The Moscow City Chamber of Advocates

# THE WORLD RULE OF LAW MOVEMENT AND RUSSIAN LEGAL REFORM

Editors
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# PREFACE

Most of the papers in this publication were delivered as speeches at the Symposium on the Rule of Law held in Moscow on 6th July 2007. Several others were prepared in anticipation of the Symposium. The Symposium was organized by the International Bar Association in conjunction with the Moscow City Chamber of Advocates, the Federal Chamber of Lawyers of the Russian Federation and the Union (Commonwealth) of Advocates of the Russian Federation. It was held in the Constitutional Court of the Russian Federation at the invitation of the President of the Court, who addressed the Symposium, as did other judges of the Constitutional Court. The President's address is one of the papers included in this publication.

I was immensely privileged to take part in this unique event and to share the responsibility for organising it. As the immediate Past President of the International Bar Association and now Chair of its Rule of Law Taskforce, I have devoted the last 3 years to the task of mobilising the world-wide legal profession to defend and promote the Rule of Law. Recent events remind us that this is a never-ending task. Unless governments and the public are constantly reminded of the importance of the fundamental principles of the Rule of Law it will be regularly undermined by governments more interested in extending this power, with the connivance of the public who are only too eager to trust or at least defer to their governments.

The Moscow Symposium was an important contribution to this task. It followed an equally important Symposium held by the International Bar Association in conjunction with the American Bar Association in September 2006; and will be followed by another in Singapore in October 2007 as part of our Annual Conference there. This movement to promote the Rule of Law was initially triggered by the Resolution of the Council of the International Bar Association passed at its Conference in Prague in September 2005, the text of which will be found later in this publication. It is impossible to emphasise too strongly the importance and value of this movement.

The International Bar Association expects to issue its own publication devoted to the Rule of Law in 2008, which will no doubt contain a num-

ber of papers contained in this publication. In the meantime, we welcome the initiative of the Moscow City Chamber of Advocates in swiftly arranging the publication of these papers.

The principal credit, both for the success of the Moscow Symposium and for this publication, is due to Petr Barenboim, who has been responsible for almost all the organisation, from original conception to final delivery. I am glad to have this opportunity, on behalf of the International Bar Association, to acknowledge our debt to him and to thank him most sincerely. If the Rule of Law had a few supporters in every country with his energy and commitment, the world would be a better place.

**Peter Barenboim and Holly Nielsen**

# INTRODUCTION

The «rule of law» is becoming a mainstream and global 21st-Century concept thanks to the combined and individual efforts undertaken by both the International Bar Association and the American Bar Association. This is an important initiative, made timely by the recent independence of a substantial majority of the world's «colonial» nations and the emergence of twenty-one new states from the former Soviet Bloc.

In 2005, the International Bar Association (IBA) and its President Francis Neate originated the worldwide Rule of Law movement with the global distribution and publication in September 2005 of the IBA Rule of Law Resolution. In November of that year, the American Bar Association (ABA) established its own Rule of Law initiative with the International Rule of Law Symposium in Washington D.C. The next important steps were a jointly-sponsored ABA-IBA Rule of Law Symposium in Chicago in September 2006; our Moscow Rule of Law Symposium on July 6, 2007 in Moscow; and a Rule of Law Symposium to be held in Singapore on October 19, 2007 as a part of the IBA Annual Meeting.

To date no clear single definition of «rule of law» has been articulated that can be recognized and easily translated into all languages and cultures. The term has been used primarily in English-speaking countries, and is not yet fully clarified even with regard to such established democracies as, for instance, Sweden, Denmark, France, Germany, and possibly also Japan. This term has at least a contextual meaning in developed markets, but is particularly confusing and difficult to translate to the audience in emerging markets. Therefore the task of clarification and definition is important. A common language among lawyers of common law and civil law countries, developed markets and emerging markets is critically important for the Rule of Law movement to succeed.

*The World Justice Project* of the American Bar Association has summed up the important purpose and goal of this movement:

We live in a world with a rule of law deficit. This shortcoming undermines efforts to ensure basic human security, fight poverty, eradicate corruption, improve public health and enhance public education. On the oth-

er hand, communities that adhere to and invest in the rule of law can minimize these problems and indeed offer sustainable economic opportunity and fair government.

The ABA President in 2007-2008, Bill Neukom, expressed a desire to expand the Rule of Law movement beyond the legal community across the globe and link it to such areas as social justice and culture. Mr. Neukom said in August 2006 that the ABA is going to commission «a Nobel-quality study and paper to answer simple, straightforward questions: does the rule of law matter, and how does it matter? Is it truly a platform for economic development?»

This multi-disciplinary and broad approach to the need for and study of the rule of law is radical but necessary in order to insure widespread implementation. The rule of law is especially important as an influence on economic development in developing and emerging markets.

We believe it is necessary (even critical) to shift the focus of the analysis from merely corporate law and problems of attracting foreign investment to a broader discussion that encompasses aspects of domestic economic prosperity and well-being. Consideration of the Rule of Law as a mechanism for attracting foreign investment may be viewed in developing and emerging market countries as something «foreign» and even imperialistic or paternalistic. Many countries, especially in Asia and Latin America, have not met strict rule of law criteria but in fact successfully attract substantial amounts of foreign investment through political recognition, market perception and economic potential. Many transitional countries, such as Russia and certain other resource-rich countries, are less interested in foreign investment than in the development of their own domestic economy which will ensure stability as foreign investment ebbs and flows. Until the Moscow Symposium in July 2007, the IBA had not discussed the relationship between the Rule of Law and economic issues.

One of the ways for the Rule of Law and its impact on economic development to expand beyond the foreign investment perspective is through an approach similar to the fundamental principles adopted by a constitutional and institutional analysis. Constitutional economics was initially established to embrace economic issues and their constitutional and legal implications. Constitutions of the majority of states grant citizens a broad spectrum of civil, political, social and economic rights. Most of these rights and freedoms are encompassed in UN conventions and other international hu-

man rights agreements. This is one of the greatest achievements of the second half of the 20th Century; the 21st Century must ensure that these rights are enforced alongside economic development, which is a critical issue for some 140 or more «new democratic states.»

Economics has crept into the development of legal, political and social disciplines. Among the social sciences, the Nobel Prize is awarded only to economists. It is time to get rid of the old-fashioned division between economics and law, first of all, in the area of governmental economic decision-making, which must be balanced between constitutionally grounded public demand and the real economic capacity.

Finally, an important gap exists in the announced agenda for discussion during the Rule of Law movement. Despite more than 20 years of activity by the United Nations against both physical and psychological torture, no legal definition of psychological torture yet exists nor a methodology for distinguishing it from legitimate psychological pressure during interrogation. Some state jurists in different countries make a distinction between «torture» and «cruel, degrading and inhuman treatment.» But a study of professional psychologists uses data obtained from survivors to prove that the distinction does not exist in practice and such efforts only provide a justification for torture. This is a field for involvement of professional organizations of lawyers such as the IBA and ABA, and other national bar associations. Further discussion on psychological torture in the framework of the Rule of Law global movement should deal with psychological torture in the context of interrogation practices, and not just the fight against terrorism.

The International Bar Association with the American Bar Association and other organizations of lawyers within the framework of the recent Rule of Law movement, together with professional organizations of psychologists, may (1) adopt a resolution on psychological torture and outline the main principles of a legal definition of psychological torture, and (2) initiate a procedure before the UN and Council of Europe institutions to adopt legal instruments based on the «resolution» which will be the first step to clarify Article 1 of the UN Convention Against Torture and give a legal definition to the term «psychological torture» which is prohibited in the Convention.

Former IBA President Francis Neate regards the Rule of Law movement, first of all, as a movement within the world legal community. He has

proposed that national bar associations should develop beyond self-interested professional organizations to be institutions of civil society fighting for the Rule of Law. This is a serious challenge for the global bar in the 21st Century.

The Moscow City Chamber of Advocates with its 7,000 members, as well as the Federal Chamber of Lawyers of the Russian Federation with its almost 60,000 members, join with the International Bar Association as member organizations in recognition of the leading role of the IBA in the world legal community.

President of the Moscow Chamber of Advocates, Genry Reznick, reminded us of the former Soviet practice to have the Bar represented abroad by state or professional show-window organizations of jurists which acted as a glass wall between Russian independent advocates and the world's independent legal community. An independent Russian bar will never allow this barrier to be resurrected. Reznick said: «We need enforcement of real judicial reform and full scale legal reform right now and forever. This time it must be a turning point in transition of the Russian legal system from dark times in the mentality of authorities to a modern Rule of Law approach. Simply speaking, authorities must comply with the Russian Constitution.»

# THE RESOLUTION OF THE INTERNATIONAL BAR ASSOCIATION

*Prague, September 2005*

The International Bar Association (IBA), the global voice of the legal profession, deplores the increasing erosion around the world of the Rule of Law. The IBA welcomes recent decisions of courts in some countries that reiterate the principles underlying the Rule of Law. These decisions reflect the fundamental role of an independent judiciary and legal profession in upholding these principles. The IBA also welcomes and supports the efforts of its member Bar Associations to draw attention and seek adherence to these principles.

An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable.

The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect. The IBA calls upon all countries to respect these fundamental principles. It also calls upon its members to speak out in support of the Rule of Law within their respective communities.

**Fernando Pombo**
*President of the International Bar Association*

# SPEECH TO THE MOSCOW RULE OF LAW SYMPOSIUM 6 JULY 2007

Ladies and gentlemen:

It is a great pleasure to be here with all of you today and I would like to thank in particular our hosts for organising this event. It is not only an honour to speak to so many distinguished lawyers, but I must say a real pleasure to see so many friends and colleagues here today.

I have been asked to talk briefly about the role of the International Bar Association regarding this very important topic and having recently taken on the role of President of the International Bar Association, I am delighted to share my thoughts with you.

Let me first talk for some minutes about the history and origins of the International bar Association. The formation of the IBA goes back to 1947. The creation of the Association was the fruition of a dream which had its origin almost a decade and a half before its formation. A devastating war which lasted over the years 1939 to 1945 made an earlier realization of the dream impossible. The America Bar Association, like its prominent European and Oriental prototypes has for a number of years entertained the thought that great benefit would be derived through the creation of some kind of affiliation of national bar associations throughout the world. By 1934, the movement for national bar associations or Law Societies has so spread that forty-three has been established by the nations of the world.

Towards the end of hostilities in World War II there was a growing conviction that an organized «Bar of the world» could make a substantial contribution to post-war reconstruction and assist in bringing about world-wide stability, understanding and peace. Accordingly, in June 1944, the matter was again discussed at a meeting of the American Bar Association, and a special committee of distinguished lawyers and jurists was appointed to examine and report on the feasibility and desirability of forming an International Bar Association. On 12 September 1944, this committee presented a report which concluded that the formation of a «truly international and

representative bar association» was highly desirable and that it would be entirely feasible despite unsettled world conditions.

In the spring of 1946, the Special Committee sent a copy of a tentative draft of the Constitution to the head of the national or capital city bar associations of each country in the world in which one was known to exist. Accompanying it was a copy of a Resolution from the House of Delegates of the American Bar Association passed on 23 December 1945 supporting the principle of co-operation among the organized Bars of the World. Each national or capital city bar association was requested to submit to the Committee its comments and suggestions with respect to the project.

The responses of this letter transmitting the Resolution and draft Constitution expressed a keen interest in the proposal and none was opposed. The time was then propitious. The President of the American Bar Association, on 2 August of 1946, extend to the head of the national organization of members of the legal profession in each of the fifty-two countries, an invitation to send representatives to a meeting to be held in New York City on October 1946. On 8 and 9 October 1946, as a result of these invitations, representatives of twenty-one countries in five continents met at the House of the Association of the Bar of the City of New York. Ten other national bar associations were unable to be present but forwarded their endorsement to the proposal of the organization of an International Bar Association.

After two days meeting, a provisional Constitution was approved. The primary purpose of the Association was to back the establishment of law and the administration of justice by law throughout the world, promoting the principles and aims of the United Nations. The first meeting of the Committee for the Organization of the International bar Association took place on February 1947. This year 2007 we are celebrating the 60$^{th}$ anniversary of the formation of the IBA.

Over the decades, since its inception, the IBA has developed from an association made up exclusively of the world's bar associations and law societies to that of an organisation with a more diverse membership including individual lawyers, judges, barristers, academics and law firms. Although the structure of the Association has changed its core values and ethos remain unaltered. In these increasingly complex times the role of the IBA in bringing together the world's legal entities and professionals is crucial. It is as vital now, as before, that the Association's principles of improving

the world situation through the use and application of law, and establishing justice for all, remain at the core of the IBA. These guiding principles have, for more than half a century, enabled the IBA to occupy a unique position of influence and importance within the worldwide legal profession, and major world bodies.

The IBA's growth reflects its understanding of the ever-changing landscape of the legal profession, while maintaining traditional practices and values. After 60 years of expansion, the IBA is now comprised of two divisions, the Legal Practice Division (LPD) and the Public and Professional Interest Division (PPID), which are subdivided into 63 committees of specialist practice areas, and six regional fora representing each continent. I also want to mention the Human Rights Institute, which works tirelessly around the globe to safeguard human rights, the rule of law and the independence of the judiciary.

In addition, the IBA collaborates with various world organisations including the UN, the International Monetary Fund, and the World Bank on a number of projects.

The IBA is truly established as the global voice of the legal profession and is playing an important role in enabling the various cultures of the world to discuss and come together on the underlying principles of the rule of law.

Throughout my mandate as President of the IBA, I particularly want to focus on **Education** as the key to promoting the Rule of Law.

We all agree that technology has changed our lives and specifically the way we work, but what has happened to the legal profession? Not too many years ago the issue was about finding information related to the matter we had to face. Today it is about processing the tons of data we can obtain in only minutes from various valuable sources. But, what is important? What is relevant to my case? Where is the piece of information that will inspire us to find the new, breakthrough angle? Nowadays, we need to train lawyers to be capable of identifying the correct analysis to undertake and to acquire the know-how of extracting the relevant data.

During my two years as president of the International Bar Association (IBA), my priorities for the Association include, among others, to provide educational programmes for those with an interest in the legal profession on a global scale. I am a profound believer in education as the most important vehicle to develop countries and societies. To achieve this objective, the IBA is developing unique learning activities, including an LLM

in International Professional Legal Practice together with the College of Law of England and Wales. What makes this programme different is that it is based on distance learning, so any lawyer, regardless of location, will have access to the same quality of training, followed by strict examinations. Passes are mandatory in order to obtain the final degree. To realise this initiative, many people have devoted time, energy, enthusiasm and passion, but it is the use of the latest technology that makes it possible.

Legal education is not what it was twenty years ago. In fact it is changing beyond recognition. Some decades ago, legal education was almost entirely academic and that gained from first hand practical experience; in other words «learning the hard way». Nowadays, there are so many different factors which contribute to creating successful legal systems and successful lawyers that the education system has had to keep pace with these changes in order to meet the needs of the marketplace. As the profession drives forward into the twenty-first century we are increasingly aware that in order to succeed, our lawyers need to have a spectrum of many different skills, including technical ability; operational skills; good inter-personal relations; and robust professional and ethical values.

Looking at each of these in turn:

Today technical skills are developed, not only by undergraduates at the universities, but also throughout the lawyers' careers by means of continuing professional development programmes. These are tending to be organised more and more on a formal basis, and with fixed quotas of obligatory attendance at training sessions, which are supervised by bar associations and regulators. The technical skills in demand are not just those which enable a detailed specialisation in a particular legal field, but other assets such as communication skills, computing, team management and — ever more important in the globalised legal market — languages.

The operational qualities of a lawyer are those which enable the lawyer to carry out his or her job. This includes the wisdom gained from practical experience of dealing with a particular industry or sector; being able to anticipate the needs of the client, and understanding and sharing his or her objectives and goals.

Being acutely aware of the needs of the client is also essential to developing a good understanding and hence relationship with the client. One of the most important factors in establishing a strong lawyer-client relationship is good communication: Statistics from National Bar Associations show

that poor communication is consistently the most common cause of complaint made against lawyers. And it is perhaps one of the easiest to rectify.

In the same way that preventative medicine has made a huge improvement to medical life expectancies around the world, preventative law is these days bringing great benefits to the clients of those lawyers who have the skills to anticipate problems before they happen; something which makes that lawyer an indispensable part of the client's activity.

Regarding professional values, we must not forget that so much of commerce and society is dependent on the confidence that we place in the Rule of Law, that anything which tends to undermine that confidence, inevitably has a negative impact on our institutions, systems of government, and ultimately, society itself. This can not be underestimated.

Justice can only be achieved if the application of the rule of law goes beyond mere theory and becomes a reality present in every act. It will happen when every lawyer, regardless of its role as an in-house, a private practitioner or a member of the courts, applies the principles of the «rule of law». National Bars and Associations like the IBA can provide attorneys with practical education they do not acquire at Universities.

I am therefore making the continued development of the Rule of Law a priority of my mandate at the helm of the IBA. The IBA is promoting numerous vigorous initiatives, such as this symposium, in order to educate both lawyers and society on the importance of having robust legal and judicial institutions rooted in the foundations of independence, professional conduct and the implacable defence of the Rule of Law. Thank you.

**Valery Zorkin**
*President of the Russian Federation Constitutional Court*

# TWELVE THESES ON LEGAL REFORM IN RUSSIA

*First published in Russian magazine «Legislation and Economics», N. 2, 2004*

## 1. The Meaning of Legal Reform

Unlike judicial reform, true legal reform has never been even undertaken throughout Russian history. The present time presents a good opportunity for accomplishment of this endeavor.

An exact and generally accepted definition of legal reform does not yet exist, even though many attempts have been made in the past to provide such a definition. In Russia, attempts at legal reform were initiated within the limited sphere of the transition from a «state-command» economy to a free market. I would like to present my personal views upon this subject, not in the capacity of the Constitutional Court President, but as a scholar and a rank-and-file Russian citizen.

For me, legal reform is more expansive and means the creation of fundamental pre-requisites, compelling our country to start «playing by the rules,» *i.e.* allowing Russia to become a truly legal and socially just state. Becoming a state ruled-by-law has long been our ultimate goal, and we have certainly made serious progress in this direction over the past several years. However, no one can say now that we have reached this destination.

Such a state with «rule-of-law» simply cannot exist without a lawful and just society. Here, as in no other sphere of our life, the state reflects the level of maturity reached by society. No one would argue that Russian society at present represents a lawful one. Both our society and state are moving too slowly towards the absolute supremacy of law.

I will not dispute the impressive results achieved by our legal institutions in the post-Soviet period. But, at the same time, I clearly see how distant these results are from the desired ideal. I also recognize how this state of affairs hinders positive changes in the development of Russia and the risks and threats it creates. Even more, in my opinion, if we do not institute legal reform now, all other on-going reforms such as, first of all, the creation of legal, constitutional economy, will eventually come to an end. True legal reform must happen very soon.

The history of reforms, carried out in the decade after enactment of the new Russian Constitution in 1993, vividly demonstrates that Russia could seriously increase its relative standing among the leading countries of the world only by using supremacy of the law as a significant stimulus for its development, which would allow our country to become integrated into the civilized world practice of lawful behavior.

Legal reform can be the «driver» for all other reforms, including reform of the economy.

A true market economy cannot be created without ensuring both full guarantees of private property and transparent predictability for entrepreneurial activity, on the one hand; and sufficiently reasonable legal control over economic processes, on the other hand. Legal reform should be an integral part of any on-going reform process. It is critical, on the one hand, for stimulation and legitimization of all-around development, and, on the other hand, for preserving the required equilibrium in the state and society.

Legal reform is a tool for implementing necessary reforms, to balance competing interests, create a dynamic and sustainable economy, and build a sustainable civil society.

Underestimating legal values, especially constitutional ones, can lead us into deadlock and drastically slow down even the most progressive reforms.

Throughout the entire history of Russia, the state has put forward neither a concept nor a program of legal reforms. Attempts during different historical periods usually involved mere judicial reform, which can serve as a foundation for the legal reform, but does not include all of the aspects related to the legal reform's control over social, political and economic life.

## 2. Goals of Legal Reform

There are three primary goals for Russian legal reform, which are simultaneously the three primary directions of such legal reform. In my opinion, they include:

1. Legal transformation of Russian society;
2. Transformation and stabilization of the legal system; and
3. Creation of a rigorous and well-balanced law enforcement system, guaranteeing equally distributed access to the function of public justice and exercise of legitimate rights and freedoms for all citizens.

These three goals need to be achieved simultaneously and holistically in all three directions. It is more a problem than a task, meaning that no one in the world could provide any ready-to-use and correct recommendations to help resolve it. This is an extremely complicated problem. Several decades might be required for a final solution. But I am absolutely convinced that if we fail to undertake and try to solve this problem then Russia's place in the 21st Century will not be the one «on the sunny side of the street.»

Any legal system consists not only of a package of legislative acts and the means for their implementation. It is not only a *mechanism*, but also an *organism*. It is a mechanism, because such system is extremely de-personalized and protective against any casual impacts from individual human interests. It is an organism, because it ultimately serves society as a whole and is directed at its members, communicating with them via feed-forward and feedback links.

No gain has ever emerged from an empty place: it usually follows a very difficult and sometimes a very painful path, by gradually incorporating various social ideas about what we perceive as *proper* and *just*. These ideas are not at all universal throughout various epochs and cultures (the so-called «natural right» with its ever-changing content). For this reason, the Anglo-Saxon legal system drastically differs from that of continental Europe, and, similarly, there is a significant difference between the British and the U.S. legal systems. That is why only in Europe alone — within the framework of the so-called continental legal system — several dozen quite different legal systems co-exist.

Most of the greatest historical transformations of legal systems have occurred under the banner of bringing each legal system closer to the respec-

tive social ethical standard, to the peoples' idea of what is proper and just. Until these two concepts become finely «adjusted» to each other, there is an incongruity between the legal system and popular ideas of proper and just, as well as between what is accepted by society and requested by the state. It is this desire of society (and the state) to bring the current legal system closer to the «natural right» and the popular idea of social justice that will eventually bring about legal transformation in Russia

## 3. Correlation between Legal and Judicial Reforms

Complete legal reform should normally include not only judicial reform, but also reform of various aspects of the structural system and content of legislation, legal education, legal awareness by the population, and also the corporate consciousness of the whole legal community.

In modern Russia, aspects and directions of development of judicial reform were formulated in the «Judicial Reform Concept», enacted by the RSFSR Supreme Soviet on October 24, 1991. This document still remains legally valid and applicable.

The «*separation of powers*» principle, also proclaimed in the Constitution of the Russian Federation, requires observance of judicial independence. And such independence requires proper funding of the courts and their activities. It is well-known that Russian courts remain under-funded. However, the cumulative economic costs suffered by both state and private enterprises as the result of under-performance by various judicial institutions, especially by the trial courts of general jurisdiction and the arbitration courts, is at least twice the order of magnitude as the financial burden carried by the state and society in financing such judicial institutions. The elimination of under-funding of the courts would definitely improve the efficiency of their work and be worthwhile.

Judicial reform usually aims to improve such things as law courts, procuracies, advocacy, inquest, executory processes, and record keeping. Taking into account the specifics of historical developments in Russia, one may assert that without undertaking a large-scale legal reform it would be extremely difficult to succeed concurrently with judicial reform. True legal awareness and respect for the law has not yet become integrated into a generally accepted system of values even among many public officers, who

frequently believe that interests of the state and those of state-owned enterprises should by definition prevail over the interests of ordinary citizens or entities with different forms of ownership.

It is necessary now to start unfolding a full-scale legal reform, which has to be completed by the year 2020. The official public presentation and implementation of such legal reform should become the prime responsibility of executive and legislative authorities. The program of legal reform needs to be adopted in the form of a legislative act, as with other such national projects.

Legal reform should be prepared and carried out using a holistic approach, with its subsequent breakdown into consecutive stages determined by concurrent political cycles and available economic opportunities, and also be coordinated with the development of administrative reform.

It is necessary to emphasize that such legal reform should, first of all, solve the problems related to the country's economic development and the formation of civil society. The official enunciation of such conceptual principles of legal reform, such as the introduction of economic disciplines into the curricula of law schools, and active adaptation of the European legal standards to those of the Russian legislation, should become a main pillar of this legal reform for the period between 2004 and 2008. Even without significant financial investments such reform could provide a quick pay-off and pre-determine the success of further development of the legal reform.

## 4. Adopting Good Laws is Not Enough

Unfortunately, good laws alone are not sufficient for future success of legal reform. The problem resides not only in the laws, but also in the current status of the popular social ideology; in the popular understanding of ideas that are proper and just. It is a very tricky question for any society, and for the present Russian society in particular.

How these popular ideas are actually formed? They are formed from ancient (sometimes, even archaic) local beliefs, which later gave birth to popular customs, and also from social norms and legal establishments originating, in their turn, from religious systems and various ideological norms.

Earlier, in the Soviet Union, these features co-existed, whereas an *almost* uniform legal system covered very different ideas of the things proper

and just with a common «big cap» of legislation and law enforcement. I emphasize the word «almost,» because, for example, the legislation on family and marriage actually did vary in different republics of the USSR.

So, the diversity in the above-described «foundations of popular justice» and the practical impossibility of their common «ossification» in the written law often gave birth to popular sayings like «How shall we judge you: lawfully and honestly?» But even the Soviet ideology was trying to «fuse» its moral requirements with much older religious ideas of the proper and just, and, therefore, one of the Communist party documents entitled «The Moral Code for Builders of Communism» with some small nuances reproduced many of well-known Christian commandments, while the legal system was often appealing to the very same moral values.

Was that ideology bad? Yes, in many respects it was. Under the pretence of «relentless struggle with the bourgeois ideology» many inalienable human rights and freedoms were ruthlessly suppressed, denying the very idea of personal freedoms. People could not do what they wanted, could not travel where they wanted and could not become what they wanted. This savage ideology produced in the human soul a feeling of utter rejection and denial. Such legal «fabric» simply was not viable and finally disintegrated. Such a society and such a state turned out to be absolutely noncompetitive with others and, finally, collapsed together with this rotten ideology. But this collapse also involved a greater part of generic moral norms of the Soviet society — the norms that were preserving its social stability.

## 5. Social Stability as an Important Factor in Legal Reform

The question of what life is like without social stability — needs to be addressed to those who have the hands-on experience of survival during bloody social upheavals. As for me, I shall answer it as a citizen and a legal scholar: it is better to have any steady social norm, however bad it might be, rather than none at all. A society and state devoid of «brakes» is a ghastly (but, fortunately, a very rare) political monster.

So in Russia, after the fall of the USSR, there began emerging «from under the Soviet boulders» those old norms of the proper and just which earlier had been «peacefully slumbering» deep in the bowels of the Soviet system. Those leftover moral «fossils» included, for example, various

*adats* (communal laws) in the republics of the Caucasus, and equally unofficial communal laws accepted among the Cossack population in some regions of Russia. Another layer of «community laws» included criminal and half-criminal norms, which in Soviet times also occupied spacious niches of their own.

This phenomenon is nothing short of a social revolution (and in Russia the demolition of the Soviet system occurred, luckily, almost without casualties), and the social revolution inevitably leads to very serious upheavals in the sphere of mass social norms. In countries with age-old and strong legal traditions such shakeups, as a rule, are quite decently compensated for by the long-inspired respect for the written code — the law.

But in Russia, which has never been blessed with a law-abiding population, we have received something of a «crazy patchwork quilt,» consisting of mutually conflicting deontological legal «patches» and normative «holes.» It has a little bit of everything — from «*unconditionally precious human life*» to «*tit for tat,*» from «*do not commit adultery, do not kill, do not steal...*» to «*you'll have to die first,*» from «*love thy neighbor*» to militant egoism and ultimate anomie.

