secure. And just this is the claim the “trump conception” makes with respect to moral rights. It does not imply that securing fairness has no price. It entails instead that fairness is an independent criterion of precedence ordering, and not a component of collective benefit. No sound “tool conception” can deny this. That would be incoherent. The real contest between the two theories can lie only in different interpretations of what kind of moral rights are entailed by the idea of fairness.

This may sound terribly abstract. Some of you might think it has no relevance at all to the policy thesis. But it has. Suppose we find that a legal arrangement is grossly unfair. Then we have an independent reason to combat it. One can object that the desired improvement is not feasible, at least not in the short run. But it is not a valid objection to say that it would involve too great an opportunity cost. My claim is that the right to protection from police brutality, to protection from custodial abuse in psychiatric hospitals, and to a competent defense attorney raise the fundamental issue of fairness. They are to be faced, that is, as moral rights.

But cost-benefit analysis is not the only argument Judge Posner marshals in support of his priority thesis. He offers yet another argument which is based on historical observations. It would not be wise for the new democracies of Eastern Europe to copy the system of rights recognized today in the United States, he says, because these are not “rights semper et ubique, they are the culmination of a specific historical process.” We should not read this statement as one of cultural relativism. What Judge Posner seems to have in mind is rather a general regularity in the sequencing of legal evolution. At the beginning of the historical process, we find the political struggle of “businessmen, publishers, writers, and politicians.” These people fought for rights “that a society needs in order to make property and political rights secure against abuse by government.” Rights of criminal defendants were demanded insofar as these were necessary for securing the economic and political independence of the new middle class. Those rights, serving the interests of criminal suspects and, in general, “members of an underclass or lumpen-proletariat most likely to be mistaken for criminals” came much later. So far as the United States is concerned, they are largely the product of the “Warren Court’s” activity. Now, Judge Posner’s address gives some evidence to the effect that such an expansion of rights of suspected criminals greatly reduced the level of protection to personal and property rights, but this is not the point here. The point lies in the intimation that Eastern Europe is at the very beginning of the historical process the United States has completed a very long time ago. Whether or not the Warren decisions are rational in the context of present-day America, in Eastern Europe it would certainly not be rational to imitate them. Too many rights secured for the underclass may jeopardize the whole enterprise of creating the legal and institutional framework for capitalist democracy. Let me call this the evolutionary thesis. If valid, this claim cannot be overruled by arguments from fairness. The judgment that a legal system which is openly biased against members of the underclass is utterly unjust had no relevance against the laws of historical evolution, provided that such laws do indeed exist. The trouble is that they do not. The structure of rights fought for and instituted during the eighteenth and nineteenth century corresponded to the particular form in which liberal democracy has been born. That was a democracy of the propertied and educated elites because everybody else was denied the right to vote and to be elected. In order to be able to repeat the developmental sequence which has been carried through in the West, the postcommunist soci-
eties of Eastern Europe would have to limit the right to political participation to those who manage their own businesses and/or have higher education. Whether or not this would be an efficient or attractive path towards mature capitalist democracy, it is simply not available as a practical option. The fact that the community of the democratic states reached universal suffrage by secret ballot as a general norm liquidated the possibility for latecomers to repeat the past experience of the early democratizers. Mass democracy is our destiny from the very beginning. And mass democracies do not cope very well with openly biased distributions of legal rights.

I made an argument from fairness against the efficiency thesis and an argument from history against the evolutionary thesis. It these arguments have some bite, then I may be justified in putting a big question mark after what I called Judge Posner’s priority thesis. And that was my aim throughout this response.

Janos Kis is Professor and Chair of Political Science at the Central European University, Budapest. This article is a response to the keynote address given by Richard Posner at the June 18 session of the Cost of Rights Conference in Budapest. Since then, Judge Posner has slightly revised his address, especially with respect to what I call the “Priority Thesis.” That may make my comments look misdirected. But if my response did contribute to the reasons which brought Judge Posner to elaborate on his conception, then its publication in its original form is, perhaps, justified.
Budapest Conference
On June 18-19, 1995, the Center sponsored a conference in Budapest, Hungary, on the Costs of Rights under Postcommunism. The aim of the conference was to launch a comparative and empirical research program, to be directed by Stephen Holmes and Andras Sajo, on the budgetary and administrative preconditions of rights enforcement in Albania, Hungary, Poland, and Russia. Participants were drawn from a wide range of legal and social disciplines, and asked both to help structure the research design, and to help sketch the limits of such an approach. Topics discussed included (1) the rights of criminal detainees; (2) the rights of mental patients; (3) the rights of access to courts; and (4) the right to health. Judge Richard Posner, Chief Judge of the Court of Appeals for the Seventh Circuit, presented the keynote speech; Janos Kis, Professor of Political Science at Central European University, responded to Judge Posner's paper. (Both papers are in published this issue of the Review.) Participants at the conference included: Skender Begeja, Susanne Baer, Bela Buda, Alexandre Chmoukier, Guiseppe diFederico, Jon Elster, Akos Farkas, Denis Galligan, Isaak Goyrovich, Stephen Holmes, Peter Jozan, Mikhail Kovalev, Agnes Kover, Peter Kuchera, Jacek Kurczewski, Lawrence Lessig, Christian Lucky, Pawel Moczydlowski, Marek Nowicki, Wiktor Osiatynski, Jan van Ryckevorsel, Andras Sajo, Judit Sandor, Herman Schwartz, Tanya Smith, and David L. Weimer.

Russian-Language Review
The East European Constitutional Review is published in Russian as Konstitutsionnoe Pravo: Vostochnoeropieeskoe 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@glas.apc.org).

Acknowledgment of Support
The Center for the Study of Constitutionalism in Eastern Europe at the University of Chicago Law School acts in partnership with the Central European University, which provides facilities, resources and funding for the Center's network of correspondents and affiliates in Eastern Europe. The Center is grateful to the CEU and to its founder, Mr. George Soros, for cooperation and support.

The Center is sponsored and generously supported by the University of Chicago Law School. The Center is grateful for the generous support of the John D. and Catherine T. MacArthur Foundation, the Open Society Institute, the Ford Foundation, the National Council for Soviet and East European Research, the National Science Foundation, and the National Endowment for the Humanities “Constitution of Democracy” grant.