In any social state system the public order is maintained, first of all, not by the written law by this virtual matrix of ethical norms, containing traditional popular definitions of the proper and just. And the fact that this matrix is so torn apart, so inconsistent, and so incomplete makes the future legal transformation of the Russian society an extremely challenging task.

## 6. Social Justice and Legal Transformation of Russian Society

We should never again return to the Soviet approach, but at the same time Russia must be not only a *rule-of-law* state, but also, according to Article 7 of our Constitution, a *social* state. So, the practical implementation of this Article, which directly applies to the constitutional system fundamentals, becomes quite a difficult problem. It becomes a problem both in the legal and in the humane sphere, as well as a problem of the national economy.

Let me give you a simple example. How should we treat a worker who has stolen several cans of paint from his factory and sold them to his neigh-

bors because his paycheck at the factory was so small that he could not feed his children properly? According to the law, *i.e.*, behaving strictly legally, we should adjudicate and imprison him for theft. But in equity, what choice did he have? Was he to find a job at another factory where the wages are better? What if the factory in question was the only one in the city where he lived?

Or should he to feed off his household plot, relying entirely like in the Middle Ages on subsistence farming? What if he did not have such a plot or he lived in a region where the climate did not allow even potatoes to grow? Is he to move with his family to a different region with better employment opportunities? From where should he find the money to pay for the move to a new city and for housing at a new place?

It is not a coincidence that President Putin has called the struggle against poverty a top priority for the future development of Russian society. This is directly related to our problem of the deepest gap existing between the requirements of humane justice and those of the law, which gap simply cannot be closed without a liquidation of poverty.

How can this problem be solved? The public budget must support an army, develop industry, improve public health and the school system, and so on. Now, should we also increase taxes to cover increased budget spending? Or should we, as some leftist radicals advise, go and «dispossess» the richest — the so-called oligarchs? But who would then make investments into the private economy, providing for Russia's economic growth and technological development, without which Russia would never have the place it deserves in the 21st Century, and without which it could never overcome the poverty problem?

Therefore, these issues both of upholding the law and social (humane) justice are two major pillars for the legal transformation of the Russian society, which transformation is absolutely required for modernization, technological and social breakthrough, but also present problems in the economical sphere. These problems should not be resolved either with the help of the old-time communistic income-leveling approach («*cutting fat off the beast, sharing that with the rest*») or through the state-imposed «dispossessing» of some oligarchs — both of these are murky shadows from the past. This problem will have to be solved by using quite complex, and far from obvious, tradeoffs and step-by-step approximations.

It is the conditions for implementation of such a method that the legal reform is intended to provide.

## 7. Transformation and Stabilization of the Legal System

Certainly, it is necessary to improve the legislation. For this task, in my opinion, we have three large problems:

The *first problem* is the quality, need for up-dating and consistency of the legislation. Judging by applications for review to the Constitutional Court, we have quite a number of badly written laws in many aspects. Some of the laws, alas, contradict both the letter and the spirit of our Fundamental Law (the Constitution).

Furthermore, our lawmakers often adopt laws that contradict applicable international law, which Russia had previously agreed to abide by. In fact, our legal obligations under various international treaties, conventions and agreements (according to the Constitution) always have priority over domestic laws. But either Russian legislators are simply not aware of the existence of such international conventions (including, among other things, standards in the human rights area, industrial standards, anti-corruption and criminal warfare standards), or they deliberately feign ignorance on the basis that: «*the West should not be bossing us around!*» or believing that «*our people aren't yet ready for that.*» Therefore, these lawmakers prepare and adopt laws pregnant with future legal collisions and conflicts, and laws directly contradicting existing international legal standards. As a result, in regard to legal compliance, Russia has become something of a rogue state.

A breakthrough can be possible only on the basis of compliance with the international legal standards. Flagrant nihilism in regard to international legal values becomes too costly during the solution of any serious problem, be it privatization, or regulation of the securities market, etc. Only after losing our personal savings to market frauds in the 1990's did we call for reason and started adopting more or less sensible laws and decrees. And finally, many laws are made and adopted under the pressure of lobbyist «special interest groups.» Such laws quite often contradict the very interests of both society and the state.

Poor qualification and insufficient experience on the part of a significant number of the Russian legislators is a fact, which it is impossible to disregard. However, parliaments in other countries do not consist entirely of professional lawyers either (though their percentage would still be much higher). The question is--what can be done about it?

In many countries such problems have been solved by introducing a principle of public awareness or «transparency,» in a process by which legislative proposals are widely and openly discussed both by the professional community and by society as a whole, and then the discussions migrate to parliamentary groups (with the involvement of independent lawyers) and specialized parliamentary committees. Only after these public discussions are draft bills submitted for the general parliamentary process. With such an approach it might be possible to reduce to a minimum the «birthrate» of «bad» laws and the risk of further legal collisions therewith, and defects which can be easily turned to personal financial advantage by unfair lobbyists, corrupted politicians and political adventurists.

I want to emphasize that at the base of this legislative process there should stand true professionals, capable both of encompassing and critically comprehending the entire Russian and international legal experience in its historical perspective, and of creatively applying it to the development of the specifics of the Russian legal system. I stress the word «*specifics*» because I am convinced that the *unified world law* is a sheer myth. All attempts to simply replicate for Russia the German, American or French legal system can only be explained either by folly or by ignorance.

The *second problem* for Russian laws is the instability of our legislation. Certainly, it is just one of those inevitable consequences of the «post-revolution» state-enforced reforms. But, as is always the case in Russia, there is a tendency to «overshoot» the proper target. For example, each of the recently adopted codes — such as Tax Code, Criminal Code, Criminal Procedure Code, etc. — has been changed up to by 50% in the two or three years after its adoption. The changes, however, did not only patch the previous «holes,» but also created new gaps which are no less dangerous. Besides, the respective codes are very poorly interrelated, which either creates legal gaps or entails legal conflicts.

And, lastly, the *third problem* — is legal practitioners. In today's Russia, they are extremely insufficient both in quantity and in quality. Highly skilled lawyers are extremely hard to find. Jurisprudence, as such, does not have the specialists sufficiently qualified for the huge task of creating an entirely new legal system. This is in part because today's Russian law students are taught based on yesterday's laws.

However, the main problem here is that under such conditions the law cannot be effectively taught at all! What professors teach to students dur-

ing their third or fourth year becomes outdated or appears totally wrong by time of graduation. Very often, this obsolescence manifests itself in the most critical, key aspects. Even the concept of a «*look-ahead legal education*» that is gaining popularity in the West cannot help in such a case.

Going back to the problem of continuous changes in the legislation, I should point out one more potential danger. The stability of the legal system, including that of the Constitution as its fundamental law is the keystone of social, political, economic and, ultimately, national stability; indeed, as paradoxical as it might sound, the key of future development. Legislation must be updated; this is an axiom. However, it is a bad situation when laws are being developed and adopted in a sloppy and hasty fashion, so that immediately following their enactment many gaps are identified and new hasty patching begins again. The entire legislative process becomes totally senseless, turning itself into a paper-pushing carousel. Such kaleidoscope-like changes of the legislation erase the fundamental principles of the Law — its stability and dynamism.

There cannot exist effective individual, corporate and public short- and long-term planning if no one knows what laws and regulations will be applicable tomorrow. When no trustworthy planning and pre-planning is possible, stability and developments cease as well. Even in a purely psychological sense, a person, a community, a society cannot function normally if the «rules of the game» are being constantly changed.

## 8. The Foundation for Legal Reform is Legal Training

It is necessary to admit a serious lack in the Russian legal training system against the world standards, especially in the sphere of civil and business law. This is caused not only by the absence of adequate curricula, textbooks and qualified teachers, but also by the inferior quality of the new legislation in these branches of law.

It is difficult to imagine a lawyer, who in his practice (irrespective of the specialty) would have never encountered economical and financial issues. And yet, very little attention is given to these questions in the curricula of colleges of law; only now in several Moscow universities has a special course entitled «Constitutional economics» begun to be offered. The current curricula in law schools are already overloaded with hours, but in

the near future it is necessary to drastically up-date the standards of legal education and increase considerably the share of economic disciplines. At the same time, law-related disciplines should be added to the curricula of schools teaching economics and business. In addition, basic courses on law and economy, including those of constitutional law and constitutional economy, should be part of the curricula of high schools and technical universities.

The laws are constantly being updated, and law school graduates should be ready for participation in that process; they should be able to find the «*laws of tomorrow*.» But in reality, many Russian universities still teach the «*laws of yesterday*,» which makes even more acute the problem of gaps between the standards of training and the needs of practice.

In the long run (probably after the year 2010), it might be necessary to think about introducing a uniform state qualification examination for judges, public prosecutors and criminal investigators. This would support a more equal level of qualification for the representatives of various legal specialties.

One of the main problems in today's Russia is the insufficient attention paid by the state to the level of higher education and the development of academic research. First, this is true in the legal area. The state does not satisfy urgent needs of a national economy that is short by dozens of thousands of lawyers versed in economic issues and approximately the same number of economists, equally versed in legal issues. The acuteness of this problem remains unrecognized, and consequently we sometimes hear remarks to the effect that the situation is not bad at all, especially when compared with the level of legal and economic education in Europe (for example, in France).

We do not invest in promotion of mass knowledge of foreign languages among lawyers and economists, nor in mutual knowledge exchange programs. As a result, we see a poor quality of the economic legislation, problems in its practical application, and a consistent backlog in economic development. China has outstripped almost all leading countries of the world in investments into knowledge development which is clearly one of the reasons for its huge economic achievements.

Almost all countries with fast-growing economies, such as China, India, and South Korea, which are gradually catching up to the United States, become extremely competitive by making significant investments into sec-

ondary and higher education and professional skills development; by training their citizens in the «tongues» of modern economy (*i.e.* English, programming, financial analysis, etc.). Even the European investments into academic research and education lag far behind. In Russia, even in the absence of money for innovations in legal and economic disciplines, these problems can be partially resolved by proper re-structuring of the educational process.

We simply cannot wait for the arrival of the first generation of law students who have at least a casual economic knowledge, and business students who are familiar with basic legal (especially, constitutional) values. This gap can be overcome only through intensive efforts to introduce economic and constitutional knowledge in higher education. For Russia, the introduction to university legal and economic departments of new educational courses such as constitutional economics becomes critically important. This can become an interim, but still very serious, step in significant improvement of the quality of higher education.

## 9. Need for a Consistent System of Law Enforcement

I would like to reiterate that any judicial verdict should be not only absolutely lawful, but it must be also just and fair; punishment of the guilty must be proportionate to the crime committed and *unavoidable* (for some reason, the latter rarely gets mentioned, but it should be). What we need is a holistic, transparent and familiar system of law enforcement, starting from courts of all types and instances down to the execution-of-judgment and other punitive structures. The creation of such system also encounters serious problems.

A law enforcement official (*i.e.* policeman) or a judge, whose salary is well below subsistence pay, can hardly be expected to withstand the temptation of generous bribe. This is an issue of poverty and social justice. Similarly, a policeman or a judge, who has only a superficial knowledge of continuously changing and hastily written laws, can hardly be expected to conscientiously enforce their execution and to follow them himself. I intentionally mentioned in the beginning of this section that legal reform is a holistic process, and all these problems must be solved together, as a complex, or, as it were, «a package deal.»

But, in fact, the very same problems do fully apply not only to judges and law enforcement officers. They concern our state officials, businessmen, the military, in other words — all walks of our life without a single exception. That means we must be concerned both about professional legal education, and about mass legal education for the wider public. As a matter of fact, beginning with today we have to start building from scratch the Russian mass legal awareness.

But how can this be done? No one has ready-to-use recipes. In the roughest approximation I can only outline a following chain: from the modern legal awareness of professional community, through the legal awareness of state authority at all levels — and then to the wider public legal awareness.

I can see no other way for achieving steady, unconditional, effective law enforcement. I constantly hear people around me saying that it is only necessary to take a bigger stick and start better controlling law enforcement bodies, courts, etc.; imprisoning *en masse* all those corrupt cops, judges and the like — and everything all at once would become lawful and nice. This is nothing but nonsense!

By all means, an unrelenting struggle with corruption and law infringement in the law-enforcement and judiciary systems is absolutely necessary. But, alas, it is absolutely not enough. Law enforcement is a very delicate and ambiguous sphere, and in such spheres, as all previous human history has already shown, both carrot and stick policies proved of minimal efficiency. The only way to achieve any significant improvements therein is not by reprisals, but by creation of mass public legal awareness.

## 10. Legal Awareness of State Power and Legal Reform

Lawyers know that a question about the legal awareness of state power has been asked for thousands of years, from the «epoch of pyramids,» and consistently thereafter. These thousand years have not passed in vain; the answer to this question is well known to many — it is the famous separation of powers, *i.e.* exercising control over the state through the separation of legislative, executive and judicial functions. Stability of the state and its integrity requires the observance of strict conformity with this principle, and, since we have begun this discussion talking about the pyramids, those represent the three sides of the pyramid of authority — legislative, execu-

tive and judicial. If there is no strong executive authority — the society and the state plunge into chaos. When there is no sensible legislation and the execution of justice is merely by decision of the court — then the executive authority sinks either into totalitarian behavior, or into criminal lawlessness, with subsequent disintegration of the state.

These powers should exist in the form of terraced legal pyramid, the top of which is the Constitution and its consequent principle of the legal (*rule-of-law)* state, a.k.a. *the principle of the Rule of Law*. The pyramid of state power, as «static and dynamic,» exists only in the form of the legal system pyramid. The state and the law are not two things placed in different pockets. There is no state existing separately from the law. The state power may be of two kinds — either legal (legitimate and just), or illegal (venal, criminal, and totalitarian).

I should emphasize that during «times of change,» during revolutionary social transformations, the executive power, as the most active by its nature, always becomes especially important: it is this power, as historical experience shows, that concentrates in itself and around itself certain «substance of changes.» It is this power that, when it is necessary to act immediately, steps onto the foreground, quickly building its part of the pyramid.

Often, during this phase, the executive power becomes hypertrophied, and, even more frequently, dangerously hypertrophied. But the only available method of civilized struggle against this threat is to promptly complete an adequate, capable and balanced pyramid of the state power (including the pyramid of law), consisting of capable and adequate bodies of the legislative and judicial power, acting independently from each other, but in strict compliance with the Constitution; to adjust consistent, noncontradictory interaction between all the above-listed bodies of state power in all three of its hypostases.

Without this, there would be neither a rule-of-law (or constitutional) state, nor constitutional economics.

## 11. The Legislative System as a Direction for Legal Reform

The deficiency of the legal education as compared to the world standards, especially in the sphere of civil and commercial law, still exists not only because of the absence of adequate curricula, textbooks and quali-

fied teachers, but also because of the extremely poor quality of the new legislation.

With respect to formation of the undeveloped system of legislation in Russia, it is out-dated approaches that still prevail, including the codes. Corporate law especially lacks a holistic and systematic approach, which is partially regulated by the Civil Code and also partially by other legislative acts which are poorly coordinated among themselves. In these circumstances, a reasonable internationalization of the Russian law becomes extremely important.

The most logical approach in this connection seems to be adaptation of the new Russian legislation to European Community standards, which are currently being actively integrated into the legislations of the Baltic states and those of Eastern Europe, *i.e.* the legislations of the countries in many aspects quite comparable with modern Russia. The concept of a uniform legal space for Russia and EC countries can become a foundation for the development of our future legislation.

At the same time, it is clear that Russia must remain part of the continental law family. Any idea of possible migration of Russian law towards the system of English common law, a pet subject among some of our economists, is both unrealistic and pernicious. It is more useful is to follow the example of Europe, which is gradually adopting valuable ideas from Anglo-Saxon and US legal systems.

We need to realize one main principle: without building first the concept of development, reception and coordination of our legislation, the process of its further development will likely retain a somewhat chaotic and a disorganized character that will interfere with successful implementation of legal and, therefore, also economic reform. Clear and flexible priorities in the development of the legal system are must be defined at the initial stage of legal reform.

And one more important point: divergence from harmonious legislation can have serious negative consequences for development of economic and financial integration of the Commonwealth of Independent States (C.I.S.) countries and, accordingly, also for development of the economy of Russia. Many of the former Soviet republics have already chosen European, and not Russian, legal models; for example materials for the Uniform Civil Code of Common Europe, as well as other standards of entrepreneurial and financial law.

The concept of a single legal space in the C.I.S. and Europe, which should provide a firm basis for development of the Russian legislation, becomes important. Preservation of the C.I.S. as a uniform market is crucial for the Russian economy and can be achieved only under the condition of uniformity of the economic legislation.

## 12. Main Drivers of Legal Reform

Legal reform should be carried out not only by the state, but also by the entire legal community with the participation and involvement of the public at large. It is necessary to encourage the corporate spirit and active awareness of the legal community, especially among its judicial representatives, but it is also necessary to demand from this community the introduction of the highest professional ethical and legal standards among its members.

Successful development of judicial and legal reform could be promoted through the constant interaction between the cooperatives of judges and lawyers (advocates), as well as by joint and regular discussion, involving many eminent legal scholars, of the problems and prospects for its practical implementation.

It is especially important to emphasize the importance of increased legal awareness, consisting of unconditional respect by all bodies of state power for legal and, first of all, constitutional values. Voluntary application of law by them (*i.e.* without prior judicial pressure) is one indicator of the state's high legal culture, a true sign of its legal and, especially, constitutional development. The attitude of society, as a whole and each member thereof, to constitutional values should clearly indicate either presence or absence of civil society in Russia.

The adoption and enactment of the 1993 Constitution has become an important stage of Russian reforms. However, the constitutional, as well as judicial, reform cannot normally develop outside of a holistic legal reform. The program of legal reform should be promoted not on the governmental, but on the national level. It should be approved as a law and be steadily carried out in consistent stages until the year 2020. Only then is there a chance of formation by that time of a well-developed legal system, as well as the construction of a foundation for a rule-of-law state,

and the overcoming of an existing deficiency vis-a-vis countries with developed legal systems. The most critical period is between 2004 and 2008, when the foundation for this reform will be laid. The program of legal reform should include all the parameters and standards of a developed legal system: from the number of active lawyers in the country and personnel decisions for operation of law courts to the resolution of all organizational and financial problems, including the wide introduction of a jury process to judicial practices.

**Francis Neate**

# THE RULE OF LAW

## Introduction

The following is the text of the Resolution passed by the IBA Council in September 2005:

*«The International Bar Association (IBA), the global voice of the legal profession, deplores the increasing erosion around the world of the Rule of Law. The IBA welcomes recent decisions of courts in some countries that reiterate the principles underlying the Rule of Law. These decisions reflect the fundamental role of an independent judiciary and legal profession in upholding these principles. The IBA also welcomes and supports the efforts of its member Bar Associations to draw attention and seek adherence to these principles.*

*An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable.*

*The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect. The IBA calls upon all countries to respect these fundamental principles. It also calls upon its members to speak out in support of the Rule of Law within their respective communities.»*

Only two votes were cast against this Resolution. At the next meeting of the Council, the two members who voted against the Resolution declared their support for it and explained that they had only voted against it because they wanted it to be «stronger». It can, therefore, be fairly said that the Resolution was passed without a single dissenting vote.

The IBA is the largest international organisation of lawyers in the world, its membership comprising about 195 Bar Associations and Law Societies from almost every nation and more than 30,000 individual lawyers, many of whom are leading international practitioners in their chosen fields. The IBA Council is the supreme governing body.

The Resolution is, therefore, an authoritative statement on behalf of the world-wide legal profession. However, it does not purport to be complete. It merely sets out some of the essential characteristics of the Rule of Law in a way which could be endorsed by the IBA Council and should command world-wide respect.

Since the Resolution was passed, it has become apparent that there may be some respects in which the scope of the Resolution can be expanded; and that it may also be helpful to offer an explanation of the reasoning behind the Resolution. This paper is an attempt to meet these limited objectives. It does not purport to be a definition.

## Part I
## THE FOUNDATIONS

The Rule of Law is the only mechanism so far devised to provide impartial control of the use of power by the State. That single sentence is sufficient to explain why the Rule of Law is pre-eminently the best available system for organising civil society.

The Rule of Law is a recent and developing concept. It has taken centuries for the Rule of Law to take root even in those countries which now claim to adhere to it. Those countries which, in the nineteenth century, would have claimed to be governed by the Rule of Law, have a very different view of its requirements today. Many other countries, in particular those emerging from colonial status or from various forms of tyranny, have only recently begun the attempt to establish it. It is arguable that there is no country which can claim to comply fully with even its basic requirements.

This is why the IBA Council has not attempted to provide a definition of the Rule of Law. Rather, it has simply provided a list of some of the essential characteristics of the Rule of Law. These are discussed in more detail in Part II of this paper. It may well be that, in time, it will be possible

to identify other essential characteristics, or to expand upon those already listed. However, all these characteristics essentially rest upon two pillars:

(1) Submission of all to the Law

(2) The Separation of Powers.

**Submission of all to the Law**

The «Rule of Law» means exactly that: the Law is the ruler. No-one is above or beyond the Law. Everyone is subject to and governed by the Law.

Experience suggests that the only way to control power is by countervailing power, not by an abstract concept such as law. It follows that the Rule of Law can only operate in a society in which it receives widespread acceptance — not just majority acceptance, but widespread acceptance. It is essential that the organs of state power — the executive branch of government, the armed forces, the police, the security services — all accept that they are subject to the Law; and that, therefore, they may only exercise such powers as are granted to them by the law and in a way consistent with the law. It is also essential that the vast majority of the other members of society accept that they are subject to the Law, even if disadvantaged by it. If a sizeable minority feel themselves so disadvantaged that they have no option but to resort to disobedience or violence, civil unrest or even civil war will result.

It follows that the law must be devised and administered in such a way as to continue to receive widespread acceptance within society. This requires a culture of respect for the Rule of Law which can take a very long time to develop, and much care to maintain. It is this requirement for widespread acceptance which demands attention to minority rights and individual human rights. The law is unlikely to receive widespread acceptance unless it is widely regarded as reasonable, proportionate and fair.

The requirement of widespread acceptance means that the law must be responsive to the needs of the people it serves. Thus, over time, an extensive body of criminal and civil law will be developed. In many countries much of this process may take place well before the country in question can even begin to claim to adhere to the Rule of Law. All countries, even those governed by the crudest dictatorship, need laws.

Furthermore, the law will continue to change and develop in response to the changing and developing needs of its citizens even when the founda-

tions of the Rule of Law are in place. Indeed, the more responsive the law is to need, the more change and development is likely to occur.

The provision and administration of the Rule of Law is expensive. It is a necessity required by all, but that does not lower its price. The Rule of Law is a rare and very precious commodity.

**The Separation of Powers**

This is the other cornerstone of the Rule of Law. The primary obligation of the State is to protect its citizens from external threat and to maintain internal order. The Rule of Law does not seek to diminish the power of the State. It seeks merely to control it. This is achieved by separating those who make the law (the Legislature), those who interpret and apply the law (the Judiciary) and those who have the power to enforce it (the Executive), each from the other. No-one has yet come up with a better formula.

The independence of both the Legislature and the Judiciary is, therefore, a fundamental requirement of the Rule of Law. In practice, few (if any) countries have succeeded in achieving a perfect and complete separation of powers.

As to the Legislature, it is difficult to conceive of an appropriate system of appointing it which does not involve a democratic vote. In many countries, the head of the Executive (President, Prime Minister or similar) is the leader of the majority party in the Legislature. In such cases, considerable vigilance is required to ensure that the Executive's control of the Legislature is not abused. Indeed, there are few (if any) countries in which the Legislature is wholly free of influence by the Executive.

An alternative approach, adopted in many countries, is a written constitution which guarantees, usually subject to exceptions, certain fundamental individual and minority rights. In these cases, extreme vigilance is required when the exceptions are invoked, and an even greater responsibility falls on the Judiciary, whose independence becomes all the more important.

The same problems arise in relation to the appointment of the Judiciary. It is fundamental to the Rule of Law that the system of appointment of the Judiciary should guarantee the Judiciary's independence from influence by the Executive or the Legislature. Even more important is the requirement that the Judiciary, once appointed, should be free from any threat of removal or other form of intimidation from the other arms of gov-

ernment. Respect for the Rule of Law requires that there be independent, transparent mechanisms for the removal of judicial officers found guilty of misconduct, but it is essential that such mechanisms are beyond manipulation by other arms of government and do not undermine the independence of the judiciary.

In addition, an independent Judiciary requires an efficient, functioning court system and a strong, independent, properly qualified legal profession to support it. An independent legal profession is also fundamental to the maintenance of citizens' rights and freedoms under the Rule of Law, so that they are guaranteed access to independent, skilled, confidential and objective legal advice. The same principles apply to protect the independence of the legal profession as apply to the Judiciary.

These fundamental requirements of the Rule of Law also call for the highest standards of skill, professionalism and integrity among the Judiciary and the legal profession. If these are not maintained, confidence in the legal process will be undermined, so will the necessary culture of respect for the Rule of Law, and the executive and legislative branches will be both tempted and enabled to interfere in the processes which protect their independence.

The importance of these principles cannot be emphasised too strongly.

**States of Emergency**

In countries which claim to abide by the Rule of Law, it is most likely to come under threat in times of war or other emergency, when the executive is most likely to seek and the people most likely to be willing to grant it exceptional powers. This is a time when the utmost care and calm, rational consideration is required and when it is least likely to be provided. In such cases, the absolute necessity for a rigorous separation of powers becomes all the more important, because it will be the Executive which calls for the exceptions and it will be for the Legislature to create and for the Judiciary to interpret and oversee them. A proper balance must be struck. Even in such cases, exceptions to the fundamental requirements of the Rule of Law should not be admitted, otherwise the society in question will risk self-destruction. In many countries, the threat of war or other emergency is frequently used as an excuse for not introducing the Rule of Law in the first place.

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Against this background, it is appropriate to examine the details of the IBA Council's Resolution. As already mentioned, the Resolution does not purport to be a definition: it merely sets out some of the essential characteristics of the Rule of Law. These characteristics can be deduced from the twin pillars which constitute its foundations.

## Part II
## THE IBA COUNCIL'S RESOLUTION

In light of the foregoing, it is appropriate to consider in turn each of the characteristics listed in this Resolution:-

**An independent, impartial judiciary**

*This has been discussed in Part I above.*

**The presumption of innocence**

This is a fundamental aspect of the requirement of a fair trial. In essence, it is no more than a requirement that the burden of proof must rest with the accuser to establish guilt, not with the accused to establish innocence. It admits no exceptions. It does not lay down any hard and fast rule as to how the burden of proof should be discharged.

**Fair and public trial without undue delay**

The essential elements of a fair trial include that the accused must be fully and promptly informed of the offence which he is alleged to have committed and of the evidence which will be adduced in support; and that he be entitled to be advised and represented by an independent, properly qualified lawyer of his own choice.

The independence and integrity of the advice and representation he receives can only be guaranteed if the legal profession is as fully independent as the Judiciary and if his communications with his legal advisers are completely confidential.

The concept of a fair trial is a matter of legal process and the legal systems in many countries have developed the details over many years. This accumulated wisdom cannot and should not be ignored. Again, it will in-

variably be the Executive which argues that these fundamental requirements of the legal process should be reduced and, again, for that reason alone, such arguments should be rigorously examined and the fundamental principles of the separation of powers rigorously applied.

The requirement of a public trial is a specific aspect of transparency and is presently, in some countries, a subject of controversy. It is possible that, in certain unusual circumstances, it will be argued that a trial (or at least some parts of it) should be held in secret, in the interests of state security. These arguments will invariably be put forward by the Executive and, for that reason alone, should be rigorously examined and the fundamental requirements of the separation of powers rigorously applied.

There will also be cases where it will be appropriate, in the interests of justice or protection of the parties (e.g. a child), for the proceedings to be held in secret. Such cases should be confined and very carefully considered.

**A rational and proportionate approach to punishment**

A rational and proportionate approach to punishment is the alternative to cruel or degrading treatment or punishment which is expressly prohibited later in the Resolution. It is the only rational alternative. Rationality, proportionality and fairness lie at the heart of the Rule of Law.

**A strong and independent legal profession**

*This has been discussed in Part I above.*

**Strict protection of confidential communications between lawyer and client**

This has been referred to above. It is an essential element in the protection of the individual from the power of the State and in building confidence in the administration of justice.

**Equality of all before the law**

The starting point for the Rule of Law is that every individual is entitled to the same level of dignity and respect; and that every individual should have the same (or, at least, broadly similar) rights and obligations. An abstract concept such as the Rule of Law can only start from this rational base. To reiterate, rationality, proportionality and fairness lie at the heart of the Rule of Law. Distinctions between individuals must, of course, be made,

for example between adults and children (to take an uncontroversial example) — that is an essential part of the legal process — but these must be made rationally and proportionately, strictly in conformity with the fundamental principles of the Rule of Law and in accordance with the processes for law-making and law enforcement required by the Rule of Law.

**Arbitrary arrests; secret trials**

*These prohibitions require no elaboration.*

**Indefinite detention without trial**

Indefinite detention without trial is contrary to the Rule of Law. There are no exceptions. The key word is «indefinite». It cannot be disputed that those accused or reasonably suspected of violent conduct can properly be detained pending trial, subject of course to independent judicial scrutiny at every stage, which is the key component for ensuring the maintenance of the Rule of Law.

**Cruel or degrading treatment or punishment**

The phrase used in the international conventions is «cruel, inhuman or degrading treatment or punishment». This encompasses torture. There are obvious reasons why cruel or degrading treatment of human beings is unacceptable. In addition, it is clear that evidence obtained by such methods is unreliable. There are no exceptions to the rule forbidding such behaviour.

**Intimidation and Corruption**

The IBA Council's Resolution is clearly defective in that it refers only to intimidation or corruption «in the electoral process». Clearly, intimidation or corruption of any kind, in any part of the legal, administrative, legislative or electoral system, is inimical and contrary to the Rule of Law. There are no exceptions.

**A transparent process**

Confidence in the system of governance in any society cannot be maintained unless the process is open and transparent. This does not mean that no communication can be treated as confidential. Indeed, one example has already been given where confidentiality is essential to the administration

of justice, and there will be many others where it will be appropriate to impose an obligation of confidence. However, wherever it is claimed that an obligation of confidence should be recognised in any part of the legal, administrative or legislative system, the burden must rest on those claiming it to establish that the confidentiality is in the best interests of the system. Every lawyer knows from his own experience that a client's reluctance to disclose something usually stems from a belief that he will be embarrassed by its disclosure, if not worse. One of the most effective control mechanisms in any situation is secrecy.

**Freedom of information, opinion and expression**

These concepts are not mentioned specifically in the Resolution, but are necessary aspects of transparency. Freedom of information and freedom of opinion are (subject to legitimate obligations of confidence) fundamental to the Rule of Law. Freedom of expression, on the other hand, is a more complex issue: one obligation inherent in any society is that opinions should not be expressed in a manner unreasonably offensive or provocative or unfairly damaging to other members of that society. Thus, most societies governed by the Rule of Law will be likely to legislate some limits on freedom of expression. Any such limits need to be rigorously examined to ensure that they do not limit freedom of information or opinion; any which limit reasoned criticism of others should be viewed with suspicion; and any which limit criticism of any part of government should be viewed with the utmost suspicion.

**Accessible and equal to all**

The law must not impose any artificial impediments on an individual's ability to exercise his/her rights under the law. Financial impediments will always exist for some and it is an obligation of every society which abides by the Rule of Law to mitigate these to the extent practicable.

The law must be:

*readily known and available in advance, and*

*certain and clear.*

Retrospective law is clearly unacceptable.

In modern societies, the law is becoming increasingly complex. This forces the conclusion that a strong, independent legal profession is all the more important to a modern society adhering to the Rule of Law.

## Part III
## FURTHER COMMENTS

It may be helpful to discuss briefly the relationship between the Rule of Law and other concepts with which it is closely associated:

**Politics.** The political process is that by which a society governed by the Rule of Law debates and settles its differences and determines the rules by which it is governed. In a society not governed by the Rule of Law, this process instead consists of an effort to persuade those with power not to exercise it, or to exercise it in a particular way. That is pleading, not free political debate. Thus, the Rule of Law is not part of the political process, rather it underpins and guarantees that process.

**Democracy.** It is clear that democracy cannot exist in a society without the Rule of Law. It is not so clear that universal adult suffrage is an essential characteristic of the Rule of Law, but it will probably be the ultimate outcome in a society which develops and lives by the Rule of Law. Universal adult suffrage is a relatively recent phenomenon, dating (for example) from 1928 in the U.K., 1920 in the U.S. Development of the structures within a society which support and maintain the Rule of Law can be a slow and tortuous process. However, it will become apparent as these structures are developed that the principal function of the law is to meet the needs of its citizens, and an extensive body of criminal and civil law will be constructed. Much of this process may well occur before the foundations of the Rule of Law are established; indeed, they may be part of the process whereby those foundations are established.

**Reform.** The law, by its very nature, will tend to favour the status quo, because that is its function. This will inevitably be a cause of frustration to those who wish to reform their society. In a country whose constitution contains certain basic human rights, reform may be easier to achieve. This is not the place to discuss the morality of using violence to bring about reform within a society. It is, however, relevant to point out that a society which ignores the justifiable grievances of a significant proportion of its members is unlikely to maintain the widespread acceptance of the Rule of Law which is fundamental to its survival.

**Justice.** The law is the law. It does not invariably deliver justice, nor would any realist claim that it did or could always do so. Nevertheless, that must be its aim, if only to maintain widespread acceptance within society. The Rule of Law is not the same as justice, but you cannot have justice without the Rule of Law.

**Freedom.** The law limits freedom in many ways, so it can hardly be regarded as synonymous with freedom. However, its principal functions are (i) to liberate citizens from the tyranny of unrestrained state power and (ii) to protect citizens from exploitation or domination by others within society with greater power. The Rule of Law «both liberates and protects».

**Human Rights.** Equally, the Rule of Law cannot be regarded as synonymous with human rights. Some human rights, as discussed above, are necessary basic principles of the Rule of Law, others are more contentious — often a balance has to be struck between some rights and others, and different societies will arrive at different answers, using the political process underpinned by the Rule of Law. You cannot have human rights without the Rule of Law, but all human rights are not necessarily part of the law in every society governed by the Rule of Law. However, most countries are party to some or all of the relevant international conventions, notably the International Covenant on Civil and Political Rights; the Vienna Convention on the Law of Treaties; the United Nations Convention Against Torture; and the relevant regional instruments such as the African Charter on Human and Peoples Rights; the American Convention on Human Rights; the Arab Charter on Human Rights; and the European Convention on Human Rights. These are in addition to the various conventions and their optional protocols relating to the rights of the child, the elimination of racial discrimination and discrimination against women. It is, therefore, appropriate to refer to these provisions, as well as the Universal Declaration of Human Rights, in any discussion of the extent to which a country adheres to the Rule of Law.

The Rule of Law is at least as much concerned with **process** as it is with the **content** of the law. If the processes whereby the law is created and enforced are rational, proportionate, fair and transparent, it is likely that the law will receive the requisite widespread acceptance and will not merely reflect the will of a single individual or group within society.

The Rule of Law is a relatively recent and fragile phenomenon, even in those countries where it is commonly regarded as well-established. Few if any of those countries can, even now, claim a perfect or complete separation of powers. Every country has to find its own path towards establishing the Rule of Law and no country can afford to be complacent once that has been achieved.

The Rule of Law is the beginning, not the end.

**Valery Zorkin**
*President of the Russian Federation Constitutional Court*

# RULE OF LAW AND LEGAL AWARENESS

**Speech delivered by the President of the Constitutional Court of the Russian Federation V.D. Zorkin** at a symposium on the rule of law sponsored by the International Bar Association together with the Constitutional Court of the Russian Federation, the Federal Chamber of Lawyers of the Russian Federation, the Moscow City Chamber of Advocates and the International Union (Commonwealth) of Advocates on July 6, 2007

Dear colleagues, some speakers here have suggested that a definition of «rule of law» is not important. Rather, what is important is the meaning in context. But, there are moments when it becomes necessary to specify what a certain name or term means. Confucius said that there are times of quietude and conformation, but also there are so-called times of «rectification and correction of names.»

Understanding of the rule of law principles differs when viewed through Anglo-Saxon legal traditions and the continental legal tradition, to which Russia also belongs. The mentality and spirit of these legal systems are different.

The Russian legal system, borne out of transformations in the 19th Century under the reforms of Emperor Alexander II, is based primarily upon the German jurisprudence. It was from here that we borrowed a concept of «Rechtsstaat,» which literally translates as «law-governed state.» The English analogue is «rule of law.» For the time being, let us use the term «rule of law» as a concept meaning the predominance (or supremacy) of legal standards in the life of a civil society and state.

This principle underlies a new world order and constitutional systems of modern democracies. Through the rule of law principle the world is becoming one common super-civilization or the civilization of civilizations, irrespective of other differences. The alternative to this principle is lawlessness and social chaos. Therefore, this principle was taken as foundation for

the present Constitution of the Russian Federation, and its implementation is the top priority of our country at this time.

## The Morality of Law

Steps such as adoption of liberal laws, legislative acknowledgement of common principles and norms of international law, and creation of corresponding state and public institutions are insufficient for the real rule of law. It is also important that statutes express the essence of law as mankind understands it at each particular stage of its development. The great philosopher Spinosa once said that law was the mathematics of freedom.

Law cannot be simply what is dictated by political authority or issued by the state. In the 20th Century there have been two examples of legal tragedies which were developing in parallel. One was totalitarian Soviet communism, and the other German Nazism. In the USSR, owing to efforts of the Stalinist regime theoretician Vyshinsky, the law was identified with statutory law, and law was identified with the will (or rather dictatorship) of the proletariat. Through such logic, whatever was prescribed by the state in the form of statutory law was lawful.

Hitler followed yet a different ideological pathway, absolutely antagonistic to communist ideology, but the result was the same. In Nazi Germany, the law was an expression of the will of the German nation, and the will of the German nation was incorporated in the Fuhrer. Hence, the law existed only as a body of statutory laws.

Both systems were killing millions of people, because for both the law was given and contained in the statutes.

## 1. Protecting Human Rights

Finding the proper balance between the European Convention and the Russian Constitution is a reflection of the more general problem of balance between two major trends: towards globalization and towards national sovereignty. On the one hand, Russia gradually becomes a part of integrated European legal territory, implementing in its legal system many European legal principles, including the principle of availability of judicial protec-

tion for human rights and freedoms, both at a national and a supranational level. On the other hand, national sovereignty always assumes the existence of national legal and judicial systems as a primary instrument of justice, with the admission of a supranational system of protection of human rights and freedoms as an additional, subsidiary tool. Meanwhile, it is important that both systems work harmoniously; if either is disregarded, the mechanism for protection of human rights and freedoms will suffer.

Article 15 (Part 4) of the Constitution of the Russian Federation along with the Federal Law #54-FZ of March 30, 1998, «On ratification of the Convention for Protection of Human Rights and Basic Freedoms» (and Protocols thereto), creates a legal basis for direct application of both provisions of the Convention, and legal propositions of the European Court of Human Rights (European Court). The European Court provides interpretation of the norms contained in the Convention, as relevant from time to time. Based on its interpretation of the Convention, the European Court develops uniform, all-European standards for protection of human rights and freedoms, mandatory for all member states of the Convention. Even though the catalogue of the rights guaranteed by the Convention, is consistent in text with the list stipulated by the Russian Constitution (in which the nomenclature is even more comprehensive, due to the addition of social rights), the content of the rights guaranteed by the Convention in some cases appears much broader in light of their practical interpretation by the European Court. The primary goal of Court reform (discussed recently in connection, among other things, with the ratification of Protocol 14 to the Convention) is to increase the role of the European Court as a supranational court, *de facto* the Supreme European Court of Justice for protection of human rights and freedoms in all European states.

As of early 2007, the number of complaints, lodged against the Russian Federation and pending consideration by the European Court amounts to approximately 22% of the total number of referable applications (in absolute figures — approximately 20,000); the annual increase in complaints lodged to the European Court against the Russian Federation in 2006 was 38%. These figures, in many respects, manifest an credibility gap that exists between Russian citizens and the domestic judiciary. The exponentially increasing number of Russian applications to the European Court cannot be entirely attributed to the fact that more and more of our citizens «discover» the Convention; but this rather happens because the domestic ju-

diciary establishments (especially trial courts of general jurisdiction) ineffectively protect citizens against violation of their rights.

The primary task of our state in response to complaints against Russia processed by the European Court should be both the modification of domestic legislation (this needs to be done without waiting for repeated acknowledgements by the European Court of other similar violations), and the assurance of domestic efficient instruments of legal protection, even though often these two directions are closely inter-related. Despite the fact that a growing number of applications testifies to the accessibility of the European Court to Russian citizens, an overwhelming majority of complaints still are declined. This is due to non-observance of application requirements, as well as under-utilization of possibilities provided by domestic legal protection instruments. As a matter of fact, citizens address themselves to the European Court when there still exists an opportunity to defend their interests in-country, but they prefer to go directly to Strasbourg. Why? I suppose the reason lies in the lack of public confidence in domestic judicial and law enforcement systems. Therefore, the state, represented both by the highest agencies of power, and specific courts and law enforcement establishments, has to provide — within the limits of reforming and streamlining the entire system — for an ability of every complaining individual to first bring the domestic system to its conclusion, and only then apply to the European Human Rights Court. If this ever happens, I guess the flow of complaints should be reduced quite significantly.

Many violations recognized by the European Court, as well as a great many complaints submitted to Strasbourg, could be avoided if Russian trial courts are more attentive and instrumental in using the Convention and European Court practice in their activity. Certainly, the problem of perfection of domestic legal protection mechanisms cannot be exclusively Russian. It exists in all member states of the Convention, especially in the so-called «new wave» participants.

The policy of the European Court, as well as that of other bodies of the European Council, is to stimulate each member state to resolve any in-system problems as revealed by the European Court, at a domestic level and eliminate from the future Court docket any repeated cases with similar violations committed with regard to other individuals. Therefore, the task of Russia — as the country holding the 1st place in the number of submitted complaints — is to pay the closest attention to perfection of its do-

mestic legislation and national judiciary in order to transfer the main burden of human rights protection onto the national legal structures and reduce the flow of complaints sent to Strasbourg. We should not forget that at the moment of Russia's entry into the European Council both domestic and international experts evaluated our legal system as non-compliant to EC standards. Since that time, Russian legislation has undergone a quite lengthy and relatively liberal transformation. But should the adoption of a most faultless law mean its equally faultless practical implementation?

Since the Convention is a integral component of national legal systems of its member states, any legal protection methods accessible at a national level should be efficient and known to the citizens of each specific country. These methods form a «first line of defence» for protection of the rule of law and basic human rights and freedoms. The first task of every national judiciary is to protect human rights by using all domestically available mechanisms, while assuring strict observance of the Convention provisions. Our common task is to render these mechanisms really efficient from the standpoint of civil rights protection.

## 2. Social and Political Rights

For centuries mankind has been trying to find ways of achieving justice. At each stage of historical development these ways have had their own specific features. We live in a world that is becoming globalized; this fact has its pros and cons. The latter, quite unfortunately, prevail. The report on «Justice and Development» for 2006, prepared by the World Bank (International Bank for Reconstruction and Development), shows that the most fundamental cause for existence of poverty lies in the absence of power combined with the absence of investment possibilities. Absence of incomes, absence of access to services, absence of assets — all these forms of public misery are combined with the absence of a «voting voice,» the absence of power and that of status. Steps taken by the State could expand the investment potential of those whose possibilities are limited, by making investments into their human capital, into the infrastructure they use, and also into assurance of fairness and safety in the markets where such people negotiate. And if the State fails to take such steps, this should mean it has other priorities in mind.

The current policy, failing to promote elimination of economically inefficient kinds of injustice, is — expressly or by implication — the result of political choice. Such political mistakes, generated by injustice and securing eternal rule thereof, are antagonistic to prosperity. The people deprived of possibilities are incapable of making any contribution to their own country's development. Their potential and talents are wasted, while other state assets such as funds, soil, subsoil and other resources become underused. Disparity in the control over resources, says the Report of the World Bank, promotes unequal representation of power, which manifests itself in poor quality of the institutions of government: nobody ever stimulates official bodies for increased accountability.

The constitutional principle of a social state assumes creation of equal possibilities for all members of the society, while the state carries out social policy recognising the right of each member of the society to such a standard of living (including food, clothes, housing, medical and social services), which is essential for sustenance of health and well-being of such person and his immediate family, both when he works and also in the event of his unemployment, illness, physical disability, or old age. In this way, constitutional law as a fundamental control of social relations gets a more pronounced social dimension.

The Russian Constitution codifies the legal foundation for social protection, including creation of conditions for dignified life and free development of each individual, labor safety and health protection, state support for the family, motherhood and childhood welfare, priority of international social standards, etc. The basic tendencies defined in the social sphere include the cancellation of excessive state support; meeting the minimum social requirements of citizens, based on the financial assets available at citizens' disposal; target-oriented social aid; etc. However, it is clear that proclaiming such noble goals is one thing, and making them a reality is quite another. Today almost 25% of Russian citizens live below the poverty line, and most of them are not unemployed. Struggle against poverty and social injustice is one of the most important tasks for both the State and society.

Even though formally the Constitution of the Russian Federation proclaims Russia as social state, the policy of which is directed at the creation of conditions providing for dignified life and free development of each individual, it is hardly a secret that such state of affairs in our country is but

a constitutional ideal. Many researchers appraise the current status of Russia as a formally social state to conform to the early 20's of the last century. Among the reasons for such «underdevelopment» of social mechanisms, we can name vestiges of the Soviet political and social system, contradiction of economic, social and other goals of the state policy, and also the fact that today's Russia belongs in the group of developing countries by major macroeconomic indicators.

Legal institutions can both defend the political rights of citizens and limit the power of the ruling elite. They can provide equal economic possibilities by protecting property rights of all citizens and providing for absence of discrimination in market relations. But, at the same time, such problems as errors in the legislation and poorly calculated social consequences of specific laws which are at odds with actual social and economic conditions and public opinion and cultural traditions can have quite the opposite, negative effect on social justice for the society and its development. It is such discrepancies that first come to light during the performance of constitutional justice.

The most comprehensive list of social rights is provided in Part 1 of the European Social Charter of May 3, 1996 (not ratified by the Russian Federation).

The Constitution of the Russian Federation, when defining the legal status of individual, followed the General Declaration of Human Rights and the International Pact of 1966 to proclaim such rights as:

a right for social security,

a right for employment,

a right for equitable labour conditions,

a right for protection of labour rights by all ways provided by the law, including the right to strike,

a right for association in trade unions and for free trade-union activity,

a right for education,

a right for health care,

a right for clean and safe environment,

a right for housing.

This above list of basic social rights — on the strength of Articles 17 (Part 1) and 55 (Part 1) of the Constitution of the Russian Federation —

cannot be considered complete and does not prevent constitutional protection of other conventional social and human rights and freedoms.

In modern jurisprudence and judiciary practice there exists a growing tendency to consider the social rights consolidated by the Constitution not only as basic reference points for the legislator, but also as fundamental inherent rights equal by importance to the constitutional civil and political rights. The constitutional social rights — along with the civil and political rights — by their nature pertain to fundamental human rights, indefeasible and belonging to everyone from birth. Based on the principles of equity and social solidarity, such rights are consolidated by the Constitution as those directly effective and therefore subject to judicial protection. As such, they become binding for both legislative and executive power, creating reference points for the state social policy, as well as for the creation and development of corresponding branches of the legislation.

One of the basic problems, still awaiting solution in the course of current social security reform, is the establishment of social security payments which will meet at least the minimum living requirements. A survey performed by the All-Russia Centre for Living Standards shows that purchasing capacity of the average old- age benefit, received by more than 29 million Russians, barely exceeds the subsistence minimum; while the average disability benefits, received by 4.2 million people in the Russian Federation, as well as the survivor's and social benefits are well below this threshold. The official minimum wage in Russia is below the average subsistence minimum; the average-wage-to-the-average-subsistence-minimum ratio in Russia also lags far behind standards adopted in the countries with well-developed market economies.

In some cases, measures of social support perform a guaranteeing function, *i.e.* they are directed at the assurance of constitutional laws. The constitutional duty of the State in guaranteeing the right for pre-school education in interrelation with the Constitutional provisions on the state support for motherhood and childhood welfare makes it necessary for the State to render financial aid to families with preschool children. Such support, as the Constitutional Court has noted, may be provided in various ways, including by setting a limit on the pay required from parents for the stay of their children at preschool day-care centers. The specified measure of social support represents one of the forms for nation-wide guaranteed public availability of education and care at pre-school institutions.

This situation draws sharp criticism from experts, wide public discontent, and growth of social unrest. In recent scientific publications the existing social security system is quite often described as inconsistent with the social equity principle, insufficient for provision of dignified life and free development of each individual, and thereby diverging with the constitutionally protected social values and aims. There is a real danger of upsetting the balance between the constitutionally protected social values, of rupture between the social and economic priorities, between the rights of citizens and public interests.

Until recently the Constitutional Court showed some restraint in this area. It repeatedly stated that the Constitution, while stipulating the individual right of every citizen for social security, refers the solution of problems related to the legal grounds of awarding guaranteed social payments, methods of their calculation, rules of indexation, definition and classification of such payments, etc. to the legislators (the rulings of CC of April 4, 2006 — #90-O, of July 18, 2006 — #297, of November 2, 2006 — #563-O, of November 16, 2006 — #510, of November 16, 2006 — #511, etc.). The legislator is given a possibility to eliminate any shortcomings and defects existing in the new regulation, which, unfortunately, are becoming more and more obvious.

Imperfection of the social security and social protection legislation manifests itself also in a number of vague and inconsistent provisions, which tend to be ambiguously interpreted in the practice of law enforcement. Quite often it leads to arbitrary application of such provisions and, consequently, to infringement of the social rights of citizens. Such infringements may be further eliminated by means of revealing the constitutional-legal meaning of the rules of law defining the order and conditions of realization of the right for social security, and on this basis — by updating of the law enforcement practice.

There exists a variety of problems related to the delimitation of benefits of compensatory nature from other benefits, and also to the separation of lasting legal relations from the common system of legal relations related to social support. We witnessed infringements of the equality principle to take place in the process of provision of social support to the dwellers of various regions of Russia, and also there were cases of wrongful refusal by various constituent entities of the Russian Federation and munici-

pal formations in granting social support to various legally eligible categories of citizens.

The federal legislator, having delegated partial authority in social protection area to the level of constituent entities of the Russian Federation and municipal formations, yet failed to define with sufficient accuracy the scope of this authority, also failing to provide proper principles of the new legal regulation and the minimum standards guaranteed to all citizens of Russia irrespective of their domicile. Any efficient financial mechanism, providing for the statewide realization of uniform social policy and redistribution of budgetary funds at all levels in order to preserve the already obtained level of social protection, was not put in place either.

In general, the legislation intended to control one of the major fields of activity of the social state, appeared to be deplorably inconsistent, vague and incomplete. The Constitutional Court of the Russian Federation, when ruling on the cases checking the constitutionality of laws and other statutory acts — by the use of its inherent authority — corrects any defects of the effective social legislation, thereby assuring the constitutional protection of basic social and human rights and freedoms.

Real assurance of social human and civil rights compliant both to the Constitution and to the well-established standards of life, commensurable to a modern socially and ethically targeted economy, is a necessary precondition not only for political stability of any society, but also for its successful development towards humanism, democracy and progress.

Certainly, to succeed in the challenging task of building a model of the social state based on the Constitution and assuring high standards of life for its citizens may seem quite difficult, but those who dare to walk shall finally reach!

## Public Legal Awareness

Does the rule of law exist? Who saw it and who can describe it? Here we should again return to great thinkers of the past. One of them theoretically proved that there was an unknown planet in the Solar system. But nobody could view that planet, so other astronomers said «the facts speak differently: we look in our telescopes and there is no such planet,» to which the discoverer replied, «the worse for these facts of yours.» So

his discovery was first written off as «crazy chair-borne sophistication.» And then the planet was finally viewed. The same situation exists with the Rule of Law.

The task consists in bringing the rule of law and an understanding of its necessity to the general public, and in the countrywide introduction of its principles; otherwise all, even the greatest, undertakings will come to nothing. A good example of this is the great liberal reforms of Emperor Alexander II, which ended in the rise of anarchy and this reformer's terrorist assassination. But the terror continued and finally Russia was caught in bloodshed of revolution. I shall not judge the revolution itself — there were good and bad sides to it — but we now speak about the rule-of-law principle. I will always repeat: we must not try to destroy the parliament. When the parliament was disbanded and stormed in this country in 1993, not everybody abroad understood it. Yes, the then-existing Constitution was imperfect, even bad, but it shouldn't have been so debased in the eyes of the mass public in favor of tactical victory.

Thank God, that conflict was extinguished and not only by the use of tanks, for otherwise a far bloodier tragedy could have ensued. I am not going to castigate political leaders of that time, especially the deceased ones. But we should preserve continuity and consider that in Russia the «soil» is barely suitable for the cultivation of «a fragile flower» like the rule of law; we should always remember that even «a slightest cold spell blown by revolutionary winds» can kill this fragile flower. That is why I believe our main goal today lies not only in creating good laws; this stage has already effectively been passed. The legislation system has been created and now it produces laws, sometimes bad and sometimes very bad. I repeatedly criticized this system, based on our experience at the Constitutional Court. For example, the tax legislation, where there are many conflicts and where normative standards can change up to several times within the same tax period. This is a shame from the viewpoint of stability of the legal system. But still we do have an adequate legislative system in place. Now it is important to transform the legal awareness both of professional lawyers and of the general public.

Russia is a typical land of extremes: there is an island of legal life and there is a huge continent of living outside of the law. There are salaries in «grey envelopes;» unfair distribution of profits; desire to settle conflicts by unlawful methods. In Russia, there still exists the danger of transforma-

tion of law into lawlessness, and of lawlessness into a worse kind of social existence, into obliteration of law or social chaos, since the majority of the population still lives in poverty. From the viewpoint of social security and living standards, Russia cannot be called a safe country. This social problem keeps at bay the ultimate victory of the rule of law, and, hence, and the triumph of democracy in Russia. Pauperized people do not need democracy not because they do not want to live in democracy but because they are unable to see the value of democracy in their life.

From this viewpoint, the people are still the protagonist and decisive factor. If most of them did not want to live by the law, the country would have already reverted to former times by counter-revolution or the like. This does not happen; but the opposite does not happen either. In my opinion, we have not yet safeguarded steady or mature democracy. I would not say that our reforms are completed. They exist in the form of legislation for judicial reform and economic reform, etc. The rule of law still has to become a real driver of liberal reforms; but such an irreversible turn has not yet taken place. Why? Because of the negative factors which do exist in Russia.

In Russia, the role of the authorities in relation to the rule of law is a contradiction. On the one hand, democratic standards are badly needed. But, on the other hand, if we adopted democratic standards as they exist, for example, in Belgium, Germany, or even in the United States unchanged onto Russian soil, this would be wrong and subject to imminent failure. In Russia, the ruler always had priority over society, and all reforms have been due solely to the efforts of the authorities while society remained impassive. This absence of proper transformation of public legal awareness was the prime reason for failure of all previous reforms. In my opinion, it still serves as the stumbling block to the success of reforms, on the one hand; and, on the other hand, it is the main factor leading to accretion of power in the hands of the ruling elite.

A dangerous tendency exists: the reformers require more and more power to bring their reforms to a successful ending. But how are we to sail through the dangerous strait between these Scylla and Charybdis so that our reformers do not get too carried away and turn themselves into a mechanism that works not for society's interests but for its own? This is one of the main challenges that Russia faces, but meeting this challenge will be impossible without the transformation of public legal awareness. Such

transformation would be impossible in a Russia isolated from the rest of the civilized world. We have to belong to the global community, and we are already there.

There are many things uniting us with other countries. Based on the rule-of-law principles can we cope not only with specific challenges for each country, including Russia, but also with global challenges dictated by our time — terrorism or international crime, the danger of ecological disaster, or poverty. Only by connecting the efforts of Russia, of its legal community, of its professional elite with those of international legal community, including the United States of America, Western Europe, and the Far East is it possible to attain reasonable horizons, behind which even brighter horizons beckon.

Paraphrasing the well-known line from Bulgakov's novel «Dog's Heart,» we may say that the rule of law resides not in the *statutes*, but in the *minds*. By saying «minds,» we mean not only these of legislators and representatives of other branches of state power, but those of the whole nation, that is mass public legal awareness. Legislative consolidation of any liberal and democratic principles and provisions, or creation of corresponding institutes *per se* does not mean successful implantation of all these into the very core of social life and public consciousness. Quite similarly, creating a parliament does not at all mean creating a parliamentary system.

In the Oxford Law Dictionary the term *Rule of Law* (when attributed to the UK constitution) embodies three concepts: the absolute predominance of regular law, so that the government has no arbitrary authority over the citizen; the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts; and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations.

The due process of law should become the very essence, the keystone, the driver both in the state and social life. Without such transformation, without their implantation into mass public legal awareness, any legislatively consolidated principles and norms, including constitutional ones, are nothing but mere scraps of paper.

Implementation of the rule of law in Russia is difficult at all levels of state and social life because its introduction in Russia takes place under very specific conditions. Historically, Western Europe was the birthplace

of democratic foundations of a state system. When the resulting model, however, was applied under different cultural, social and economic conditions, it was frequently incompatible with the mentality of nations shaped by other cultural, religious or communal traditions. Unlike European countries, Russia simply does not have enough time for an evolutionary, unhurried development and adaptation to the local milieu — cultural, religious and social — of the principles and norms of behaviour, such as individual legal behaviour, which developed in Western Europe over centuries. Due to religious and other cultural and social specifics, European public legal awareness tends to be rather individualistic, whereas the Russian social milieu has been almost exclusively shaped by collective and communal consciousness of the local population. Any independent cultural environment will inevitably resist the introduction of non-native legal institutions into national legal systems. This process is universal, and it affects even successful organizations such as the European Union. Such resistance to introduced («implanted») norms and institutions onto historical, cultural and religious specifics of the receiving state, lead to deformed public opinion about the borrowed institutions, to modification of their content, and quite frequently to defamation of their character in the eyes of population; and, as consequence, to general public rejection of inherently positive phenomena.

Unlike in the western culture, the law is not a determinative social control factor in the legal systems where the moral priority still belongs to religion, traditions and customs, which is especially true for countries of the so-called «eastern mentality.» For instance, one of the basic postulates of the western concept of democracy, asserting the priority of individual human rights and freedoms, is not equally supported by many Asian states. To a certain degree, the same may be said about Russia, where traditionally high state involvement in the economy and the majority of other areas of social life throughout practically entire history of the Russian statehood entailed wide public immunity to the majority of traditional West European legal institutions.

In the modern world we see certain factors which inhibit the process of universalizing human rights and application of uniform standards across the entire world. The universal human rights catalogue (axiomatic for western mentality and incorporating the best of political and legal landmarks of European thought) is difficult for comprehension by nations belonging

to different traditional cultures, even if such human rights provisions were included in their national constitutions and regional international agreements. «Axiomatic truths» of human rights have not been realised and comprehended in pre-revolutionary Russia or in the Soviet Union, where human rights were always sardonically referred to as «the so-called human rights.» Today's Russia, with all its seeming proximity to western civilisation, still undergoes a very slow and difficult process of understanding human rights. Many human rights violations, caused by corruption, rampant organised crime, social and economic sufferings of a considerable part of the population, are already a product of the new Russia.

The task is to shape correct legal awareness among the population as a basis for digestion of democratic heritage, so that democratic legal ideas and values can finally become a real priority in the country's development. The fact that Russia is a truly Eurasian country with a multi-ethnic population, belonging to several different traditional cultures complicates the formation of common public legal awareness, since it cannot rest upon uniform cultural, religious and traditional values. Under such conditions, formation of the true rule-of-law state goes only too slowly and painfully, as the human rights culture, as an element of the social milieu, requires much time to grow and mature.

The role of the Constitutional Court under these conditions is one of a gardener cultivating constitutional principles on the national-specific soil. Rule of Law includes several essential elements:

The *first element* is the ability of legal norms, standards and principles to govern people in their daily activities. People should be able to understand law and match their behaviour to the effective rule of law.

The *second element* is the stability of statute law. Statute law should be reasonably stable to allow for proper planning and coordination of actions over a certain period of time.

The *third element* is efficiency and dynamism. Law must direct the activities of the entire population, or at least a majority thereof. In other words, people should be directed by the law, abide by it and be capable of further development.

The *fourth element* is the supremacy of the statute law; the regime of due process of law. In the so-called «continental» legal systems, to which Russia belongs, this principle (the regime of due process of constitutional law) plays an especially important role.

The *fifth element* is the supremacy of legitimate authority. State officials of all levels (including judges) shall, as well as ordinary citizens, be governed by the law.

The *sixth element* is the functioning institutions of impartial justice. Courts should put the law into practice and carry out legal proceedings on the basis of justice.

## Rule of Law as a Guiding Goal

The Rule-of-Law principle is our guiding star, telling us in which direction to go, even though we might never reach the ideal. I think the ideal exists only in the hands of our Creator. But this must not mean we should not pursue this ideal. We, the seamen, who have embarked on a ship, called the human civilisation, in order to come through all the storms and find the desired destination, should be always guided by the Rule-of-Law principle as our Stella Polaris.

**Francis Neate**
*Former President of the International Bar Association*

# SPEECH TO THE RULE OF LAW SYMPOSIUM IN MOSCOW ON 6TH JULY 2007

Good Morning:

It is a great privilege to have the opportunity to speak to such an important gathering of fellow lawyers, in such an important city. We lawyers are an unusual group. Throughout my long time with the International Bar Association, I have come to realise that there is much that we have in common with each other, whatever our nationality, often regardless of the state of relations between our different countries. I have come to realise that lawyers across the world share the same values and perform the same function in society, wherever we may be — above all, a conviction that **the law** is the best method of governing society, and a professional dedication to implementing the principles which allow a **civil society** to be created and to continue. The law is the engine of a civil society and we lawyers are the engineers.

I made the Rule of Law the focus of my presidency of the IBA throughout my 2 years in office. I defined the objective at the outset to be:- «to mobilise the legal profession to defend, promote and build the Rule of Law across the world».

We have made enough progress in achieving that objective to encourage me to say that it remains the objective and I believe will continue to be a principal focus of the IBA for some years to come.

What is the Rule of Law? Some people, even quite intelligent people, express confusion about this. It is really not difficult.

The Rule of Law is the only system so far devised by mankind to provide **impartial control** over the exercise of state power — I repeat: **impartial control** over the exercise of state power.

«Rule of Law» means that it is the law which — ultimately — rules, not a monarch, not a President or Prime Minister, clearly not a dictator, not even a benevolent dictator. Under the Rule of Law **no-one** is above or beyond the law. The law is the ruler.

The Rule of Law is an English concept. I am told that the equivalent in Russia, and possibly in other countries, is better translated as «Legal State», or «a

State governed by law». If the latter phrase is acceptable — «a state governed by law» — then surely we are talking about the same thing. In a paper published in 2004, Mr. Valerii Zorkin, Chair of your Constitutional Court, used the expression: «Supremacy of Law»; I expect he will tell us later himself what **he** means by this phrase, but I would guess it means we are definitely talking about the same thing. However, the best way to determine whether or not we are talking about the same thing is to look at the **essential characteristics** of the Rule of Law and to determine whether or not they are similar to the essential characteristics of the «Legal State». That is what I propose to do today.

The Rule of Law is manifestly so preferable to any other system so far created for organising society that I see no need to justify it by further argument.

The Rule of Law rests on two fundamental pillars, which can be regarded as its foundations.

## First

Submission of ALL to the Law.

As I have already said, «Rule of Law» means that it is the law which — ultimately — rules, not a monarch, not a President or Prime Minister, clearly not a dictator, not even a benevolent dictator. Under the Rule of Law **no-one** is above or beyond the law. The law is the ruler.

Commonsense tells us that you will not control power with an abstract concept such as law — you control power with countervailing power (the Cold War springs to mind). So, for the Rule of Law to flourish, it is essential for all the organs of state power — the executive branch of government, the armed forces, the police, the security services, even the judiciary — to accept they are bound by — subject to — the law. Even this is not enough, because if a sizeable proportion of citizens regard themselves as seriously disadvantaged by the law, they will revolt. In other words, for the Rule of Law to survive, it requires **widespread acceptance** within society — not just majority acceptance — **widespread acceptance**.

There has to be a **culture of respect** for the law throughout society. This has to come from the TOP downwards.

It is this fundamental characteristic of the Rule of Law which ultimately leads towards the acceptance of other important values — such as democracy, freedom, minority rights, human rights.

The Rule of Law is not the same thing as democracy — but you cannot have democracy without the Rule of Law.

The Rule of Law is not the same thing as freedom — indeed, it limits freedom in many ways — but you cannot have freedom without the Rule of Law.

The Rule of Law does not necessarily confer minority rights or individual rights on all people in the same way in all cases — but you cannot have minority rights or human rights without the Rule of Law.

Any lawyer will tell you that the law does not always provide justice — but you cannot achieve justice without the Rule of Law.

It is this condition of widespread acceptance which makes the Rule of Law so fragile. Those who wish to exercise power find it a constraint. Politicians, those in power, even in the best organised societies, tend to be the first to chip away at it. And, as I have already indicated, if the law is promulgated and/or applied in such a way as to disadvantage a substantial proportion of the members of society, civil unrest or even civil war will result.

## Second

The second fundamental characteristic of the Rule of Law is, of course, the **separation of powers**. This is based on simple commonsense. If those in control of the power of the State also make the laws and/or enforce them, you cannot have the Rule of Law, you have the Rule of those in power, — Rule **BY** law rather than Rule **OF** Law.

So you come to the absolutely fundamental requirement of separation of powers: the Executive, the Legislature and the Judiciary. In practice, few if any countries have succeeded in establishing a perfect and complete separation of powers. For example, in my country the Prime Minister is usually leader of the majority party in Parliament and therefore controls, in greater or lesser degree, both the Executive and the Legislature. In recent years much the same position has existed in the U.S. In such cases a written Constitution can do much to mitigate the risks and, of course, a **fully independent judiciary**, supported by a properly **functioning court system** and a **fully independent legal profession**, becomes absolutely crucial.

This is the context in which we need to talk about the independence of the legal profession — as a crucial element in maintaining the Rule of Law.

When we talk about the «core values» of the profession — independence, confidentiality/privilege, avoidance of conflicts of interest — we tend to sound like a trade union, promoting our own self-interest. This is not the point at all. An independent judiciary, supported by an independent legal profession, is the corner-stone of the Rule of Law. And it is those countries that are governed by the Rule of Law, which are the envy of the rest of the world.

It was sheer outrage at the wilful disregard of the fundamental principles of the Rule of Law by the U.S. in Guantanamo Bay, and by my own government in Belmarsh, which lead me to start the IBA's campaign to defend and promote the Rule of Law.

I started by drafting a Resolution for the IBA Council, and after a variety of redrafts, the Council passed the following Resolution at our annual Conference in Prague in September 2005. [I will take the liberty of reading the Resolution in full:

*«The International Bar Association (IBA), the global voice of the legal profession, deplores the increasing erosion around the world of the Rule of Law. The IBA welcomes recent decisions of courts in some countries that reiterate the principles underlying the Rule of Law. These decisions reflect the fundamental role of an independent judiciary and legal profession in upholding these principles. The IBA also welcomes and supports the efforts of its member Bar Associations to draw attention and seek adherence to these principles.*

*An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment, a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable.*

*The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect. The IBA calls upon all countries to respect these fundamental principles. It also calls upon its members to speak out in support of the Rule of Law within their respective communities.»*]

What is unusual about the Resolution is that it goes into detail. It is not content with pious generalities — it sets out a list of the basic mini-

mum characteristics of the Rule of Law. It does not claim to be perfect, nor does it claim to be comprehensive. It simply lists a number of characteristics which the leaders of the world's legal profession were able to agree (there was ultimately no dissenting vote) were fundamental to the Rule of Law. These were

An independent, impartial judiciary

An absolute prohibition of intimidation or corruption

The presumption of innocence

The right to a fair and public trial without undue delay

A rational and proportionate approach to punishment

A strong and independent legal profession

Strict protection of confidential communications between lawyer and client

A prohibition of cruel or degrading treatment

Equality of all before the law, and

A transparent process accessible to all.

The IBA is the largest and leading international organisation of lawyers in the world. Our membership comprises over 195 Bar Associations and Law Societies from almost all nations, together with over 30,000 individual lawyers, most of them leading international private practitioners. The Council is the supreme governing body.

This Resolution is, therefore, an authoritative statement on behalf of the worldwide legal profession, and commands the utmost respect. I have written to the Heads of State of most countries in the world, quoting the text of the Resolution and inviting them to endorse it.

I have to say that the response so far has been disappointing. I have had relatively few replies. I also asked the relevant Bar Associations and the Law Societies to write to their Presidents in support, and to let me know what they said and what happened, but I regret to say that I received relatively few responses. I was delighted to receive an unequivocal endorsement from the President of France. I received a satisfactory endorsement from the Lord Chancellor of the U.K., asked to reply by the Prime Minister. I have had no reply from President Bush.

I did receive a reply sent on behalf of your President which informed me that the principle of independence of the legal profession was enshrined in your Constitution. I found this reply, like most of the other replies I received, strangely equivocal. It should not be difficult for the leader of any

country to reply: «Yes, we agree with the Resolution and are pleased to endorse it.» One sentence, very simple. Yet almost no-one chose to reply in that simple way. In almost every case, some diplomat was found to put together a form of words which sounded acceptable, but did not amount to an unconditional acceptance of the Resolution. This is just one illustration of the untrustworthiness of governments. It is an abiding characteristic of those with power that they only accept limitations on their power with great reluctance. Lord Acton got it right many years ago: «Power corrupts, and absolute power corrupts absolutely». This is why it is so important that a **culture of respect** for the Rule of Law, generated from the TOP downwards, should permeate society.

In those few countries which can fairly claim to abide by the Rule of Law, even if imperfectly, it has taken a long time to develop this culture of respect. And it is still a fragile flower. For example, in my own country, we have since 2000 seen at least two examples of disregard for the Rule of Law, one entirely explicit. In the United States, we can refer not only to Guantanamo Bay, but to the fact that until 1963 racial segregation was still the norm in many parts of the country. We must not delude ourselves that the Rule of Law is a strong plant, even where it seems to have taken root.

I try to be careful not to criticise a country when I am a guest in it. In any event, I seldom know enough about the country in question to know whether criticism is justified. So I have no intention of passing any direct comment about the state of the Rule of Law in Russia today. All I can fairly say is that it is a very recent phenomenon. One only needs an elementary grasp of world history to recognise that it was less than 20 years ago that Russia first began to make efforts to abide by the Rule of Law. It would not be surprising, therefore, to find that, in Russia, that essential culture of respect for the Rule of Law has shallow roots.

Allow me to ask an rhetorical question: who have been the heroes of the Rule of Law over the last twenty years? Nelson Mandela? Aung San Suu Kyi? I will give you two others — Al Gore and Mikhail Gorbachev. Gore, because he accepted the decision of the Supreme Court that he had lost the election, despite strong evidence that he had not. Gorbachev, because he let it be known that he would not use force to preserve the Soviet empire. Yet both are commonly regarded as «losers». Why? Because we have too much respect for power. We think we need «strong» leaders. And look where that gets us — into war after war. Of course we need strong leaders.

But the strength we need is moral strength — the kind of moral authority which commands acquiescence through respect, not the kind of authority which commands obedience through fear.

This leads me to my final point. Last year I was invited by the Czech Bar Association to speak at a Conference which was attended by representatives of every strand of the legal profession, from judges of the Constitutional Court downwards, and a number of distinguished international speakers. The subject matter I was asked to speak about was: «Independence of the Legal Mind». I puzzled over this, because it was not a phrase I was familiar with. I concluded that the main purpose of the phrase was to refer to the moral courage necessary to be a good lawyer, the courage to form your own, independent opinion, to hold to it and clearly express it, regardless of the pressures which might be applied to modify it or even not to express it at all. I thought about my own experience in practice as an international business lawyer over 35 years and realised that I had encountered more examples of the need for moral courage than I had realised at the time. The obvious examples are those which trouble those who regulate the legal profession or draft its codes of ethics: the in-house lawyer, or the independent lawyer with only one client, on whom the pressures to provide the client with what he wants, even if of dubious legality, can be overwhelming. Even in the larger commercial firm, the pressure to ignore potential conflicts when presented with the opportunity to act on a huge transaction is enormous. The path to success in international commercial practice is to cultivate a positive, creative, «can do» attitude to one's client's needs: the best response to the client's briefing about what he wants to achieve is not to suck one's teeth and forecast all the difficulties; rather, it is to respond: «can do».

I speculate that the case of Enron was a prime example of this. The client asks for an off-balance-sheet company. «No problem», says the adviser, «we know all about that». The company is supplied. So the client asks for another. And another. No questions are asked. The flow of fees is uninterrupted. A blind eye is turned.

The same attitude can lead to a lawyer engaging in money-laundering. Or corruption. No questions are asked. A blind eye is turned.

I was pleased to find at the Czech Bar Association's Conference on «Independence of the Legal Mind», that my interpretation of what this meant was widely shared. There was general agreement that the overriding require-

ment for preserving independence was moral courage. But I was even more interested — indeed humbled — to find that for these lawyers — having so recently experienced a regime which did not even pretend to comply with the Rule of Law — moral courage meant far more than resisting the temptation to earn a large fee. It means being willing to challenge authority, to be sceptical about the claims of those in power, to question the prevailing wisdom.

This is not easy. We lawyers are no braver than anyone else. I became a lawyer to enhance my physical well-being, not to put it at risk. But as I travelled the world during my two years as President of the IBA, I came to realise that there are lawyers in some countries who have no alternative but to be incredibly brave. Zimbabwe and Iran are two countries that come to mind. There are lawyers in many more countries — the Czech Republic is just one example — who are faced with the need to change their mind-set, and the mind-set in government, if they are to succeed in building a society governed by the Rule of Law. This requires moral courage of the highest order.

I have discussed what the Rule of Law is, and why it is important. I venture to suggest that every one of us should be asking: What can I do to defend/promote/build the Rule of Law? What can I do about it?

I was disappointed recently to hear the previous Chairman of the Bar Council in England and Wales (Geoffrey Vos' predecessor) say that the Bar Council had been reluctant to speak out against the threats to the Rule of Law reflected in recent actions by the U.K. government, because the Bar Council was reluctant to trespass into politics. This is nonsense. These issues are **not** political issues. Without the Rule of Law, there could be no politics. There could be no free political discussion, no political process — instead, we would be reduced to trying to persuade those with power to exercise it, or not to exercise it (as the case may be), in our favour. That is not politics, that is pleading.

The political process involves free political debate and discussion. It is the Rule of Law which underpins and guarantees that process.

It is our responsibility as judges and lawyers to uphold, promote, defend and build the Rule of Law, not just because we make our living from it, but because we are its guardians. Traditionally, the role of Bar Associations and Law Societies has been seen as two-fold: to regulate the legal profession, and to represent it; and the role of the Judiciary: to apply the law. I suggest that there is a third function, a further and greater responsibility. That is to explain, promote, uphold, defend, build the Rule of Law and confidence

in our legal systems, first of all in our own countries, but also across the world. First and foremost, that responsibility can and must be discharged in our own professional lives, by observing the highest ethical standards, the highest professional standards, the highest quality of care and service to our clients. But the challenge is to go beyond that — to understand that we have a wider, higher duty to the society we live in, to ensure that the value and importance of the Rule of Law is properly understood and given the highest priority at all levels. I suggest that this should be a priority for every judge, for every individual lawyer and for every Bar Association and Law Society, so that we lawyers become a force to be reckoned with in building peaceful and prosperous countries rooted in the Rule of Law.

What can we do?

First and foremost, we can support our colleagues, both in our own and in other countries. There is only one Rule of Law. There is only one Legal Profession. Anything which damages the Rule of Law in one country puts it at risk in all other countries. There is strength in collective action. Look at the example of the Nigerian Bar Association. They were concerned at the widespread failure of their government to obey Court orders. They organised a two-day boycott of the Courts by their members. They issued a detailed, magnificent, press release explaining why — so that the public might have a glimmer of understanding of what life would be like without the law. They had substantial press coverage. The result was that the government promptly began to obey Court orders.

The Law Council of Australia mounted a similar, successful campaign — to procure the release of David Hicks from Guantanamo Bay.

I know this takes courage. That is why I advocate collective action. There is **safety** as well as **strength** in collective action. That is why the judges, the Bar Associations and Law Societies must take the lead.

Secondly, we must look at our own legal systems and legal institutions. How can these be strengthened? The Rule of Law is a fragile phenomenon. In order to survive, it needs all the help it can get. It needs strong, brave judges; efficient, readily available Court systems; a highly competent, strong and well-organised legal profession.

Thank you for listening to me.

I look forward to hearing your views during the rest of this Symposium.

# 2. INDEPENDENCE OF THE JUDICIARY AND THE LEGAL PROFESSION

**Genry Reznick**
*President The Moscow City Chamber of Advocates*

## THE RULE OF LAW AND LEGAL PROFESSION IN RUSSIA

> *In today's Russia, legal professionals are quite insufficient both in quantity and in quality. Highly skilled lawyers are extremely hard to find.*
>
> Valery Zorkin
> President of the RF Constitutional Court

It is with a clear purpose that I have chosen these words of Valery Zorkin's to serve as an epigraph for this article. As he correctly pointed out: «Unlike judicial reform, legal reform has never even been enunciated throughout the Russian history. Our time presents a good opportunity for accomplishment of this endeavor.»

The Chairman of the Committee on Financial Markets and Monetary Circulation of the Federation Council (Upper Chamber of the Parliament) of the Russian Federation, Sergey Vasiliev, called Zorkin's «Theses on Legal Reform in Russia» the «most significant publication of recent years.» I could but repeat the same in regard to Valery Zorkin's latest book, entitled «**Russia and its Constitution in the 21st Century. A View from Ilyinka Street**» (Moscow, 2007), primarily because this book contains both the above-mentioned theses, published for the first time in 2004, and then develops the concept of legal reform even further.

When applied to both legal and judicial reforms, the legal standard of «qualified legal assistance» which is stipulated by the Russian Constitution, acquires an especially great value. We could even call it one of the principles of our Constitution, one of its keystones. However, the actual content of this constitutional principle has yet to be clarified after almost 14 years of its proclamation in the text of the Constitution of 1993.

In conformity with Article 48 of the Constitution of the Russian Federation, all legal assistance rendered in Russia should be qualified. The word «qualified» in this context obviously means the provision of such assistance on a professional basis and by those who deserve to be called real professionals. The first proof of this professional status is undoubtedly the legal diploma received at graduation from Law School. However, according to standard world practice, the constitutional function of qualified legal assistance provision cannot be carried out outside of the limits of established professional and, quite often, also moral and ethical standards. Besides, the above-stated professional standards should be maintained by the possibility to exercise professional control over their observance. The definition «legal assistance» fully coincides with term «legal services» as no clear-cut distinction between these two has yet been legislatively recorded.

Article 19 of the Constitution of the Russian Federation, while guaranteeing equal rights to all citizens, in fact, does simultaneously guarantee equality between citizens using legal services rendered by commercial enterprises and those receiving legal counseling (assistance, services) from lawyers (advocates). When turning to a lawyer for legal assistance (services), citizens receive this assistance from a qualified and certified chartered professional whose activity is regulated by a whole variety of conditions and standards. The same citizens, having sought legal services (assistance) from an entrepreneurial firm, receive no guarantees whatsoever, even on provision of such legal assistance to them by a person with a law diploma, and are «insured» only by an illusory possibility of claiming the ensued damages after having proved at court that the legal services (assistance) in question were rendered improperly. By the way, how can it be proved that someone without a legal diploma to his credit can render qualified legal services? Provision of legal services without prior assurance of the required skill level of those who provide them, violates the constitutional norms in regard to the legal (law-governed) state, equality of citizens and, most importantly, in regard to qualified legal assistance, which actually coincides in its content (except for criminal cases) with that of legal service, yet being wider in the sphere of its application.

On the one hand, Russia has an organized Bar as a matter of legislation which includes 88 regional chambers of lawyers (advocates) and the Federal Chamber of Lawyers of the Russian Federation with about 60,000 member and mandatory membership for defense attorneys. On the other

hand, the State excuses itself from regulation of legal services provided by an unknown number of jurists and sometimes non-jurists whose only restriction is the inability to have the status of defense attorneys in criminal cases. In comparison with common international standards, we see that persons who provide legal services to the Russian population:

are not required to have formal legal education from educational institutions authorized to award degrees in law;

are not tested for competence in order to earn the right to represent clients;

are not subject to disciplinary proceedings and sanctions for violating fair and clear rules of profession; and

may practice law without compliance with standards of the profession.

No civilized country in the world would allow legal services to be rendered by persons not answering to proper professional standards. The situation existing in Russia today had been caused by both long-standing and quite recent reasons. In any case, these reasons are already out-dated, and now it is time to bring the practice of providing legal services (assistance) INTO CONFORMITY WITH THE CONSTITUTIONAL REQUIREMENT of their proper qualification level. Preservation of the currently existing chaotic fashion of providing legal services would mean both preservation and creation of conditions for an even greater field for corruption inside our legal system. The Constitution guarantees qualified legal assistance to every citizen, but this does not mean that anyone is allowed to act as a provider of such assistance.

It is necessary to eliminate the disturbing situation that has developed in this country in the market of legal assistance (services). At the present time, such assistance (except criminal cases) is rendered to an undefined circle of citizens and organizations by two large groups of providers: lawyers (advocates) and entrepreneurs. The state control over these two groups features absolutely unjustified distinctions in approach. To be become a lawyer, every law graduate should answer to high professional and moral requirements and be able to pass a difficult qualification test. During his professional work, he is obliged: to observe ethical rules for the infringement of which he may be made accountable, up to his disqualification; to observe the rule of confidentiality; to avoid conflict of interests; to refuse any obviously illegal commissions; to render legal assistance from time to time to

citizens of the Russian Federation on a free-of-charge (*pro bono*) basis, the share of which in criminal cases may amount (in different regions of Russia) to 60-90 % of the total; and to insure his professional work.

Provision of legal services by entrepreneurs is not subject to any state control at all. No conditions exist in the Russian legislation for their provision of legal services to the market. Moreover, an entrepreneur rendering legal assistance may not even be a chartered lawyer, which greatly contributes to the growth of corruption in this area.

Qualified legal assistance (services), as a public function constitutionally guaranteed to any citizen who needs it (including on the free-of-charge basis), by its very nature cannot be considered as entrepreneurial activity aimed at the acquisition of gain. According to international standards, this public function should be carried out by representatives of an independent legal profession, while the quality assurance of such assistance should be exercised by a self-managed lawyers' association.

In his «Theses on the Legal Reform in Russia» Valery Zorkin writes: «Legal reform should be considered an integral part of the entire on-going reform process, for it is critical, on the one hand, for stimulation and legitimization of all-around development, and on the other, for preserving the required equilibrium both in the state and society. The legal reform is the tool required for carrying out of necessary reforms, to balance competing interests, for a dynamic and sustainable economy, and to build a civil society.

I would like to single out three primary goals, which are simultaneously the three primary directions of legal reform. In my opinion, they include:

1. Legal transformation of the Russian society;
2. Transformation and stabilization of the legal system;
3. Creation of a rigorous and well-balanced law enforcement system, guaranteeing equally distributed access to the function of public justice and exercise of legitimate rights and freedoms for all citizens.

I should emphasize that it is a «triune» task, which needs to be resolved simultaneously and holistically in all three directions. No one in the world can provide any ready-to-use and correct recommendations to resolve this extremely complicated problem. Several decades might pass before its final solution could be found. But I am absolutely convinced that if we ever fail to solve this problem then Russia's place in the 21st Century will not be one 'on the sunny side of the street'.»

During the discussion and adoption of the Russian Law «On Advocacy and Activity of Advocates,» some people were asking baffled questions or simply making sceptical remarks regarding the formulation that the Bar (Advocatura) as an institution of civil society. Such confusion was due to the fact that a definition for «institute of a civil society» was not elaborated in the legislation, and, as it seems to us, such concepts as «an institute of civil society,» as well as that of «civil society» itself, have no commonly-accepted legal meaning in Russia. Here, in my opinion, resides the basic doctrinal deficiency of our law in regard both to the concept of civil society and to the legal profession.

The constitutional and legal content of such concepts as «the Bar (Advocatura)» and «civil society» is actually very deep, in spite of the fact that these terms are never used in the body text of the Constitution of the Russian Federation. Moreover, as we believe, it is none other than the concept of civil society directly related to that of «constitutional citizenship,» signifying (as a mandatory attribute of the «citizen» concept) the proper respect and adherence to the existing Constitution of the Russian Federation.

Article 2 of the Constitution of the Russian Federation stipulates that human rights and freedoms are the highest priority for the State, while their protection is its prime duty. Since the most critical form of protection of human rights and freedoms is the protection of any citizen against unjustified imprisonment, and this, as specified in Article 48 of the Constitution of the Russian Federation, is carried out by means of provision of qualified legal assistance, it is the State that bears the duty of making such legal assistance available.

It is possible to speak about the independent status of lawyers (advocates) vis-a-vis the State only in the context of the protection of human rights. The legal profession was delegated a duty of the protection of human rights and freedoms by the State, by direct application of Article 1 (Rule-Of-Law State) and Article 48 (Provision Of Qualified Legal Assistance) of the Constitution of the Russian Federation.

The Bar (Advocatura) is vested with the duty to provide for protection of civil rights directly by the Constitution of the Russian Federation, which should be exercised through provision and organization of qualified legal assistance, and this was the reason why the legislature chose to call it «an institute of the civil society.»

It is not the State, but the authors of the Constitution of the Russian Federation — «the Multinational People of the Russian Federation» (the Constitution Preamble) — who have vested the Bar (Advocatura) with an inalienable right of executing its duty of the protection of the highest constitutional value — human rights and freedoms.

This is why in every criminal trial a lawyer (advocat) opposes a public prosecutor. The assurance of equal rights of the lawyer (advocat) and state representative corresponds to the equal rights of the Bar (Advocatura) and the State in the protection of human and civil rights. It is the Bar (Advocatura) that provides free (within the limits of the constitutional standard for qualified legal assistance) legal services to the poor and other socially unprotected groups of population in labor disputes and other non-criminal cases.

In addition, in Article 3 of the Russian Law «On Advocacy and Activity of Advocates,» the Bar (Advocatura) is referred to as an «institute of the civil society,» which emphasizes, on the one hand, the equality of the Bar and the State in the sense of Article 19 of the Constitution of the Russian Federation, and, on the other hand, the independence of the Bar from the State and the latter's duty to ensure such an independence as a critical component of its function to protect human and civil rights, stipulated by Article 2 of the Constitution of the Russian Federation.

If the public prosecution acts as an advocate of the State, the Bar (Advocatura) should act as a defense lawyer for civil society.

Numerous cases of compromised independence of lawyers (advocates), as well as related cases of non-provision to the accused of their rights for legal defense during trial, are vivid signs of neglect toward the substantive provision of the procedural law — the principle of contentiousness of the parties in court, ensuring the justness of a judicial decision.

Here, contentiousness and equality are meant to be those between a citizen and the State, with the obvious inclusion of the citizen's legal representative — his lawyer (advocat). The same constitutional and legal content should be introduced into the relations of civil society and the State (contentiousness and equality). The Bar is the only legislatively recognized institution of civil society which enjoys principles of both *equality-with-the state* and the *independence-from-the-state*.

The doctrine of Bar independence is reflected in the text of the Russian Law «On Advocacy and Activity of Advocates» which says that the

Bar (Advocatura) is a professional community of lawyers (advocates) and, as an institution of civil society, must not be included into the system of agencies of state power and local governments. Moreover, in order to provide accessibility for the population to legal assistance and to help those who render such assistance, such agencies of state power are to ensure independence of the Bar and to finance the activity of lawyers providing legal assistance to citizens of the Russian Federation on a free-of-charge basis in cases stipulated by existing legislation.

These statements correspond to world standards and to the social mission of the legal profession in a truly constitutional state.

Legal guarantees of independence to a lawyer, in particular, and to the Bar, in general, should allow for aggressive protection of human rights and fundamental freedoms, guaranteed by the European Convention on Protection of Human Rights and Fundamental Freedoms, by OSCE and UN documents, and by the European Charter of Social Rights, all requiring adherence of EC states to the proper procedure of judicature.

There exists a purposeful misinterpretation of the position of the European Human Rights Court, promoted by some representatives of the Russian law enforcement bodies, who point to an allegedly restrictive application by the European Court of the human rights doctrine in the area of crime control. When such misinterpretations are openly published in legal literature, the assumptions of their authors are adopted by employees of the Ministry of Justice and such employees are given wrong guidelines in regard to the parity of rights as allocated to the State and to the legal profession.

The Moscow City Chamber of Advocates, while exercising its public legal function as an institution of civil society, together with all representatives of the Bar in Russia, takes an essentially different stand both on the legal positions of the European Human Rights Court and on the norms of international human rights legislation, which are mandatory for the Russian Federation.

Such a conceptual contradiction between the Bar and some state law enforcement governmental bodies is unique to Russia today and, probably, has no analogues in practice of the states with well-developed civil society. The weakness of existing civil society and the duty imposed thereby on the Bar to protect this civil society are characteristic of Russia presently, while not urgent or vital for already developed civilized public systems.

The doctrine of the Bar as a defender of the existing civil society is a totally Russian doctrine, defined by the present-day situation in this country.

The role of additional guarantor of the Constitution of the Russian Federation in the area of separation of powers, as stipulated by Article 10 of the Constitution of the Russian Federation, is given to the Constitutional Court of the Russian Federation. Its Chairman Valery Zorkin expressed a very important thought regarding the mutual relationship of the State and civil society:

«It is important to emphasize the sense of justice that our authorities should have. As soon as they attempt to create the laws for their own convenience, any legal reform becomes a sheer fiction. After all, any elements of civil society are still very immature here. The absence of a counterbalanced system of political parties, augmented by the absence of mass legal awareness in our population, creates wide opportunities for our return to a non-legal state. We are now struggling for the supremacy of law. I do not believe that we might ever become a non-legal state, but we are now at the way-point where the future legal status of Russia is at stake.» («Rodnaya Gazeta», 29 April 2004).

The constitutional and legal meaning of Article 17 of the Law «On Advocacy and Activity of Advocates» is precisely the same as that of Article 3 of the same Law and may be interpreted only in relation to its proclaimed principles of independence, self-management, corporateness and legality in the activity of this institution of civil society. The constitutional and legal meaning of the definition of the Bar as an institution of civil society allows us to qualify any serious intrusion of the State into the area of lawyers' (advocates') independence and self-management as the undermining of the very basics of the constitutional system, specified in Articles 1, 2, 7, 13, 15, 17, 18, 19, and 48 of the Constitution of the Russian Federation.

Moscow City Chamber of Advocates with its 7,000 members, as well as the Federal Chamber of Lawyers of the Russian Federation with its almost 60,000 members, join with the International Bar Association as member organizations in recognition of the leading role of the IBA in the world legal community and IBA's role as an originator of the Rule of Law movement in 2005 through its adoption of the Resolution on the Rule of Law in Prague. It was Soviet tradition that the Bar (Advocatura) was represented abroad by state or show-window professional public organizations of jurists

which actually just created a glass wall between our independent advocates and the Western independent legal community. Some people in modern Russia probably will be happy to continue this Soviet tradition. But an independent Russian Bar will never allow the restoration of such an abnormal situation. We will take responsibility for development the Rule of Law movement in Russia as well as for proper development of judicial reform and proclamation of legal reform in the country.

Legal reform includes both judicial reform and also a whole complex of transformations in the area of system and content of legislation, legal education and training, preparation of corporate and trade union legal advisers, and also in the sphere of corporate legal awareness of legal professionals and legal awareness of the whole population. The judicial reform does, first of all, encompass the reform of courts, the procuracy, advocacy, criminal investigation, and a system of training and re-trainings of judges, investigators, public prosecutors and lawyers.

The concept of the 1991 judicial reform from its first lines combined the concepts both of «legal» and «judicial» reforms. But in 2007, I think that it would have been better to preserve a more narrow definition of «judicial reform» so that it would not be re-included in the concept of «legal reform.» Such overlapping probably prevented further development of a broader legal reform that never was even proclaimed officially.

Let us now consider the primary goals of judicial reform and the status of its implementation. The resolution of the Russian Supreme Soviet (predecessor to today's Parliament) of October 1991, entitled «On the Concept of Judicial Reform in the Russian Federation», and the Concept, approved by it, still are effective legal documents, which formulate a number of primary tasks and major directions of judiciary reform.

The Concept of 1991 identified the following tasks:

1. protection and non-violation of the fundamental human rights and freedoms, as well as of the constitutional civil rights in legal procedure;

2. fixing in the norms of criminal and civil procedure, as well as in corresponding legislative acts, of democratic principles for organization and everyday activity of law enforcement bodies, as well as other conceptual ideas answering to the latest recommendations of legal science;

3. assurance of reliability and better public accessibility of information on the activity of law enforcement bodies and other judicial and legal statistical data;

4. creation of a federal judiciary system;

5. recognition of the right of each citizen to entrust his trial on a criminal case to jury, except for the cases explicitly prohibited by the law;

6. expansion of possibilities for appealing in court of any wrongful acts of officials, establishment of judicial control over the legitimacy of application of preventive measures and other measures of procedural enforcement;

7. organization of legal proceedings on the principles of contentiousness and parity of the parties, as well as on the presumption of innocence of the defendant; and

8. differentiation of the forms of judicature.

For the past of 15 years, considerable progress has been made in some of these directions. However, the situation is far from being perfect, with such important tasks remaining yet to be dones:

establishment, in the structure of state power, of judicial power as a stand-alone and influential force, totally independent in its activities from both the legislative and executive powers; and

achieving a level of finance and logistics support to courts, judicial authorities, procuracies, police, investigative forces, as well as provision of their staff with sufficient salaries, proper housing and social welfare, corresponding to the level of responsibility assigned to these bodies and to their staff by the State.

With respect to the extremely important direction of judicial reform, defined by the Concept as «further perfection of the system of measures guaranteeing the independence of judges and their subordination only to the law, with the adoption of the principle of irrevocability,» the situation has worsened rather than improved over the past years.

The constitutionally proclaimed separation of powers in regard to the assurance of judicial independence has not yet occurred. Judicial power still remains seriously dependent, firstly, from the executive power, which still provides its financial security in direct violation of Article 124 of the Constitution of the Russian Federation.

The decision to move the seat of the Russian Constitutional Court from Moscow to St. Petersburg against the will of its justices and that of the whole legal community vividly showed not only the absence of respect towards judicial power destinies and the desire to isolate the Constitutional Court from the democratically-minded Moscow legal community, but, first of all, it demonstrated the possibilities for selective and politically-opinion-

ated use (as in this case — for moving) of budget resources exercised by the sole discretion of the executive power. The cost of such move is estimated at 7 billion Rubles, which otherwise might have provided better housing for many thousands of officially needy judges, or to repair all (approximately 300) court buildings currently in states of disrepair.

The absolutely preposterous idea of *(re)moving* the Russian Constitutional Court from Moscow and a highly-selective attitude of the executive power to financing of the judiciary system emphasizes the existing dependency of judicial power and actual non-fulfillment of Article 124 of the Constitution of the Russian Federation, stipulating «state funding of courts, which should provide the possibility for a full and independent effectuation of justice.» It is not a coincidence that, at the same time, authorities tried to avoid the Constitutional Court and the Russian Federation from signing, along with 46 other European countries, Protocol # 14, which gave more authority to the European Court on Human Rights.

Worthy financial and material support of judicial activities will allow not only achievement of a higher efficiency and speed of judicature, but also obtaining the level of respect from both the State and society which is required for successful work of the judicial power.

As for the personnel policy of the executive power, one of the signs of the contempt it demonstrates towards the court lies in the regular delaying of judges' reassignments. Serving judges often do not get included in the lists for renewal of their powers. And the Presidential Administration, just as often, does not even bother providing any explanations or reasons for such decisions. So, in this respect, the process of appointment and especially renewal of judges' powers is absolutely non-transparent, which creates a possibility for the executive power to use undue influence on individual judges, in particular, and on the judicial power, in general. From the Soviet times our society had inherited a retaliatory mentality of judges, which pre-determines a small number of acquitting judgments and unreasonably long terms of imprisonment.

The issue of frequent complaints against corruption in Russian courts lodged by foreigners deserves our special attention. We must note that the English term «corruption» is considerably broader than the usual Russian term «vzyatochnichestvo,» *i.e.* the reception of bribes by judges for ensuring the desired outcome of lawsuits. Corruption means not only graft practices as such, but also the «gratuitous» judgments in favor of the exec-

utive power, for instance, based on the judge's career expectations or for other reasons.

We could recall just few years ago well-known attempts of holding meetings at the level of the Government of the Russian Federation for the purpose of considering current progress and even the results of a specific case in the court where the State interests were involved even with the invitation of representatives of the court dealing with this case!

It is necessary to openly and firmly declare that the judicial reform in Russia is not completed yet, to get rid of all illusions about its allegedly successful completion, and to set a task of actual deployment of the judicial reform in the 2007-2012 timeframe. The Rule of Law has not yet become a commonly-accepted value for many officials of the State, who frequently consider state interests and those of state property as prevailing over strictly legal considerations.

The judicial reform has not yet affected many internal systemic problems. To be specific, very little has been done for qualitative renewal of judicial manpower, for radical tightening of selection criteria for candidates, for gauging their economic knowledge and conformity to ethical requirements. Owing to the above and because of the still remaining rather «limited dispositive legal capacity» of courts in complicated social disputes, the public status of judge remains low.

Guarantees of court independence exist almost only on paper. Insufficiency of such guarantees predetermines the pliability of a court to pressure from the «siloviki» (law enforcement and security governmental bodies) and the public prosecution, which is indicated by a still negligibly low occurrence of «not guilty» verdicts. Within the framework of judicial reform, it is necessary to resolve a whole number of organizational, material and legislative problems connected with professional activities of judges.

Most important is the personnel problem. Realization of the judicial reform is impossible without proper staffing — each court should be provided with enough judges and other staffers for efficient effectuation of justice. It is necessary to develop and approve normative standards of workloads for judges and staffers in order to come up with the courts' level of strength.

Sufficient financing of courts is a key issue for the judicial power's independence from any extraneous influences, and also must serve as a basic guarantee of successful realization of judicial reform. Despite the existing problems with budgetary financing, courts must be relieved of their

need to engage in annual «begging» from the bodies of executive and legislature power. Regardless of all difficulties with securing stable funding for judicial reform, and taking into account possibly lower oil prices in the future and other economic risks, it is necessary and possible to establish a firm percentage of budgetary spending for judicial reform.

It is necessary to emphasize that the judicial reform expenditures do not quite coincide with spending on courts and present a broader budgetary category, including also the costs for re-training of public prosecutors, criminal investigators and lawyers. Hereby, we mean not the traditional professional re-training, the costs of which should be included in the usual budget of a law-enforcement body, but the special courses on economic and ethical matters for joint training of judges, lawyers and public prosecutors.

Such programs of regionally-based joint re-training, with some methodological coordination from the center, would promote not only consistent interpretation of economic and ethical issues between different professional groups, but also the formation of a professional legal community, characteristic of developed democracies.

Besides, separate re-training of different groups of legal professionals is economically, methodologically and organizationally inconvenient and financially inexpedient. It is necessary to introduce an obligatory share of budgetary funds to spend on the judiciary, equal to at least 2 % from the entire budget, and to enter this norm into the Budgetary Code of the Russian Federation, while preserving the existing legislative principle of non-abatement of the sums spent on public courts during each new budget year.

The current budget expenditures on courts are obviously quite insufficient, and, if we add to them those on economic and ethical re-training, 2 % is the smallest possible figure. The judicial reform should be carried out not only by the State, but also by the professional legal community, and also by other sub-systems of civil society. It is necessary to encourage the corporative awareness of the legal community, especially that of its judicial component, making its representatives digest and embrace the highest (internationally acknowledged) professional standards.

Creation of an on-going interactive process between the corporations of judges and lawyers (advocates), and joint regular discussions of judicial reform issues with eminent legal scholars could promote its further successful advancement.

Public prosecution must finally become a democratic institution. Today, this structure, especially the General Prosecutor's Office of the Russian Federation, is the least reformed (since the Soviet times) law-enforcement body. Constant involvement of the federal security and police agencies into investigative processes, utilized by the General Prosecutor's Office for various corporate criminal cases, seriously weakens (if not hamstrings completely) the control to be exercised by this structure over the due process of law in the above agencies. Moreover, at times the activity of the General Prosecutor's Office does directly result from the operative activities of federal security and police agencies, and vice versa, their activities become a part of the investigative process, which might be very dangerous to the due process of law in the country.

The General Prosecutor's Office of the Russian Federation, more persistently than other law-enforcement bodies, retains its conservative retaliatory attitudes.

The Russian legal profession is in a state of serious crisis and its successful reform is one of the major preconditions for success of judicial reform, in general. The greatly delayed adoption of the Law «On Advocacy and Activity of Advocates» and fuzziness of some of its definitions had led to procrastination in formation of a modern structure of the legal profession, having filled it with jurists, lacking any serious corporate legal and ethical training, but providing legal services to citizens.

As with the judiciary, investigative and prosecutive bodies, the Bar is also in great need of serious additional training in both economic and ethical areas.

It is with much regret that we have to note that such facts as the seizure of defense attorney's files at temporary holding facilities under the pretext of control over an inmate's correspondence arouse our well-founded suspicions about the existence of audio surveillance utilized by the remand prison authorities to monitor the meetings of lawyers (advocates) with their clients in all of «high-publicity» criminal cases. It is technically feasible to enhance quite lawful general video surveillance to such an extent that every word written by the lawyer and his client to each other (for fear the room is wired) might become known to a third party.

Since the remand prison authorities, due to their close contacts with federal security and police agencies, can transfer the content of conversations between defense lawyers and their clients to any interested parties in

the prosecutorial area, the lawful right for legal defense belonging to those accused in the «hottest» (for the executive power) criminal cases becomes reduced to zero. Wide public actions are required to check for the presence of hidden video- and audio-surveillance in the rooms where lawyers meet with their clients. It is equally necessary to check for unsanctioned phone tapping of lawyers' landline and mobile phones. The total «electronic» control over all kinds of communications of the lawyers engaged in «high-publicity» criminal cases can erase completely all possible achievements of the judiciary reform. We may see a systematic attack on advocates. For instance, when the Moscow City Chamber of Advocates asked its members to report the facts of breaching law against lawyers, we got more then 50% of all number of reports from lawyers involved in legal assistance in cases related with Yukos. Lawyer Gustap reported to us that investigators of the General Procurators Office tried without any legal reason to question him and after recognizing him as the witness in the case and on this basis banned him from the defense of his client Goldman. Defense attorney Heifez, involved in the same criminal case, reported that due to the absence of any evidence against his client Kurtzin, investigators produced (without any evidence) «based on secret information» a document to the effect that Kurtzin is trying to conduct illegal activity from prison cell using his lawyers. Moscow-based Centre of Assistance to International Protection sent to us reports about many facts of pressing or denying rights of several lawyers involved in cases related to Yukos.

We see cases when a lawyer's office is searched by authorities only because he has a certain client and the authorities would like to find in the lawyer's files evidence against this client. As a result of such search all of the lawyer's files related to the case are taken out and read by investigators. I wrote to the Chair of the Moscow City Court in February 2007 that such practice, usually always approved by the courts, is breaching the basic principle of confidentiality of relations between lawyer and client.

We need enforcement of real judicial reform and proclamation of full scale legal reform right now and forever. This time it must be a turning point of transition of the Russian legal system from dark times in the legal mentality of authorities to a modern Rule of Law approach. Simply speaking, authorities must comply with the Russian Constitution. It is interesting that from 2006 the Russian Government has skipped Constitution Day on December 12th as a national holiday and instead established a new hol-

iday as the Day of National Unity on November 4th (when Russian troops freed Moscow from the Polish army four centuries ago!).

The Russian state must understand that real national unity should be based on the Constitution and on the Rule of Law. A Concept of judicial reform should become the continuation of the 1991 Concept, preserving not only the continuity in its principles, but also the corresponding legal status of such a document. Therefore, this new Concept must be adopted by no less than the Parliament of the Russian Federation. For the control over its realization, it would be very expedient to create in the State Duma a special parliamentary committee on judicial reform, as it was in the parliament of Kazakhstan. Within the framework of such a committee, in order to monitor the current progress with the issue of real independence of the judicial power, it would be desirable to create a subcommittee on the separation of powers, similar to the one that existed in the U.S. Senate in 1960s and 70s.

**Anne Ramberg**
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# THE ROLE OF AN INDEPENDENT LEGAL PROFESSION IN ESTABLISHING AND UPHOLDING THE RULE OF LAW — A SWEDISH PERSPECTIVE

The rule of law requires many things. It requires adequate legislation duly adopted. There is a requirement as to form. But there is also a qualitative threshold. The law must properly incorporate fundamental societal values including the demands of human rights and international humanitarian law. But not even that is enough. The rule of law also requires a proper administration of justice. This in turn mandates a reliable and qualitative court system with well educated and honest judges, prosecutors and advocates.

The legal profession has a special responsibility in the struggle to establish and preserve the rule of law. To achieve that an independent judiciary and an independent Bar are indispensable. They are fundamental cornerstones in the building of a democratic society built upon the rule of law. Without independence for the lawyers the judiciary will not have cases properly to adjudicate. Without an independent Bench the advocates becomes meaningless.

One important task of the independent lawyer is to serve as the watch dog of the rule of law. Our basic raison d'être is to represent individual clients. But in addition the Bar members need to monitor and inform society of threats to the rule of law wherever it appears. This happens not only in primitive non- democratic societies. It also happens in well established democracies. This has become all too obvious in the aftermath of 9/11. When the threats to society are perceived as being very serious, the willingness to uphold the rule of law seems to become subdued. The watch dog function of the Bar then becomes all the more important.

A democratic society based on the rule of law must obviously fight crime. But in so doing it must ensure that human rights are duly protected. The difficulty lies in balancing the tension between those objectives.

The fact that a particular society qualifies as a democracy does not necessarily mean that it also respects human rights. In recent years we have often seen how new national and international legislation constitute serious derogation from fundamental human rights principles. Sad examples of inappropriate tilting of the delicate balance arise from the ongoing war on terrorism.

Also my country, Sweden, has brought its contribution to the setting of this troubling scene. An example is the, in my opinion, unconstitutional freezing of assets of citizens of Somali origin on very slim suspicion of terrorist activity. Sweden has also disgraced itself by handing over in Sweden to US Authorities two Egyptian asylum seekers. Politically active refugees have been deported to the very regime which was alleged to have persecuted them.

The profession through the Bars and Law societies as well as the individual lawyers can contribute in many ways. The members of the profession at large have many different functions. That notwithstanding we have common core duties to preserve, defend and develop the rule of law as a long term commitment to the democratic society.

## Democracy and the rule of law

Democracy is obviously not a guarantee that society upholds the rule of law. There are many examples in the past as well as present, where there is democracy, but not adherence to the rule of law.

My conclusions are twofold.

It is not enough with democracy. As history shows us democracy can be used by the majority to overrule the rule of law for different reasons. However, the whole idea with the rule of law is that its principles must never be abolished — not even for political expediency. And not even if the intention is good. This said it has to be admitted that in certain very limited circumstances a society may derogate from certain human rights principles if the reasons are extraordinary. This is reflected e.g. in Article 15 of the European Convention on Human Rights. The apparent risk however is that rules of exception are misused. This in my view is what we often see today.

The rule of law is not limited to the questions relating to fair trial and due process in general. It also requires a substantive law which reasonably satisfies basic qualitative demands.

The rule of law could be seen as the technique of social engineering required to protect human rights. It relates to the protection of the individual citizen and organisation from the demands of the political power. The exercise of public power must be subject to the rule of law. But the laws must have a certain content and form and must be interpreted and applied according to certain generally accepted principles. Justice and fairness must exist side by side.

## Independent bars and self regulation

The rule of law cannot exist without independent Bars. Only with independent Bars can the lawyers themselves maintain their independence. Only then can they maintain the core values with integrity, wisdom and knowledge so as to fulfil their basic function: The loyal assistance to the client in dire need of help.

The role of the defence lawyer is especially difficult. An active defence is and should normally be interfering with the activities of the police and the prosecutor. The task of the defence-lawyer is to represent the client and safeguard a fair trial and due process. And as we lawyers often have to explain to our non-lawyer friends: The right to fair trial and due process also extends to the guilty. It includes highlighting irregularities and abuse of power. The right to be represented by a defence lawyer when the citizen is suspected is fundamental and is protected in several conventions; the International Covenant on Civil Rights, 1966 and the European Convention on Human Rights, 1949.

The duties of the lawyer are reflected in the privileges given by law to the client. The client — lawyer privileges exists as a protection for the clients and in the public interest. Those privileges result from the rule of law.

It was interesting to note former Prime Minister Blair's disappointment over the unwillingness of the legal system to deliver what the politically defined «public interest» according to Blair, demands. The «public interest» is often defined by the parliament of the street whose interests typically demands the imposition of the death penalty and more harsh punishment. In my opinion self regulation is essential for the Bars to stay independent. In Russia the treatment of Robert Amsterdam and the attempt to disbar Karina Moskalenko are good examples of what is at stake. The independence

of the lawyers guaranteed by the constitution and respected by the judiciary, the executive power and the legislator is fundamental.

In Sweden we do enjoy a very independent Bar and independent lawyers. A Swedish lawyer may not be employed by anyone but another lawyer. The Bar itself admits new members and disbars those who commit serious breaches of our code of conduct. The Swedish Bar has a strong position in society. It is interesting to note that when a parliamentary commission is appointed to consider a reformed Swedish constitution an issue before the commission is whether the independence of the Bar should be explicitly embodied in the new constitution. It is by no means certain that we will succeed, but we will certainly pursue the idea — in the public interest.

## Upholding the core values and the quality

The Bars are to establish an organisational structure that enables monitoring and maintaining of high ethical and professional standards. This means that regulations regarding admission, code of conduct, training and supervision have to be implemented. Disciplinary functions are necessary if the lawyers do not comply with the regulations. Independent Bars can only exist with strong and clearly defined core values. When these core values are infringed upon by the members effective sanctions have to be imposed.

The profession is today facing several threats from rule makers both on a national and an international level. But some of our difficulties are of our own making. The commercialisation of the profession is one. Globalisation in the legal market involves market possibilities for the profession, especially for the large law firms. This is good. But this process also results in pressure to the core values and the identity of the profession. New commercial structures apparently demand large law firms with high specialisation. This results in increased competition both nationally and internationally. Increasingly the lawyer becomes a business adviser and a consultant. The downside is that this process may undermine the core values of the profession. This is particularly apparent as regards the rules on prohibiting conflict of interest. In the ambition of harmonising rules the risk is that the most permissive system becomes the norm. In my view this process, if permitted to go too far, endangers the very core of our profession,

that of undivided loyalty to the client and as a consequence the independence and self regulation of the profession.

The balance to make it possible for the large commercial law-firms to operate in an international market, on the one hand, and the preservation of the core values, on the other, is, I believe, is an important task in growing economies for all Bars and Law societies today. To deal with these issues it is my conviction that the Bars need to get the large firms involved in the joint effort to promote the interests of the profession at large. A united Bar is important and necessary in order to gain strength.

## Legislation

The Bars should Support good legislation both at a Constitutional and at a Substantive level. As lawyers we have a special duty in the legislative process. That duty obliges us to ensure that human rights and the rule of law are always given its proper place in the mindset of the legislators.

It is essential that new coercive measures meet the proportionality test. That means that they should be necessary, they should be efficient and they must be proportional in the strict sense. The proportionality test is only often dispensed of and where applied the application is often biased in favour of repressive legislation.

Due to real or perceived terrorist threats a number of new laws have been introduced to permit secret coercive measures, The Data Retention Directive in Europe and new tools for the police have gained acceptance not only by the legislator, but also by a frightened population. All this forms the beginning of a new type of society — a society of supervision and repression. New legislative proposals including secret wire tapping without suspicion of crime, as well as bugging also of media and newspapers, are examples of a dangerous step by step development towards a «silent» society.

The Swedish Bar is actively participating in the legislative process in different ways. Last year the Bar contributed to the law reform process by submitting opinions to the government on almost one hundred legislative proposals. We have also participated in a number of hearings and other meetings. It is gratifying that these opinions carry great weight in the legislative process, among the politicians and in the media. Our efforts have lead to substantive changes in proposed laws.

The Bar is also represented in Governmental and parliamentary committees charged with the task to propose new legislation. As the Secretary General I was appointed a member of The Working Group of Experts on Different Models of Judicial Review; a subcommittee to the parliamentary committee working on a new constitution.

Together with some other advisory bodies including the Council on Legislation, the Bar has strongly criticised the recent large number of legislative proposals from the Government concerning extended use of coercive measures. Such proposals are usually said to be justified by society's need effectively to fight crime, especially terrorism and other severe crime. A troubling tendency is that those forms of surveillance which are technically possible also become both permissible and politically desirable. The technological imperative however means that the balance between individual freedom and human rights on the one hand, and the state's legitimate use of coercive measures, on the other, is difficult to strike in times of terrorism and severe criminality. In my view these interests are often in imbalance. Repeated violations on citizens' integrity are permitted to the detriment of due process and to the preservation of the rule of law in general. I submit that the time has come to tilt the balance in the opposite direction.

There is an obvious risk that political opposition groups, anti-globalization movements, animal rights activists, civil rights activists and other dissenters may become technically included in the terrorist definition. The political decision process behind the inclusion of citizens in terrorist lists merits special attention. Surely, the South African ANC would have been classified as a terrorist organisation under the EU Frame Decision on Terrorism. It is telling that that explicit exception from the definition was made for the Resistance Movement in the Second World War. It is highly uncertain how more modern but equally legitimate groups would have fared. The risk that many would be classified as terrorists is only too apparent.

It is evident that if States introduce coercive actions against groups of citizens instead of individuals based on what is perceived to be hazardous behaviour such measures can also be used against political opponents, religious groups or any other group of boisterous citizens.

To raise its voice when the principles of rule of law are being infringed upon the Bar needs to be active in the media and in the public discussion on legal politics. The Swedish Bar has been active also in that arena. The results are quite encouraging. I believe it is fair to say that, the Bar to-

gether with others opposing this development, has managed to contribute to the early demise of some of the more unacceptable proposals concerning bugging and measures said to prevent terrorism and other severe crimes. These proposed measures have included secret wire tapping, secret camera surveillance and mail control, *without the prerequisite of a suspicion of crime*. The laws proposed were said to be temporary in nature. However under a special suspension rule contained in the Swedish Constitution a qualified minority of the members can require that, in certain circumstances, the voting in parliament on new legislative proposal can be postponed for a twelve month period. I was happy to note that these law proposals were so postponed under that rule. The revised proposal subsequently introduced by the Government was improved in that it contains far better control systems and transparency than was originally proposed.

This recent year a proposed new legislation permitting the government, the military and the secret police to eaves drop on all communications passing national boarder in order to prevent external threats also was postponed after a hard debate initiated by the Swedish Bar.

It is my belief that lawyers should refrain from advising governments in legislative matters — if not in accordance with the rule of law. Lately too many lawyers have left their integrity and served their masters with unlawful advice in the name of the war on terror.

## Access to justice — Pro Bono- CSR

A fundamental task for the Bars in establishing and upholding the rule of law is to improve access to justice, safeguard legal aid and stimulate lawyers to provide Pro Bono work. The Bars can improve and support pro bono activities. Law firms and individual lawyers can contribute by getting involved in pro bono work and by getting involved in human rights and humanitarian issues. The Bars should train lawyers in corporate social responsibility (CSR) and support the implementation of CSR/principles. Lawyers should be encouraged to abstain from representing clients who do not respect rule of law principles or do not comply with standard CSR principles. Lawyers should promote commercial practices that respect principal human rights.

## International activities

The International Bar Association, IBA and the American bar Association, ABA have both taken strong actions in order to promote, establish and uphold the rule of law. They are both excellent role models for the individual Bars how to support the rule of law through its member organisations.

International Legal Assistance Consortium, ILAC is another organisation that harbours many Bar associations and Law societies. The goal of ILAC is to allocate recourses in post-conflict countries in order to establish the rule of law including protection of fundamental democratic institutions such as independent judiciary and independent Bars.

Setting up and assisting Bar Associations are fundamental. Capacity building is of course of vital importance when establishing and preserving a democracy built upon the rule of law. This can be done by supporting the upholding of core values such as independence, professional secrecy/confidentiality, prohibiting conflict of interests etc in order to establish and maintain high professional and ethical standards. Assistance with discipline and entry requirements as well as diversity challenges are other examples where the Bars and their members may contribute to the establishment and upholding of the rule of law.

The Swedish Bar has i.e. in collaboration with IBA and ILAC participated in a mission in Palestine in order to promote human rights and humanitarian law by capacity building and education of the members of the Palestinian Bar. We also do trial-monitoring in different countries.

## Strategy

In order to preserve the independence of the Bars it is desirable for the Bars and their members to share the same fundamental goals. To achieve that we need to create a professional identity built upon the core values that can be understood and accepted by all lawyers.

Today a tension exists among the sole practitioners, the small law firms and the large law firms. There is a lack of understanding between lawyers representing individuals versus business lawyers. The traditional lawyer, acting for individuals in court and representing individuals against the state, has given the profession its legitimacy. In a growing and globalised

economy business lawyers are necessary in advising clients on contractual matters, competition issues and litigations. In doing this they also uphold the rule of law.

The Bars ought to create a strategy on how to establish and uphold the rule of law. The concept of the rule of law is not evident for everybody. Many people take the rule of law for granted. The important task is to explain to the public what the rule of law is about and what are the consequences of its absence. The lawyers should participate in the public debate more frequently. They may do so as private individuals. But they may also involve themselves in legal politics. In many jurisdiction lawyers are rarely represented in parliament. In my view the voice of the profession may be fortified by more active involvement in the political processes.

To get the grassroots involved is necessary to implement and uphold the rule of law in any country. Lack of involvement by the citizens may result in disrespect for fundamental principles and disregard the rule of law. This is a difficult task in the modern western world. It is perhaps easier to explain the rule of law requirements in jurisdictions with new democracies. In those jurisdictions people are often well aware of the price of not respecting the rule of law. I assume that this is the case in your country. From my own, very small jurisdiction, I must confess to the paradox that only the former communist party has had a political program clearly addressing fundamental principles, human rights and rule of law issues. I wish that this insight will eventually be spread all over the political spectrum.

**Geoffrey Vos QC**
*Chairman of the Bar Council of England and Wales*

# INDEPENDENCE OF THE JUDICIARY AND OF THE LEGAL PROFESSION

## Introduction

1. Commentators agree that independence of the judiciary and of the legal profession is central to the Rule of Law. I have no doubt they are right. It is worth taking a moment to explore why this might be the case.

2. The legal profession offers the most important bastion for the defence of the individual against the exercise of excessive power by the State. An independent judiciary is the only possible guarantee that the rights of the individual against the State can be fairly resolved. These are fundamentals.

3. But states find many ways of chipping away at the independence of the judiciary and the legal profession, and it is worth identifying those aspects of that independence that need the closest attention. The judiciary and the profession need to be treated separately.

4.I will be speaking at every stage of the 'executive' rather than the 'Government'. Though simplistic, it is worth re-stating that the 'executive' is the branch of government that needs to be kept away from influencing the judiciary. The judiciary must, of course, be ultimately and appropriately accountable (like the executive) to a democratically elected parliament.

## Indicia of independence of the Judiciary

5. For the judiciary, independence encompasses at least 6 aspects as follows. Deficiencies in any of these areas can severely impede the Rule of Law.

6. **Appointment:** An independent system of appointment free from influence by the executive. In England, we now have an independent Judi-

cial Appointments Commission, replacing the original system of appointment by the Lord Chancellor personally. Appointment by the Lord Chancellor method hardly set a good example to developing countries — he was a central member of the executive. I look forward to hearing about judicial appointments in Russia.

7. **Disciplinary procedures:** There must be a disciplinary procedure, which cannot be influenced by the executive. Disciplinary processes can, otherwise, used as a subtle (or sometimes not too subtle) means of control and oppression of the judiciary.

8. **Payment**: The judiciary's pay and conditions must be adequate to ensure that the judiciary will not be prone to corruption. The way in which the executive treats the judiciary is another possible instrument of inappropriate pressure. It may be that we will hear more today about the movement of the Constitutional Court here in Russia from Moscow to St. Petersburg.

9. **The executive's influence on decision-making:** There must be processes in place to ensure that the executive cannot influence judicial decision-making. An example of discrete ways of doing this will make the far-reaching nature of this point clear. I acted some years ago for the Office of Fair Trading (the OFT — a Government entity) against Rupert Murdoch (Sky Television), and the BBC in respect of the Government's challenge to Murdoch's exclusive Premier League football television rights on competition grounds. On the first day of a 60-day hearing, the Prime Minister and his Sports Minister said to the TV that they could not understand why the OFT should have wanted to bring such a claim. This was not an appropriate statement to have made. The OFT's claim failed, and action was delayed for some 5 years until DG Competition was able finally to take action in relation to the obviously anti-competitive position that prevailed. Whatever the reality, the impression was left that the executive had sought to influence the judiciary. The anecdote demonstrates that the executive's influence and attempted influence on the judiciary occurs in even well-regulated of states.

10. **Judicial corruption**: This is the most difficult area. The executive's influence on the judiciary is, of course, a species of corruption. No less concerning is financial corruption. The judiciary in India is well-regulated and hard-working, but it suffers from a measure of well-documented financial corruption. This operates to sap international confidence in its dispute resolution procedures, and in its independence. It is insidious and hard to

prove. One of the greatest strengths of many of the European democracies is the resistance of their judiciaries to financial corruption.

11. **Removal**: If a judge can be removed by the executive, the Rule of Law faces an immediate obstacle. The senior judiciary in the UK can only be removed by a motion of both Houses of Parliament. This is an important safeguard. The suspension of the Chief Justice in Pakistan demonstrates the effect that executive interference with the judiciary can have on the Rule of Law.

## Indicia of independence of the Legal Profession

12. For the legal profession, independence has different features, though it is equally important for the existence of the Rule of Law. I will limit myself to 6 of these features.

13. **Qualification**: The legal profession must be properly qualified, otherwise the citizen cannot rely on the advice he/she receives. This is not a real problem in many parts of Europe, though we spend much time in the UK arguing about the level of training that is truly necessary for a lawyer to be adequately qualified. Equally, we argue about the appropriate level of continuing professional development requirements — we will all be having some more of that today! More seriously, however, we have no legislative prohibition in England on non-lawyers giving legal advice (as opposed to appearing in the courts). We have never really needed such legislation, as there has been no significant attempt by non-lawyers to assume the role of legal advisers. I understand, however, that the issue in Russia is far more problematic. If entrepreneurs provide legal advice (or there are inadequate numbers of qualified lawyers), the very protection that an independent legal profession offers is undermined.

14. **Regulation more generally**: We are having a battle in England at the moment about who precisely should regulate the legal profession, after many years of fairly pure self-regulation. Our Government is legislating to create a new complex structure, with which I shall not bore you this afternoon. But, the key question is whether the executive should appoint the ultimate regulator. If it does, it can influence the way in which the profession operates, the rules and ethics of the profession, the training requirements and admission and removal. Once the executive is able to control

the legal profession in these ways, independence is compromised, and the Rule of Law is under threat. If the defence of the citizen against the State is controlled by the State, there is no longer a properly independent defence and the legal process can easily become a charade. Likewise, if the executive has an influence over the discipline of lawyers, it can use that power to remove those lawyers who fight too hard on behalf of the citizen. It is the thin end of the wedge. I believe you have recently seen specific examples of this tendency in this country.

15. **The preparedness of the profession to take on the executive**: A fearless legal profession is vital to the existence of the Rule of Law. It is an aspect of my last point. In England, the Bar has, for many years, always had a rule, known as the 'cab rank rule', which means that every barrister must accept any case he is offered, however much he may disagree with the case or cause espoused by the intended client. This cab rank rule ensures that a high quality advocate and a high quality defence are available to every citizen, however unpopular he may be. As a digression, I might mention that this was not always the case: in 1916, Sir Roger Casement (an Irishman) was prosecuted in England on charges of treason. So unpopular was his cause that he could get no English QC to represent him, and was defended (unsuccessfully) by an Irish Sergeant. In short, the executive needs to allow the legal profession to defend anyone that it chooses to prosecute — this is central to the Rule of Law. The recent examples of the fearlessness of the Zimbabwean legal profession are worthy of mention. Senior members of the Law Society of Zimbabwe continue to defend opposition politicians, despite the lawyers themselves being arrested and beaten. This brings me to the next indicia of the independence of the legal profession.

16. **An adequate legal aid system**: It is no use allowing lawyers to represent those prosecuted by the State if there is no structure to allow the lawyers' fees to be paid for the impecunious. Legal aid systems vary in sophistication across the world, but the essential requirement is that defendants in all but the most trivial matters do not go unrepresented. (We could argue about what should be regarded as 'trivial' for these purposes). But the availability of a defence is pyrrhic if in practice lawyers will not act pro bono or are not paid by the State to defend those who cannot afford to pay.

17. **Robust ethical principles**: The application and enforcement of ethical principles by a legal profession are a clear indication of its independence. If the executive takes control of ethics, there is a risk that it will also

control which lawyers are allowed to practice with the disastrous consequences to which I have already alluded. I do not believe that we can under-estimate the value of a proper system of ethical principles applicable, and applied, to lawyers by their professional body.

## Conclusions

18. A narrow view of the Rule of Law (such as that espoused by the American Bar Association) would place huge emphasis on the independence of the judiciary and of the legal profession. I do not disagree with that emphasis, but there is an irony there. To many in Europe, American lawyers are seen as independent, but in many cases, as independent business people rather than as independent real lawyers. This state of affairs is seen as threatening the status of the legal profession and its ability to offer the kind of independent services that I hope we can, by now, agree are so important to the Rule of Law.

19. In Russia, there may be a related problem. Lawyers who are not truly lawyers pose a risk to the Rule of Law for some of the reasons I have already touched upon. First, if lawyers are not really giving legal advice, but are motivated by business imperatives, the individual will not receive proper advice and will be vulnerable to the abuse of power by the State. Secondly, if non-lawyers are truly able to give legal advice, the situation is even more serious, because again the citizen will be denied his/ her right to resist prosecution or persecution by the State.

20. I hope that, in this short talk, I have been able to identify some of the features that you need to look out for, when one is considering the independence of the judiciary and (separately) the independence of the legal profession. By identifying those features, we are all able to take steps to make sure that we preserve our independence, and thereby, move towards closer adherence to the Rule of Law.

**Judge William Birtles**

# THE INDEPENDENCE OF THE JUDICIARY

## The rule of law and the role of the judge

The role of the Judge in a democratic society is to bring about the realisation of the rule of law. This task has implications in various areas. Thus, for example, this approach is a justification for the existence of a constitution as a supralegislative norm. Moreover, the enforcement of the rule of law requires judicial review of the constitutionality of statutes. The rule of law leads to the conclusion that the final interpreter of the law should be the Court, and not the legislature or the executive. Thus, the principle of the rule of law affects the formulation of proper interpretive doctrine, based on the rich aspects of the rule of law. This doctrine is purposive interpretation, which takes into consideration the various aspects of the rule of law.

## The Independence of the Judiciary

### (a) Democracy and judicial independence

Judicial independence is a central component of any democracy and is crucial to the separation of powers, the rule of law, and human rights. It is also, however, a component that stands on its own. It is part of any democratic constitution, whether mentioned expressly or merely implied. It is an inseparable part of any constitutional scheme.

Constitutions of non-democratic countries also include provisions concerning human rights. These provisions, however, are a dead letter, because there is no independent judiciary to breathe life into them. Judicial independence has a dual goal: to guarantee procedural fairness in the individual judicial process and to guarantee protection of democracy and its values. Without judicial independence, there is no preservation of democracy

and its values. The existence of judicial independence depends on the existence of legal arrangements that guarantee it, arrangements that are actualised in practice and are themselves guaranteed by public confidence in the judiciary.

The accepted view is that judicial independence is composed of two foundations. Only together do the two guarantee the independence of the judiciary. These two foundations are the independence of the individual Judge and the independence of the judicial branch. The Siracusa Draft Principles on the Independence of the Judicial addressed these two foundations of judicial independence:

«Independence of the judiciary means:

(1) That every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law, without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and

(2) That the judiciary is independent of the executive and legislature, and has jurisdiction, directly, or by way of review, over all issues of a judicial nature.»[1]

These two foundations are cumulative. Neither is sufficient by itself.

**(b) Personal independence**

A crucial condition for judicial independence is the personal independence of the Judge. This is a constitutional principle. In some countries it is explicitly established in the constitution. Other countries derive it as an implied provision of the constitution. Judicial independence means that in judicial adjudication the Judge is free of all pressures. I do not mean freedom from internal pressure, which is sometimes expressed in a Judge's deliberations concerning the judicial decision. Such deliberation is often related to the social reality of which the Judge is a part and to societal trends which the Judge must balance. A Judge's freedom from pressure refers to freedom from external pressure, regardless of the source. Personal independence is independence from relatives and friends, independence from the litigating parties and the public, independence from fellow Judges and

[1] Draft Principles on the Independence of the Judiciary («Siracusa Principles»), prepared by a committee of experts convened by the International Association of Penal Law, the International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers 1981.

Judges responsible for managing the system (including the President or Chief Judge of the Court), independence from office holders in the other branches of Government. The Judge's master is the law. The Judge has no other master. From the moment a person is appointed as Judge, he must act without any dependence on another.

The independence of the individual Judge means that the Judge is subject to no authority other than the law. This authority includes, of course, the authority of case law determined by the Courts whose opinions bind the Judge. Judicial independence does not mean release from the chains of binding precedent or other judicial instructions that bind the Judge. These are part of the law to whose authority the Judge is subject. Judicial independence means building a protective wall around the individual Judge that will guard against the possibility of influencing decisions by influencing the conditions of his employment. For example, the Judge should not be removed from office except as the result of a judicial proceeding, based on reasons related to improper behaviour in the fulfilment of his office. In my opinion, such a process should be run by a body composed entirely or partly of other Judges. In the United Kingdom the only practical way of removing Judges from the High Court and the Court of Appeal is upon on an address to the Crown by both Houses of Parliament. A similar provision applies to the Law Lords (shortly to become Judges of the Supreme Court). Other judicial officers enjoy less security. Circuit Judges may be removed by the Lord Chancellor for incapacity or misbehaviour. Similar provisions apply to District Judges. The Lay Magistrates are appointed until the age of 70, although they may be removed at the discretion at the Lord Chancellor at any time. In my opinion these are not appropriate arrangements. Threat of impeachment proceedings or the unfettered discretion of the Lord Chancellor is subject to exploitation by politicians seeking to influence Judges. Removing a Judge from office must be done exclusively through a proceeding that guarantees independence of the Judge in his tenure. Such proceedings should be run by Judges, not politicians. It should be run as a trial in every way.

Judges should be protected against reductions or erosions in their salaries. Further, a Judge's salary and conditions of service should not be set by the executive branch. In my opinion the salaries of Judges should be set by an independent body chosen by the legislature, and not by the legislature itself.

Personal independence requires administrative independence of the individual Judge. Obviously, the Judge is part of an administrative framework and must act according to its rules. Judicial independence is not a licence for administrative lawlessness. Those rules, however, must guarantee that Judges are not subject to pressure that infringes on their independence. For example, the permanent location of a Judge's place of work should not be changed except to fulfil clear administrative need. The President (or Chief Judge) of each Court establishes the organisation frameworks to which Judges are subject. The Court President, including the Supreme Court President, cannot tell Judges how to exercise their judicial discretion unless those instructions are part of a judgment binding the Judges. Indeed, Judges' personal independence is independence from those who surround them. On matters of adjudication, the Judge is alone. He is subject to no authority other than his understanding of the law.

**(c) Institutional independence**

Personal independence is a necessary condition for judicial independence. It is not a sufficient condition. A crucial condition is institutional independence. A Judge's personal independence is incomplete unless it is accompanied by the institutional independence of the judicial branch, designed to ensure that the judicial branch can fulfil its role in protecting the constitution and its values.

Institutional independence is designed to build a protective wall around the judicial branch that prevents the legislative and executive branches from influencing the way Judges realise their roles as protectors of the constitution and its values. The judicial branch must therefore be run, on the organisational level, in an independent manner. It should not be part of the executive branch and should not be subject to the administrative decisions of the executive branch.

The independence of the judicial branch must, of course, be part of the checks and balances mandated by the separation of powers. Therefore, the judicial branch should not determine its own budget: the judicial branch's budget should be set by the legislative branch, and the judicial branch should give the legislative branch an accounting of the way it is run.

## Judicial Ethics and the Bangalore Principles

Increasingly Judges across the world have adopted codes of conduct. There has been increasing international awareness that sustainable and equitable economic development are closely linked with the existence of a legal and judicial system which functions equitably, transparently and honestly.

The Bangalore Principles of Judicial Conduct arose from a United Nations initiative. Revised Principles were adopted in November 2002 following a round-table meeting of Chief Justices held at the Peace Palace, The Hague, Netherlands, and were endorsed at the 59th Session of the United Nations Human Rights Commission at Geneva, Switzerland in April 2003.

A copy of The Bangalore Principles are attached as an annex to this paper. The Principles are succinctly stated as six values: independence; impartiality; integrity; propriety; equality; competence and diligence. Each value is supplemented by a statement of the principle and a series of points relevant to its application. Inevitably they overlap. Thus the principle of independence is stated thus:

«Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A Judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.»

There follow six points of application: Bangalore Principles page 3.

The Bangalore Principles end by requiring all national judiciaries to provide mechanisms to implement these Principles if such mechanisms are not already in existence in their jurisdictions.

The Bangalore Principles do not mean that Judges should live like hermits. Judges enjoy the same rights and freedoms as other citizens, and are free with discretion to engage in extra professional activities of their choice. They should not be isolated from the societies in which they live. The judicial system can only function properly if Judges are in touch with reality.

**Ekaterina Mishina and Melanie Peyser**

# FROM INSTITUTIONAL INDEPENDENCE TO INDEPENDENT JUDICIAL DECISION-MAKING: OPPORTUNITIES FOR STRENGTHENING JUDICIAL INDEPENDENCE IN RUSSIA

## Introduction

One of the most important accomplishments of the Constitution of the Russian Federation, signed on December 12, 1993, was the establishment of an independent judiciary. Since that momentous change, the Russian government has taken major steps to strengthen the judiciary as an institution through legislation; increased funding; creation of judicial institutions such as the Judicial Department and the new Academy of Justice; and the computerization of many courts. The importance of the courts in the day-to-day life of citizens has become more apparent as has the authority of judges in relation to other participants in the legal system such as prosecutors and attorneys with the introduction of an adversarial process and new procedural safeguards. At the same time, the number of Russian judges and the volume of cases reviewed in Russian courts have grown dramatically. Despite increased funding for the courts, current court administration and training capacities are not keeping pace with the changing needs of the courts.

The Russian court system has been forced to tackle institution building in the context of a new constitution and ongoing battles for power among the three branches of government. As may have been expected, the Russian judiciary has struggled both to define itself and to defend itself from attacks and influence by the executive and legislative branches, as well as less visible commercial, political and social interests. Efforts to improve the infrastructure and financing of the courts have been matched by attempts to limit institutional independence and power through changes to the make

up of judicial qualification collegia and even the power of the Constitutional Court to statutory review[1].

Pressure on individual judges to issue decisions that serve the needs of government actors or interests outside of government is troublesome and more difficult to address than threats to institutional independence. The Russian government has moved to increase judicial salaries dramatically, and there are ongoing efforts within the judiciary to address judicial ethics and discipline. However, a vertical hierarchy remains within the judiciary, and judges reviewing politically important cases are still subject to internal pressure from court chairs, as well as, outside influences.

During the years immediately following the signing of the U.S. Constitution in 1787, United States federal judiciary struggled with many of the same difficulties faced by the thirteen year-old Russian judiciary. U.S. experience shows that there is no full-proof method for ensuring that judges are always free from influence; however, certain steps can be taken to increase the strength of the judiciary as an institution and of its judges as independent arbiters of disputes. The purpose of this paper is to offer select recommendations to curb outside influence and increase the independence, fairness and transparency of judicial decision-making in Russia. Some reference is made to state courts and state-court judges in the United States; however, the experience of federal courts in the United States provides a unified set of rules, procedures and relationships and is therefore more relevant to the Russian experience.

This paper reviews some of the historical, cultural and constitutional underpinnings of *institutional* independence of the judiciary in the United States. However, the primary purpose is to make suggestions to strengthen the independence of *individual judicial decision-making.* The authors have attempted to capture some of the key behavioral characteristics of U.S. judges and the philosophy and mechanisms that contribute to the independent behavior of individual judges.

The authors analyzed press articles in Russia and the United States; referred to notes of meetings over the past five years with Russian judges and other justice system officials; reviewed U.S. and Russian journal articles and bar association reports on topics related to judicial indepen-

[1] Solomon, Peter H. Jr. Threats of Judicial Counterreform in Putin's Russia // Demokratizatsiya. 2005. Summer.

dence; and conducted targeted interviews of Russian scholars, U.S. judges at various levels of the federal judiciary and state courts in the United States, and legal advisors and staff of the U.S. federal judiciary. As part of this process, the authors looked at current trends in Russia and the United States and identified a number of challenges to decisional independence in both countries.

Part I of the paper clarifies the distinction between institutional independence of the courts and decisional independence of individual judges. Part II provides a brief outline of issues currently facing the Russian judiciary with respect to judicial independence of judges. Part III describes the results of impressionistic research carried out in the United States to determine how U.S. judges understand individual independence and to identify factors that contribute to independent decisionmaking. Part IV recommends ways in which either a U.S. best practice or a lesson learned in the United States could be tested in Russia to increase the independence of Russian judges.

## I. Institutional v. Individual independence

The drafters of the U.S. and Russian constitutions were concerned with establishing judicial branches of government capable of serving as a counter-weight to the legislative and executive branches of government, but they understood that the judiciary would be populated by individual judges, who would be asked to resolve disputes and interpret laws often under the most difficult circumstances. Therefore, both constitutions state the independence of the courts as an institution and attempt to provide the conditions necessary for judges to feel secure enough in their positions to make decisions free of outside influence.

Article III of the United States Constitution makes an explicit distinction between the courts as an institution and the independence of judges by establishing independent courts but separately providing protections to judges: «The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be dimin-

ished during their Continuance in Office.»[1] Chapter Seven of the Constitution of the Russian Federation provides detailed standards for the establishment of the courts separately from guaranteed protections for judges.[2] And, the Law «On the status of judges in the Russian Federation» further outlines the authority, selection, discipline and compensation of judges as independent actors within the judicial branch.[3]

Much has already been written about judicial independence in Russia. However, this issue is typically analyzed from the standpoint of inter-branch relations and the institutional independence of the courts. As envisioned by the Russian Constitution, the independence of individual judges in carrying out their judicial responsibilities is fundamental to the protection of citizens' rights and development of a democratic state. In order for true judicial independence to exist it is imperative that political, personal and financial influences on judges' decisionmaking be diminished to the greatest extent possible.

As a practical matter, it is nearly impossible to separate the conditions that threaten institutional independence of the judiciary and the independence of individual judges in their official capacity. That said, the independence of individual judges or «decisional independence» — the independence of a judge during the process of reviewing the facts of a case, conducting legal analysis and making a decision in a case — is not only affected by the institutional independence of the judiciary. A judge's ability to make fair, independent decisions may be affected by legal protections, judiciary policies, training and educational support provided by the judiciary, as well as, a judge's competence, character, ethics and temperament.

## II. The Russian Context

The following difficulties faced by Russian judges in making fair and unbiased decisions meet three criteria: 1) they pose a serious threat to Russian

[1] Constitution of the United States, Article III, Section 1.

[2] Constitution of the Russian Federation (ratified December 12, 1993). Chapter Seven, Articles 118—128. 1993.

[3] The Law of the Russian Federation No. 3132-1 of June 26, 1992 on the status of judges in the Russian Federation (with Amendments and Addenda of April 14, December 24, 1993, June 21, 1995, July 17, 1999, June 20, 2000, December 15, 2001, August 22, 2004, April 5, 2005).

judges' ability to render fair decisions; 2) they are issues that have impeded in the past or currently threaten decisional independence of judges in the United States; and 3) either the success of the U.S. judiciary in addressing the issues or a lesson learned by a failure to do so could serve a useful example to the Russian judiciary as it continues the reform process.

A) Institutional dependence on executive branch authorities at all levels and executive branch pressure on judicial decisionmaking in select cases. In spite of efforts to improve the financing and maintenance of federal courts in Russia, many still rely on local authorities for buildings and other municipal resources. Court chairs are often forced to request favors from local officials just to maintain basic safety and health standards in court buildings. One visible example of why this dependence is so important is the open violation by judges in their decisions of one of the fundamental principles of the Russian Constitution: the superiority of federal laws over regional law. Interestingly, such violations occur all over the country from the tiniest village to Moscow. The situation is so acute that lawyers in Moscow like to say that if there is a conflict between a law and an order of a local prefect, the prefect's order will win out.

B) A hierarchical culture and system of authority that affects judicial decisionmaking and operates outside of the appellate process. One of the remnants of the Soviet judiciary is a hierarchical culture, in which the chief judge of the district has almost total control over case distribution, performance evaluation and, to a lesser extent, nomination of judicial candidates for consideration by the President. Initial screening of judicial candidates is conducted by a local Judicial Qualifications Collegium through a written exam, submission of additional documents and an interview. Following the interview, the Collegium then makes a recommendation to the chief judge either to nominate or not nominate the candidate for a judgeship. If the chief judge refuses to nominate the candidate he may return the candidates file to the Collegium for further review. Even though the chief judge is barred from overriding a second recommendation for nomination of the same candidate if two thirds of the Collegium has voted to approve, the chief judge still has considerable power in the selection process. In many cases, new judges feel that they have a debt to the chief judge for having been appointed by the President. After appointment, the chief judge has the power to influence promotion to higher courts.

Additionally, the chief judge typically controls the case distribution process. Although electronic case distribution software is being deployed in the court, chief judges in courts with few judges can easily manipulate the electronic system. The power to decide who reviews cases can be used both to ensure that a loyal judge reviews important cases and to overload a disloyal judge with boring routine or unpleasant cases.

C) The failure of new judges to adapt to the judicial role and leave behind the culture, assumptions and methods acquired during their tenure in law enforcement, executive branch agencies or the courts. A substantial number of judges in Russia are former prosecutors, law enforcement officers or secretaries for judges, who themselves have been on the bench since the Soviet period. Some observers believe that new judges, who have been groomed in the pre- and post-soviet justice system, have trouble leaving behind prior responsibilities to protect the interests of the state or enforce the laws of the land. This sometimes results in unintentional judicial bias in favor of the State. This condition may also lead to some judges making conscious decisions to be particularly tough on defendants or parties suing the State. It is impossible for judges to divorce themselves completely from the experience and training that preceded their appointment to the bench; however, judges whose decisions are consistently progovernment not only make less than fair decisions but also diminish public trust in the judiciary.

D) Limited evolution of ethics norms and a lack of understanding and application of ethics norms in day-to-day judicial activities. Judges have limited access to information and analysis to help them understand standards set forth in the Law «On the status of judges in the Russian Federation» or national and international ethical norms. The Russian Code of Judicial Ethics provides general guidance on ethics issues, and the Law «On the status of judges in the Russian Federation» outlines infractions, for which a judge may be disciplined. Judges may also forward questions to the Qualifications Committee, and the Committee produces a digest, *Vestnik*, which covers judicial qualifications and discipline. A review of the first three editions of *Vestnik* reveals that the vast majority of questions covered relate not to judicial ethics or discipline but rather to the Law «On the status of judges of the Russian Federation» and its application to judicial selection, qualifications, and termination for non-disciplinary reasons. *Vestnik* does cover disciplinary decisions; however, these descriptions provide

little if no guidance on how a judge could act differently under similar circumstances. There is little evidence that judges ask questions in advance of acting to determine what to do in complicated situations. The cases reviewed in *Vestnik* are typically extreme in nature and have resulted in disciplinary action. More subtle cases that test the definitions of objectionable behavior are not included. Resources on judicial ethics and discipline are limited both in scope and availability.

E) Pressure on judges to allow the use of the court proceedings as an instrument to achieve politically motivated outcomes. There have been many accusations lodged against the executive and legislative branches (at both the national and local level) about attempts to influence judges in individual cases of political, financial or personal importance to officials. Specific cases of pressure on judges have been raised not only by human rights activists and foreign organizations but also by judges, who have been involved in sensitive cases and allege pressure from court chief judges.[1]

F) An acute lack of public trust and respect for judges and the courts, and widespread dissatisfaction with the legal system as an avenue for resolving disputes. Polling in Russia suggests that public trust in the court system and judges is extremely low. While the number of civil cases filed per month has skyrocketed over the past ten years, and this trend is often pointed to as an indication of greater trust in the courts, the overall image of the courts among citizens is one of corruption, delay and, at best, indifference to citizen concerns. A 2004 Public Opinion Foundation poll, 67% of those polled thought that majority of Russian judges took bribes.[2] Attacks on the judiciary in the press and public statements by representatives of the executive branch and legislators are all routine occurrences in Russia. Most of the information received by citizens about the court and judges is negative.

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[1] Francesca Mereu. Judges Lost Their Jobs Speak Out // France-Presse. 2004. October 21.

[2] Klimova S. Attitudes on Russian Courts: Prejudices or Bitter Experience? // Public Opinion Foundation. 2004. October 28. See http://bd.english.fom.ru/report/map/ed044328

## III. The American Context

In a speech in March 2003, then United States Supreme Court Chief Justice William Rehnquist, speaking about continued attacks on the independence of the U.S. judiciary, said «These incidents are to some extent an outgrowth of the tensions built into our three-branch system of government. To a very significant degree these tensions are probably desirable and healthy in maintaining a balance of power in our government.»[1] Historians point out that changes in the quality of relations between the judiciary and the other branches of government, as well as, the frequency and aggressiveness of attacks on the judiciary and the independence of judges are like a pendulum. When attacks become too aggressive or relations deteriorate to a significant degree, there is usually a backlash by the public and/or the judiciary, and pressure grows to improve relations.

U.S. courts have the luxury of a strong foundation of judicial independence, but they must still work hard to defend the courts and judges from attacks; educate the other branches of government about the courts' functions and needs; and explain their work to the public. As they do so, they rely on:

A) A strong history and tradition of respect for judges that predate the Constitution. The U.S. justice system derives its strength from a number of sources, including its roots in English common law, English legal tradition, the U.S. Constitution and the fact that, in the United States, judges make law.

In the opinion of most of the judges interviewed for the purposes of this paper, the strength of the American judicial system is intimately linked to the history of common law in England where judges were always well respected by the population.

B) A simple constitutional framework. The second source of the judiciary's power in the United States is the lack of a concrete description of federal judicial review and procedures. The U.S. Constitution does not provide a detailed framework for the Federal Courts because of disagreement among representatives at the Constitutional Convention. Those in favor of strong

[1] Remarks of Chief Justice William Rehnquist at the Chief Justice Symposium on Judicial Independence, University of Richmond T.C. // Williams School of Law. 2003. March 21.

state powers did not want to establish a separate Federal Court system because they feared that Federal Courts might infringe upon the power of state courts. However, virtually all delegates recognized the need for some kind of national court system.[1] Alexander Hamilton noted that the main defect in the Confederation was the lack of a central judicial system and that laws are dead without courts to explain and define their meaning and application.

C) Status as the weakest of the three branches of government. The Founding Fathers understood that the judicial power isn't obvious in a system with a separation of powers. Nevertheless, Montesquieu said, without a strong and independent judicial branch, the normal and effective functioning of a system based on a separation of powers is impossible: «The doctrine of separation of powers and judicial independence flowered in the process of developing the federal Constitution of our nation and is reflected in the Founding Fathers' dialog. In Federalist Paper Number 78, Alexander Hamilton noted that as the weakest of the three branches of government, the judiciary is without the «force or will but merely judgement; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgements.»[2] Further, he noted that «the general liberty of the people can never be endangered from that quarter.»[3] In fact, he predicted that any danger would come from the union of the judicial branch with one of the other branches of power. In support of this thesis, he quoted Montesquieu as saying «there is no liberty, if the power of judging be not separated from the legislative and executive powers.» In the end, Hamilton spoke in defense of lifetime appointments for judges and the concept that salaries of judges should not be decreased during the period of their service on the bench.»[4]

D) The power to make law. Another cornerstone of the deep respect for those who serve justice in Anglo-Saxon countries is the fact that, in contrast to countries with laws flowing from Roman law, judges in common law countries create law. The building of a body of law occurs at when judges, charged with applying the law, apply in practice acts and statutes passed by the legislature. The role of precedent and the doctrine of *stare decisis* also

[1] Mishn A.A., Vlasikhin V.A. The Constitution of the United States: A Political-Legal Commentary // International Relations. Moscow, 1985. P. 114.

[2] Federalist Paper No. 78, McLEAN'S Edition, May 28, 1788.

[3] Id.

[4] Ronald M. George, Chief Justice of California. Challenges Facing an Independent Judiciary. New York University Law Review, November 2005.

play an important role, as does the concept of inherent powers, in accordance with which a judge has the power to apply the law because of his or her position as a judge.

## IV. Applying U.S. Best Practices and Lessons Learned to Russian Conditions

US judges are subject to many of the same pressures as Russian judges. In a system of checks and balances, there will always be attempts by other branches of government to enhance their power vis-a-vis the courts. The judiciary as a whole, and individual judges for their part, must find a balance between independence and accountability. In some instances, the judiciary may choose not to address a perceived attack until the issue becomes so politicized that it cannot be ignored.

One of the key principles in practice of the separation of powers and judicial independence in the United States is the concept of restraint. Judges, legislators, executives and the branches of government they represent are all expected to show reasonable restraint in exercising authority vested in them. For the most part, each branch restrains itself doing everything that the Constitution and laws of the land would permit. Even though state and federal legislatures could create elaborate systems for inspecting judges' work and attitudes; judges have traditionally been trusted to police themselves and to take steps to address concerns raised by actions outside the judiciary. And, in instances where the judiciary is compelled to take action by the legislature, there is generally no micromanagement of the judiciary's methods for meeting the requirement to act.

In most cases, mechanisms designed to increase accountability of judges focus not on punishment or control of judicial behavior. They shift responsibility for judicial behavior to individual judges and provide support and guidance to judges in meeting standards. Institutionally, the legislative branch traditionally exercises restraint in its regulation of the courts; changing the jurisdiction of the courts; and impeaching judges. There are some members of Congress who consistently attack the federal judiciary and/or introduce bills in Congress to reduce judicial autonomy. However, these bills generally fail because other members of Congress typically take a more moderate view.

With or without pressure from Congress, the U.S. federal judiciary and the fifty state-court systems regularly introduce reforms and make adjustments to improve internal mechanisms to protect judges from outside influence whilst ensuring accountability to the public. The approaches outlined below cannot and probably should not be replicated without adaptation in Russia. The U.S. judicial approaches identified here are included because of their relevance in the United States and Russia today:

A) **Attract a cadre of judges who bring appropriate knowledge, possess the personal qualities desired in judges and can adapt to the judicial role.**

1) Judicial Selection. Judicial selection is one area, for which it is useful to

consider current controversy in the state courts of the United States. Recent calls for judicial elections to select judges in Russia make it worthwhile to provide a brief commentary on judicial elections.

Judicial selection in the United States is often criticized because some states continue to hold partisan and/or non-partisan elections to select judges. In fact, there are four primary methods used to select judges for state courts. Some states use a combination of these methods depending on the level of court, for which selection is being conducted. These four methods include:

Partisan elections, in which judicial candidates are listed on ballots as candidates for one of the two major political parties.

Non-partisan Elections, in which judicial candidates run for election without the political party label.

Retention elections, which serve as a method for selecting which judges should be chosen to continue their service on the bench at the end of their term.

Appointments, in which the state governor appoints either with or without confirmation by the state legislator.

At the trial court level approximately 24% of all American judges are selected through an appointment process. 43% of all trial court judges are selected through partisan elections, and 33% are selected through non-partisan elections.[1] Initially, judicial elections were established in order to en-

[1] Call to Action: Statement of the National Summit on Improving Judicial Selection, Expanded Edition with Commentary, National Center for State Courts, Williamsburg, VA.

sure public trust of the judiciary. The theory was that citizens would be more likely to respect the order of a judge, whom they themselves had elected. Over time, judicial elections have become more and more hotly contested, and the methods used to win elections have become more and more aggressive and sometimes misleading. Thanks to long judicial campaigns and saturation of television and radio with attack advertisements citizens often believe that many judges have bad qualities. Advertisements may also contribute to an overall decline in public respect for the judiciary and judges. On one hand, a polling project in Kansas demonstrated that 65% of residents of the State of Kansas believed that judges should be elected rather than appointed by the governor[1]. On the other hand, an American Bar Association survey suggests that «three out of four Americans believe judicial campaigning compromises the impartiality of elected judges[2].

Judicial elections strip judges' insulation from outside influence after the vote is over. In partisan elections, it is virtually impossible for judges not to become involved in politics, and judges find themselves making promises to the public about how they might rule on issues that may very well come before them should they be elected to the bench. Campaign statements may make it difficult for judges to be unbiased on the bench.

Depending on the rules of the state, candidates for elected judicial positions may need to fundraise both to win their initial seats and to maintain those seats during retention elections. The majority of funds donated to judicial campaigns come from large firms and attorneys, who may come before the judge in court in the future. Judges report that large donors to a judges' election campaign often believe that recipient judges owe preferential treatment in return for their support. Therefore, some states put a ceiling on donations (e.g. donation can be more than $100) as a way to decrease the potential for a donors to influence an elected judges.

Even retention elections can have an adverse effect on the independence of judicial decisionmaking. A judge facing a retention election may be less likely to rule on controversial cases in an independent manner. Unpopular decisions during the weeks and months leading up to the election could result in a judge losing his position in a retention election. And, re-

[1] Kansas Citizens Justice Initiative, Draft Final Report, 1997.

[2] Justice at Stake, National Poll of American Voters from 2001, 2004. See Ted A. Schmidt, Under Attack without Merit. Arizona Attorney, February 2006.

tention elections themselves are stressful, time-consuming, and distracting for judges.

Today there are widespread calls to fix the judicial selection process especially in those states where partisan elections continue. In July 2000, the American Bar Association House of Delegates approved the Standards on State Judicial Selection, Report of the Commission on State Judicial Selection Standards (the Standards)[1]. These model standards suggest that state selection commissions and other bodies use a list of recommended selection criteria, including:

Experience: 10 years of experience in the practice or teaching of law, public interest law, or service in the judicial system.

Integrity: high moral character and a reputation in the community for honesty, industry and diligence.

Professional competence, including intellectual capacity, professional and personal judgment, writing and analytical abilities, and knowledge of the law.

Judicial Temperament

Service to the law and contribution to the effective administration of justice, including dedication to professionalism, and a commitment to improve the availability of justice to all those found within the jurisdiction[2].

An important facet of the recommended judicial selection model is the placement of the burden to demonstrate possession of the aforementioned qualities in the hands of the applicant. The recommended selection model does not include personality tests, assessments by psychologist or any other kind character analysis by a medical professional. Instead, the Standards recommend that a nominations committee collect information about candidates and assess candidates on the basis of published criteria. When taken together, the Standards and criteria provide ample opportunity for candidates to demonstrate their appropriateness to become a judge. For example, the legal experience standards of ten years or more legal experience provides the local legal community with a significant period of time

[1] American Bar Association, Standards on State Judicial Selection, Report of the ABA Standing Committee on Judicial Independence Commission on State Judicial Selection Standards, July 2000.

[2] American Bar Association, Standards on State Judicial Selection, Report of the ABA Standing Committee on Judicial Independence Commission on State Judicial Selection Standards, July 2000.

to form an opinion about a candidate's behavior, temperament, integrity, honesty and diligence during the practice of law.

The focus on whether a candidate has demonstrated behavior befitting a judge over a period of years reduces the possibility of corruption by psychologists. A candidate, who has a character flaw but universally exercises self-control and behaves in accordance with a judicial temperament throughout his or her legal career, would have a good chance of being nominated. On the other hand, a candidate, who demonstrates arrogance, bias or disrespect for the law, may seem to be perfectly «healthy» to a psychologist, but this candidate would not make a good judge.

American judges seem to believe that a common set of characteristics result in good judges. Interestingly, exceptional legal knowledge and skills are only pre-requisites or basic eligibility requirements for consideration. There is no shortage of talented and knowledgeable lawyers in the United States. It is more difficult to find lawyers with appropriate personal qualities for the special role of judging. In the course of interviewing American judges, experience, wisdom and «life experience» were all noted as imperative for success as a judge. Interviewees reported that had they been younger or less experienced when appointed to the bench they would have been intimidated by the parties and may not have been taken seriously.

Judges and representatives of state nomination committees stress skills gained through courtroom, trial and legal writing experience as opposed to general knowledge of court operations or case management. For the most part, U.S. judges serve as generalists and do not specialize in a specific area of law while on the bench. Judicial candidates must be ready and able to adapt to the judicial role and to review a broad range of criminal and civil cases even if their legal practice before appointment was highly specialized. Candidates need not be experts in every area of law. They must simply be willing and able to learn legal procedure and substantive law quickly and effectively.

According to judges and scholars, polled for the purpose of this paper, judicial candidates should demonstrate basic qualities that will allow them to develop a judicial temperament and a willingness to accept the necessary changes to their day-to-day lives that work as a judge implies. Interviews with practicing judges produced a long list of characteristics such as: the capacity to separate personal views from legal analysis; respect for all

participants in the process; openness to different kinds of cases; patience; solid analytical skills; an aptitude for sorting out complicated facts and situations; a natural respect for objectivity; courtesy; courage; patience; good judgment; and perhaps most importantly, a lack of arrogance. With respect to arrogance, several practicing judges noted that a good judge is always willing to explain his or her decision.

While the selection process in the Russian Federation is essentially a merit-based system, it seems to focus on legal knowledge and relies heavily on personality assessment as opposed to evaluation of demonstrated behavior. It would be useful to review the criteria and the methods for determining whether judicial candidates have or could develop the qualities necessary to serve as a judge. A focus on the demonstration, through career and personal life, of characteristics and competencies necessary for success as a judge would help increases the chances of identifying well-rounded judicial candidates for appointment. Viewing legal knowledge as only an eligibility criteria for judicial candidacy would facilitate an in depth review of candidates' conduct and would enhance the information available for decisionmaking purposes.

*RECOMMENDATIONS:*

*Maintain a merit-based selection process but consider modify the criteria to focus on personal qualities and conduct as demonstrated through behavior in a candidate's professional and personal life.*

*Raise the minimum number of years of experience for judicial candidates either by increasing the number of years of experience required to become a judge or by changing the kind of experience that can be counted toward legal experience for the purpose of obtaining a judgeship.*

*Develop a «competency profile» that outlines the qualities, skills and knowledge that predict success in a judicial career and indicate preparedness of a judicial candidate not only to apply the law correctly and follow procedural law but also to enhance citizens' trust and respect in judges and the judiciary.*

B) **Protect Judicial Compensation and Tenure** Judicial salaries in the United States usually provide for a comfortable but not extravagant lifestyle. Federal court judges, who come to the bench from positions as federal prosecutors or government lawyers, may even receive a pay increase

upon appointment to the bench. That said, many state and federal court judges come to the bench from lucrative private practice or law firms where they earn several times the salary offered to a judge. Even entry-level attorneys at large law firms make more than some state court judges, and first-year lawyers at the largest firms in the United States can receive as much as $130,000 per annum in base salary (not including bonuses or other incentives)[1]. The salary for federal district court judges in 2005 was $162,100, and salaries of State judges of general jurisdiction trial courts averaged $113,504 and ranged from $88,164 to $158,100 in 2004.[2] The pension benefits for both judges and their spouses are typically excellent in the state courts and uniquely generous for federal court judges, and this is attractive to judge candidates.

While the most talented lawyers in the United States could receive much higher salaries in the private sector than they could as judges in either state or federal courts, the courts are still able to attract some of the best legal minds to the bench. A livable salary helps. However, interviewees suggested that financial gain was not part of their decision to seek a judgeship. Several judges stated that the intellectual challenge and rewards of administering justice, deciding cases and drafting opinions motivated them to become judges. Judges noted an interest in public service, a desire to do something important for society, and hopes to improve the justice system as additional reasons. Finally, U.S. judges have traditionally chosen careers as judges over high salaries in other legal careers because service as a judge is considered by many to represent the zenith of the legal profession. In short, service as a judge is extremely prestigious.

Over the past several years, the U.S. federal judiciary and many state judiciaries have come to face a crisis in judicial compensation. Judicial salaries are almost universally controlled by the purse strings of the legislative branch. For example, increases in federal court judicial salaries are linked to congressional salary raises, and judge compensation has become bound up in politics. Members of Congress don't like to increase their own sala-

[1] See College Journal of the Wall Street Journal at www.collegejournal.com/salarydata/law

[2] Occupation Outlook Handbook, U.S. Department of Labor Bureau of Labor Statistics, August 2006. See http://stats.bls.gov/oco/ocos272.htm#earnings. State court information based on a 2004 survey by the National Center for State Courts (www.ncsconline.org).

ries because such increases are unpopular with the public. Therefore, judicial compensation has also stayed much the same. The lack of raises for judges has resulted in judicial salaries decreasing in value in real dollars. In the case of the U.S. federal judiciary, the U.S. Constitution guarantees that judicial compensation not be decreased, and critics believe that the fact that judicial salaries are decreasing in real dollars is functionally the same as a decrease in judicial salary. This is making it more difficult to attract qualified candidates to judgeships even given permanent tenure for federal court judges.

The U.S. Constitution states that «Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior.»[1] The purpose of this clause and protection of salaries for judges was to protect judges from the caprice of the members of the legislative and executive branches. Federal judges are appointed by the president with the advice and consent of the Senate, and they may only be removed from their positions through impeachment.

Conventional wisdom suggests that Russian lawyers, who are motivated to adorn judicial robes, are more likely to become judges because of opportunities for financial gain and stability. Judicial salaries are not as high as those paid by large corporations and law firms, or as high as fees charged by expensive defense attorneys. Yet, judicial compensation in Russia is predictable, and the health, pension and other benefits make judgeships especially attractive for single parents or others who require a stable income and benefits. Moreover, because Russian judges usually apply for and are appointed to judicial positions when they are in their twenties judicial salaries may seem quite high to young lawyers.

Over the past several years, substantial increases in monthly salaries for Russian judges have resulted in the judiciary becoming more attractive to young lawyers, and the competition among lawyers for judicial appointments has increased dramatically. In large cities even these salaries may not be adequate to attract the best legal minds to the judiciary at the same time that the judiciary is still struggling to solidify its independence. If at all possible, the Russian judiciary should try to maintain control over judicial salaries and avoid any linking with civil service or parliamentary pay increases.

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[1] Constitution of the United States, Article III, Section 1.

*RECOMMENDATION:*

*The Russian judiciary should propose automatic cost –of-living adjustments to ensure that judicial salaries keep pace with inflation, facilitate recruitment of qualified candidates for judgeships, and discourage attrition.*

C) **Deliver highly practical and narrowly-tailored judge orientation and training.** In the United States, judges have historically been appointed to the bench in their mid-to late forties. Judicial careers usually follow lengthy careers in civil litigation criminal prosecution or defense. Newly appointed judges may have had extensive training in legal advocacy, but they must still acquire knowledge and skills that are unique to judging. Newly appointed judges must leave behind previous positions; many of their personal and professional ties; the culture of their former workplace; and their habitual reactions to a range of situations.

The federal judiciary provides newly appointed judges with two one-week sessions of orientation training and support that focuses on the adjustment to the judicial role, judicial skills and development of both an understanding of the ethics codes and personal identification with ethics norms. For newly appointed federal district judges some attention is paid to legal procedure to acquaint civil law specialists with criminal procedure and criminal law specialists with civil procedure. However, new district court judges will also spend considerable time in interactive seminars discussing hypothetical ethical dilemmas; learning about procedures for obtaining advice on ethics and financial disclosure rules; identifying problems related to managing judicial clerks and other court staff; and visiting a federal prison to talk to inmates and study the conditions in which those convicted in their courts will serve out sentences. In several states, formal judicial mentorship[1] programs bring together experienced judges with newly appointed judges to help new judges adjust to judiciary culture through confidential advice and support on personal and professional issues related to the judicial role.

Training and advising programs are designed to help new judges understand their role; develop resilience to outside influence; identify legal

[1] Judicial mentorship or «mentorstvo» in Russian should be distinguished from «nastavnichestvo» as mentors do not play a supervisory role but rather provide confidential advice and support to newly appointed judges.

and other resources for future use; and develop instincts about activities or actions that may negatively affect public trust. Programs and publications are designed especially for new judges and help set common standards of skills and behavior.

New Federal Court judges are provided with a collection of practical guides, videos and publications developed specifically for judges. Most of these resources contain only what judges need to know to fulfill their judicial role, and they are as short as possible since judges are too busy to read long texts. New-judge training for federal court judges is based on the premise that new judges are superior lawyers who are open to learning new areas of law.

*RECOMMENDATIONS:*

*New judge training should emphasize the skills, behavior and knowledge that are unique to the judicial role rather than a review of standard substantive law areas that judges have already covered during their legal education and experience prior to becoming a judge.*

*Practical materials, narrowly tailored for judges, should be developed and distributed to new judges upon appointment.*

D) **Defend judges from pressure or influence by judicial leadership or by individuals or entities outside the judiciary.**

2) Judicial Leadership and Management

While court structures in the United States are similar to the structure of Russian courts the relationship between judges of courts of first instance, appeals courts and supreme courts, as well as between judges and chief judges of courts are very different. Unlike their Russian counterparts, chief judges and higher court judges in the U.S. federal judiciary have virtually no authority or role in judicial selection, promotion of judges or case distribution, and this difference may be one key to insulating judges from influence within the judicial hierarchy. Federal Court judges work without a boss and manage their chambers (office, staff) independently.

Chief judges do not carry supervisory responsibilities with respect to other judges except to the extent that chief circuit judges handle conduct and disability complaints (*See* IV.G). Chief judges work with their chief clerks (court administrators) to address court operations, equip-

ment, financial and human resources issues. Cases are distributed on a random basis.

The previously mentioned culture of restraint extends to relationships between chief judges and other judges at all levels. In the federal judiciary, chief judge positions are filled on a rotation basis for a fixed term based on seniority. Rotation helps support mutual respect and accountability since judges who work together for many years know that at least a couple of their colleagues could serve as chief judges during their tenure. Likewise, chief judges know that they may return to their positions as regular judges when their terms as chief judges end.

One of the keys to defending judges from external attacks is a strong judicial leadership that is not afraid to stand up to the other branches of government in defense of judges. In the United States, it is the Chief Justice of the United States, who plays this role with respect to the federal judiciary and to a great extent, his actions and statements will affect all judges in the country.

Few would dispute United States Supreme Court Chief Justice John Marshall's role establishing an independent judiciary and protecting individual judges from attack. Even though his appointment was political in nature he surprised everyone by his stalwart defense of judicial authority and judicial independence.

Similarly, Chief Justice William Rehnquist defended the judiciary rigorously, and often reminded politicians when they stepped over the boundary of healthy criticism of the judiciary. For example, during his last years at the Supreme Court some members of congress threatened to file articles of impeachment against judges when they disagreed with the final disposition of cases. Chief Justice Rehnquist condemned this practice. «Noting 'suggestions to impeach federal judges who issue decisions regarded by some as out of the mainstream,» he recalled federal judges' «unpopular, some might say activist, decisions in the desegregation cases, [which] are now an admired chapter in our national history.' It is well established, he said 'that Congress's authority to impeach and remove judges should not extend to decisions on the bench.'»[1]

[1] Wheeler, Russell R., Chief Justice Rehnquist as Third Branch Leader, JUDICATURE, Volume 89, Number 3, 2005, p.123, quoting William Rehnquist, 2004 Year-End Report on the

Federal Judiciary (January 1, 2005), available at www.supremecourtus.gov

*RECOMMENDATION:*

*The Russian judiciary should find ways to break the vertical hierarchy within the court system and begin to identify the next generation of strong judicial leaders to defend judicial independence.*

E) **Improve public trust and citizen satisfaction**

As retired U.S. Supreme Court Justice Sandra Day O'Connor said in a speech in March 2006 at Georgetown University, «Statutes and constitutions do not protect judicial independence — people do.»[1] In order for the public to become a constituent for judicial independence, the public must understand the importance of judicial independence. Over the past ten to fifteen years, courts have increasingly sought opportunities to meet with citizens and explain their courts' functions. State and Federal courts have developed a variety of tools to educate the public. They open their doors to citizens to learn about the court, the law and legal process; invite citizens to comment on the quality of court services and court administration; and involve citizens in decisionmaking on issues such as access to justice, court house schedules, court locations and architecture and a variety of other matters not related to decisionmaking in specific cases.

Several state court systems and the Federal Judicial Center have extensive programs to assist school teachers prepare curricula and lessons for students. Often, these programs include videos of court proceedings, mock trial programs, materials from famous cases, and history lessons about the courts. Videos are often of current cases so students can study how judges make decisions in real cases.

States also run programs, in which state supreme courts or appellate courts hold proceedings «on tour» around the state for educational purposes — at schools or in communities where there are no courts. Often, there are discussions on the courts following the proceedings. «Judge bureaus» provide judges as speakers for community group and school educational programs and events. And, yet other courts hold programs to educate citizens about specific areas of law for which there is an interest or need such as consumer rights. The Administrative Office of the U.S. Courts has a col-

[1] March 9, 2006 Speech by Sandra Day O'Connor at Georgetown University, Washington DC, as reported by National Public Radio.

lection of information and talking points to assist federal judges in preparing to speak at schools and community organizations.

Some states conduct «court user surveys» to solicit opinions from citizens about court services and operations, and a handful of states have statewide or community-level boards that include citizens (sometimes a majority of citizens) to advise the courts on improvements in access to justice and services. New Mexico holds «court innovation tours,» in which the Chief Justice travels to community courts to hear citizen, litigant and lawyer concerns, as well as, to learn about innovations being tested by local courts. The American Bar Association has joined with eminent retired representatives of all three branches of government to work to improve programs on civics and government in primary and secondary schools in the United States. Each year, the American Bar Association celebrates «Law Day» with public education programs in schools and communities throughout the country.

Finally, several state courts have special education programs for journalists in order to improve the accuracy of reporting on the courts and to discuss issues related to media access to the courts.[1] And, several states have programs to train courts and bar associations on how to provide understandable information to journalists for use in stories, and how to address inaccurate or misleading reports in the press.

A key feature of programs aimed at improving public trust in the courts is the role that judges play in meeting, educating and listening to feedback from citizens of all ages. Courts and judges that participate in these programs report that they have learned a lot from talking to citizens about the administration of justice. And, citizens tend to rate courts higher when they have input into how they are run or understand how the courts operate thanks to educational programs.

*RECOMMENDATIONS:*

*Invest substantial judicial resources and tap into resources of nongovernmental and international organizations to develop national programs to education the public about the courts; solicit feedback from citizens and*

[1] For a list of state court programs see the National Center for State Courts information on public trust and confidence at: http://www.ncsconline.org/projects_Initiatives/PTC/PublicUnderstand.htm#public.

*court users; train court media officers; develop PR and educational materials about the courts.*

*Encourage judges to participate in public education programs by meeting with school and community groups to talk about the judiciary and the law.*

*Engage advocates, prosecutors, the police, NGOs and citizens in strategic planning for court administration improvements and court building projects to ensure that new initiatives and buildings meet the needs of all visitors to the court.*

F) Develop a body of applied judicial ethics and conduct norms. The **Code of Conduct for United States Judges** (the Code) calls upon federal judges to «avoid impropriety and the appearance of impropriety in all activities» and «not allow family, social, or other relationships to influence judicial conduct or judgment.»[1] While compliance with the Code is not obligatory, virtually every judge strives to act within the Code both because of peer pressure and judges' understanding that membership in the judicial community requires a personal willingness to act in an ethical manner. Additionally, some violations of the Code may amount to offenses under the Judicial Conduct and Disability Act of 1980 (the Act) or could be impeachable offenses.

Drafting and interpretation of the Code are the responsibility of the Committee on Codes of Conduct of the Judicial Conference of the United States (the Committee). The thrust of all activity surrounding the Code and the Committee is to help judges comply with the Code rather than to punish judges. The emphasis is on the individual judge's effort to comply with conduct norms rather than on the enforcement of the Code by a judicial or other body. Therefore, the General Council Office of the Administrative Office of the U.S. courts provides informal consultations on a regular basis. The General Counsel's Office is staffed by attorneys with experience in judicial ethics, conduct and disability. Judges may also submit written questions to the Committee, which strives to respond to all inquiries promptly. Both formal and informal questions are confidential. If a judge submits a formal question to the Committee and follows the Com-

[1] Canon 2 and 2A, Code of Conduct for United States Judges, Committee on Codes of Conduct, Judicial Conference of the United States, as amended, September 2000.

mittee's written response the judge will not be held responsible if the advised course of action is determined to be an actionable offense.

The Committee publishes a compendium of answers to questions that have been submitted to the Committee by judges (all identifying information is removed), as well as, «advisory opinions,» which provide analysis of several cases that have arisen on the same issue, deemed important or timely by the Committee. The compendium and advisory opinions are available to all federal court judges on the website of the Administrative Office of the U.S. Courts. The compendium is searchable by topic. A judge can look for facts and circumstances about real situations that are similar to his/her own situation.

By grappling with complicated circumstances, the Committee essentially creates precedent on the Code of Conduct. As time goes by, more and more questions are being addressed, and the federal judiciary as a whole is gaining a deeper understanding of norms of judicial conduct.

The Federal Judicial Center provides training for newly appointed judges and others on judicial ethics. The Administrative Office of the U.S. Courts produces manuals for judges on ethics and related topics such as financial disclosure rules. U.S. federal courts have found that reviews of Codes of Ethics in a classroom atmosphere are not adequate to help new judges in applying ethics and conduct norms to their daily work. Often, these norms are counterintuitive or are so broadly stated that it is impossible to apply them to specific situations. Training and educational programs, as well as publications, aimed at judges should provide real examples and facilitate active discussion of examples rather than restating broad ethics norms. Judges who feel confident about their understanding of ethics will be better able to avoid the appearance of impropriety or make mistakes that may undermine the prestige of the judiciary or the judge's reputation.

*RECOMMENDATIONS:*

*New judge training should include a heavy emphasis on judicial ethics and conduct and should introduce new judges to resources and advice on how to interpret and apply ethics and conduct norms.*

*Answers to judges' ethics questions (in addition to disciplinary decisions) should be published so that the judiciary can flesh out, report and train judges on judicial ethics and conduct. Judges should be encouraged to send written questions, and answers should be published and accessible to judges and the public.*

G) Develop and monitor a transparent and effective method for addressing citizen complaints about judicial conduct. Citizens must be able to trust that 1) judges are acting and deciding cases in a fair and unbiased manner; 2) judges are subject to the same laws, with which the average citizen must comply; 3) judges are accountable for ethics violations; and 4) complaints by citizens are carefully reviewed in a fair and transparent manner. Statistics suggest that over 90% of complaints against federal court judges are frivolous and are in response to an unfavorable decision in a case rather than to an ethics or conduct violation. However, the courts must address each and every complaint in order to demonstrate to the public that the judicial process is fair. In the past few years several controversies have emerged regarding citizen complaints of ethics and conduct violations, as well as the judiciary's failure to take adequate measures to take corrective actions or sanction the judge in question.

In addition to impeachment, Section 372c of Title 28 of the United States Code establishes the process for addressing complaints that allege judicial misconduct or disability. Since the Statute was originally passed, there have been some modifications, and Congress has twice raised strong concerns about the failure of the courts to investigate and take action against judges who engage in misconduct. Citizens have also noted that it is difficult to find information about how to file a complaint.

A recent review of the implementation of the Judicial Conduct and Disability Act of 1980, which provides citizens with the right to file a complaint regarding a judge's misconduct or inability to carry out his or his judicial duties due to a physical or mental disability, found that U.S. federal court judges needed to be more familiar with the Act. The Judicial Conduct and Disability Act Study Committee, led by U.S. Supreme Court Justice Stephen Breyer, recommended additional educational resources, as well as, access for judges to individual cases (with names and other identifying information reviewed), in which complaints resulted in corrective action or were disposed of without action. [1] Access to individual cases both that resulted in action and that were dismissed without action would allow judges to understand the nuances of how the Act is applied. By comparing the

[1] Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice, The Judicial Conduct and Disability Act Study Committee, September 2006, p.123.

facts of specific cases, judges are better able to understand what constitutes and does not constitute a violation under the act so that they can better understand what kind of behavior is prohibited under the Act, which provides only a general standard.

*RECOMMENDATIONS:*

*In order to avoid criticism, the Russian judiciary should conduct regular reviews of practice and procedures for investigating alleged disciplinary violations and provide detailed information to judges to increase knowledge of the process and conduct norms.*

## V. Conclusion

As retired United States Supreme Court Justice, Sandra Day O'Connor has noted, «Judicial independence doesn't happen all by itself, it's tremendously hard to create, and easier than most people imagine to destroy.» Regardless of the strength of the judiciary as an efficient, fair and transparent institution, it is human beings, who must make decisions that affect the lives of citizens each day. Some of those decisions will be controversial, and many will affect powerful governmental institutions, businesses and individuals. In the end, it is the personal qualities, skills, knowledge and comfort with independent decisionmaking of each individual judge that will determine whether that judge can be influenced by purposeful manipulation or by public opinion. It is also the judicial culture, established by judges themselves, that either encourages or discourages ethical behavior on the part of judges. As U.S. courts debate the value of judicial elections, the role of interest groups in federal judicial selection, and methods for investigating citizen complaints and holding judges accountable for their behavior, Russian courts are addressing such controversial topics as financial disclosure of financial assets and income; court-media relations; judicial education and a host of other issues that influence judges' behavior. The question of judicial independence and the independence of individual judges will always be relevant because judicial independence (institutional and individual) depends on so many factors. Some of these factors such as judicial selection criteria, the content of judicial education and the methods used to investigate, act upon and report judicial misconduct can

and should be addressed on an ongoing basis. Thankfully, the ever-changing climate and continuous efforts of both the Russian and American judiciaries will offer ample opportunity for sharing experiences and lessons in the years to come.

*This research was conducted in the Federal Judicial Center (Washington, DC) in 2006 within the framework of the program "U.S. — Russia Experts' Forum". The program was supported by the US State Department and administrated by IREX.*

# 3. THE RULE OF LAW AND ECONOMIC DEVELOPMENT

**Moscow Rule of Law Symposium White Paper:**

## THE RULE OF LAW AND ECONOMIC DEVELOPMENT: A CONSTITUTIONAL ECONOMICS APPROACH

*«Moscow» working group of the Moscow City Chamber of Advocates for preparation of the 6 of July, 2007 Moscow Rule of Law Symposium of the International Bar Association together with the Constitutional Court of the Russian Federation and three Russian bar associations*

### Recent Rule of Law Global Initiatives

The «rule of law» is becoming a mainstream and global 21st-Century concept thanks to combined and individual efforts undertaken by both the International Bar Association and the American Bar Association.

This is an important initiative, made timely by the independence of a substantial majority of the world's «colonial» nations and the emergence of twenty-one new states from the former Soviet Bloc. One important aspect of the rule of law initiatives is the study and analysis of the rule of law's impact on economic development. The Rule of Law movement can not be fully successful in transitional and developing countries without a more or less certain answer to the question: does the rule of law matter for economic development or not?

In 2005 the International Bar Association (IBA) and its President Francis Neate originated the worldwide rule of law movement with the global distribution and publication of a September 2005 IBA Rule of Law Resolution. In November 2005 the American Bar Association (ABA) started its own rule of law initiative with the International Rule of Law Symposium in Washington D.C.

The next important step was a jointly-sponsored ABA-IBA Rule of Law Symposium in Chicago in September 2006. The next IBA event was our Moscow Rule of Law Symposium on July 6th, 2007, which will be followed by a Rule of Law Symposium in Singapore on October 19th, 2007 at the IBA Annual Meeting.

Our working group considered the preparation of materials for the «Rule of Law and Economic Development» panel at the Moscow Symposium an important opportunity to involve more experts worldwide into the discussion on this issue, and which may be useful with respect to the «Rule of Law and Social and Economic Development» panel discussion in Singapore and for further development of ideas and recommendations in the area of rule of law and economics.

## Finding a Common Definition of «Rule of Law»

The rule of law is especially important as an influence on economic development in developing and transitional countries. However, to date no clear and global definition of «rule of law» has been articulated that can be recognized and easily translated into all languages and cultures. In many ways, this reminds us of the global discussion on «corporate governance» that was initiated by multilateral institutions and developed markets in the mid-1990s. This term had an intuitive meaning for developed markets, but did not translate into other languages and was confusing to the audience in emerging markets. Today that term has become an understandable and mainstream concept in most countries due to development of its definition and applied meaning.

To date, the term «rule of law» has been used primarily in the English-speaking countries. Frankly, the «rule of law» doctrine is not yet fully clarified even with regard to such established democracies as, for instance, Sweden, Denmark, France, Germany, and Japan. Therefore the task to clarify the definition is important. In Russia, for instance, the definition of «legal state» (law-governed state) derived from German legal tradition is very close to the rule of law concept and is an important principle in the text of the Russian Constitution adopted in 1993.

A common language between lawyers of common law and civil law countries is critically important for the rule of law. This is not purely an

academic task. The recent rule of law movement may be characterized as an amazing effort of the world legal community to clarify and virtually enforce worldwide through national bar associations the «ideological» and almost spiritual legal concept of the rule of law.

## Inclusive Approach to a Rule of Law Discussion

In connection with broadening of the rule of law discussion and implementation to a worldwide legal community, we believe it is necessary (even critical) to shift the focus of the discussion from merely corporate law and attraction of foreign investment to a broader discussion that encompasses aspects of domestic economic prosperity and well-being. Consideration of the rule of law as a mechanism for attraction of foreign investment may be misunderstood by the legal communities in transitional and developing countries as something «foreign» and even imperialistic or paternalistic. Many countries, especially in Asia and Latin America, have not met strict rule of law criteria but in fact successfully attract substantial foreign investment due to political, market perception and economic potential. Many emerging markets, such as Russia are less interested in foreign investments than in the development of their own domestic economy which will ensure stability as foreign investment ebbs and flows.

The Rule of Law and Economic Development Approach puts forward a goal of promoting the rule of law concept in many countries around the globe. In order to make it efficient and successfully implemented on the local level we will inevitably have to take into account diversity of the countries and their legal systems. Therefore, it is important to adopt several tailored approaches that help establish the rule of law worldwide.

## Application of the Constitutional Economics Analysis

We believe that one of the appropriate directions for Rule of Law and Economic Development study to expand beyond a business and corporate law perspective is in connection with the fundamental principles introduced by the constitutional and institutional analysis. This constitution-

al approach is not purely theoretical, but should be utilized to serve more practical issues discussed within the Rule of Law concept.

Initial implementation of the Rule of Law as it impacts economic development will naturally occur at the constitutional level, and this level of study provides an early commonality among countries that is not the case for corporate law. Constitutional law includes textual provisions of a Constitution, constitutional principles, «constitutional» precedents and decisions of the supreme national courts[1], international human rights treaties and conventions, and legal practice of international courts. Corporate laws vary significantly across countries. A major source for analysis could be provided by the constitutional principles and texts that bear a lot more similarities among the countries positioning themselves as democracies. For instance, corporate law in civil law and common law countries has significant differences, whereas constitutional law is basically very similar.

It is well established that constitutional law and any constitution itself have supremacy over other laws. Any country will be more sensitive to the rule of law ideas if they prove their value first of all in respect to the national constitutions and general constitutional principles which are instrumental to create a proper distribution of their present national wealth and existing economic resources.

The Rule of Law and economic development should be deeply studied by the scholars, both economists and jurists in the framework of the rule of law movement. This field of research has been considerably developed in economics by James Buchanan who was awarded the Nobel Prize in 1986 «for applying constitutional and contract thinking to economic theory and the political process.»[2]

It is argued that the constitutional economics approach allows for a combined economic and constitutional analysis and helps to avoid one-sided understanding. The term constitutional economics studies 'compatibility of economic and financial decisions within the existing constitutional framework and the limitations or the favorable conditions created thereby.»[3] It could

[1] Final instance national court for constitutional matters

[2] http://www.nobel.se/economics/laureates/1986

[3] Peter Barenboim, Constitutional Economics and the Bank of Russia, Fordham Journal of Corporate and Financial Law, Vol. 7, Number 1, 2001, p. 160.

be characterized as a practical approach enabling application of the tools of economics to constitutional problems.[1]

Constitutional economics studies such issues as proper national wealth distribution. It also includes budget spending on courts, which is completely controlled by the executive power in many transitional and developing countries. This undermines the principle of «checks and balances» on power and causes the most critical financial dependence of the judiciary. One solution could be allocation to the judicial system of a fixed percentage of annual governmental expenditure. In Costa Rica, for instance, 6% of the annual federal budget must be spent on the judicial branch according to the constitutional provision.

Another important area that constitutional economics covers is a latent form of governmental spending on the judiciary in the form of privileges (free cars and country houses, etc). Such system is completely outside the realm of transparency and creates a precedent for the corruption of the judiciary by the executive authorities. In this situation, an opportunity to «trade» such privileges or even officially allocated funds is read as the price for judicial flexibility and loyalty to governmental interests. Interestingly, the legal system of Belgium distinguishes two methods of corruption of the judiciary: governmental through budget expenditures and privileges (the most dangerous form of corruption), and private corruption. State corruption in judicial area will make it almost impossible for national business to facilitate growth and development of the national market economy. It will also significantly limit any country opportunities to share benefits of the World market economy.

This example proves once again that without a proper constitutional economics approach to the «Rule of Law and Economic Development» it will be difficult to create any kind of index to measure the real existence of the separation of powers in any national legal system.

## Recommendations

Based on the ideas stated above and with appreciation for the hard and significant work already done, we would like to suggest certain addi-

[1] Christian Kirchnez, The Principles of Subsidiary in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics, 6 TUL. J. INT'L. & COMP. L. 291, 293 (1998).

tional approaches for expanding the Rule of Law and Economic Development work.

Work to articulate and agree a definition of «rule of law» that will be understood and able to be translated into many languages and cultures

Make a special reference to constitutional law and constitutional economics within the Rule of Law agenda issues discussed above, including proper distribution of national wealth, independence of the central banks, financing of the judicial system and others

Invite both lawyers and economists to participate in discussion of the outlined issues of the Rule of Law and Economics using constitutional economics approach as well as other methodology. Such approach will undoubtedly encourage most ambitious Western economists as well as experts from, for instance, Russia and India to participate in the Rule of Law and Economic Development, and provide a multi-perspective approach to these very complex problems.

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# NOTE RELATING TO A MOSCOW RULE OF LAW SYMPOSIUM WHITE PAPER ON THE RULE OF LAW AND ECONOMIC DEVELOPMENT

As promised, a few spontaneous reflections:

**Inclusive Approach to a Rule of Law Discussion**: You believe that it is necessary (even critical) to shift the focus of the discussion from merely corporate law and attraction of foreign investment to a broader discussion that encompasses aspects of domestic economic prosperity and well-being. I fully agree.

Rule of law is a very broad concept and cannot be limited to corporate law etc. It actually permeates every aspect of an organized society. My 23 years in the Judiciary and the Ministry of Justice taught me that the system of laws and corresponding institutions in a society is a tremendously complex web. It goes without saying that rules are necessary in many sectors of society and that these rules must be respected.

I just returned from a major international conference held annually here in Sweden — The Tällberg Forum. During the discussions I was struck by frequent comments from participants from Asia that they did not appreciate the «Western bullying». We should therefore be careful not to offend anyone but rather involve those in need of assistance in the discussions and certainly in the planning of any activities.

Furthermore, in a country where there is a need to strengthen the rule of law, it is not self evident in which sector of the legal system the work should begin. This is a matter that has to be agreed upon with the government or Parliament or other competent national authority as appropriate.

That said, I often make the point that strengthening the rule of law might attract foreign investment to the benefit of the country. But this is a byproduct of a work that has much broader aspects. For example, unless you have a proper tax law and tax administration it is not possible for the host coun-

try to establish and fund the institutions (various administrative authorities and courts) that are necessary for the administration of a state under the rule of law. Seen in this perspective, the fact that such institutions also offer a safer environment for foreign investors is a secondary element.

This means that you have to adopt a multifaceted approach in the work to establish the rule of law worldwide. Furthermore, this can be done only through a multitude of projects. Such projects should be identified in a dialogue between those in need of assistance and those who can offer it. It is against this background that I believe that we should try to establish a global marketplace for legal technical assistance.

**Application of a Constitutional Economics Analysis**: An analysis of the constitution of a country that is offered legal technical assistance is a sine qua non. Basically, any piece of legislation to be enacted must be analysed against the constitution. And this analysis must not only be limited to the provisions on the distribution of the legislative powers in the country, i.e. whether the competence to legislate in a particular case rests with the Parliament, the government, or with any other competent authority at the national level. It must also be analysed against the substantive provisions of the constitution, e.g. to what extent it allows limitations of fundamental rights and freedoms. And this applies irrespective of whether the constitution is a written constitution, as is the case in most countries, or is formed by custom, as in the UK.

I agree with the comments that any country will be more sensitive to rule of law ideas if they prove their value first of all in respect to the constitution and general constitutional principles. However, depending on how sophisticated the applicable constitution is, the rule of law work may even provide evidence that there are constitutional issues, even lacunae, that must be addressed in the process.

The comments, that spending on courts completely controlled by the executive power,

point to a general problem, which I had reason to study some 25 years ago when I was involved in the preparation of what later became the Basic Principles on the Independence of the Judiciary that were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Principle 7 reads as follows:

«It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.»

I am afraid that there is no ideal system when it comes to financing a national court system. (The same is actually true also with respect to appointment of judges.) Obviously, Parliament would have to make the ultimate decision, since the courts are financed through taxes. The question is to what extent the government should be involved. In my own country, the budget for the courts is actually presented by the government to Parliament. I believe that this matter could be studied in more detail. It should definitely be discussed with the host country since, basically, it is for that country to decide. By definition this is a constitutional question.

**The first recommendation** of the Moscow paper to articulate and agree on a definition of «rule of law» that will be understood and able to be translated into many languages and cultures:

I refer to my address at Lund University on 31 May. I do not believe that it is worth while trying to develop a definition. Rather, one should try to identify some basic elements that would be necessary ingredients in a system under the rule of law. I believe that Bill Neukom and his American Bar Association (ABA) team is engaged in this work, and I assume that the meetings in Prague and Moscow are intended to provide input in this process.

**The second recommendation** of the Moscow paper to make a special reference to constitutional law and constitutional economics within the Rule of Law agenda:

This should be done. Depending on whom you ask you will get very different answers with respect to what elements should be included. I attach a paper that I prepared for ABA on 30 January 2007 relating to the topic.

The following are four elements that I often mention as necessary in a state under the rule of law:

Democracy (which of course in some cases will have to be a goal);

Proper legislation (which means **inter alia** that it upholds international human rights standards);

Institutions to administer the law, including the court system; and

Individuals with the necessary integrity and knowledge to manage those institutions, including independent and impartial judges.

A colleague of mine, a professor of finance law, prefers the following enumeration:

Proper legislation and competent institutions;
A functioning banking system;
A possibility to register titles to land; and
A proper tax system.

**The third recommendation** to invite both lawyers and economists to participate in discussion of the outlined issues of the Rule of Law and Constitutional Economics:

These topics are certainly interconnected. However, I think that it is important to make a distinction between discussions of a more strategic nature at the national level, were also the World Bank and other international institutions would be involved, and the kind of projects in which members of the International Bar Association can engage.

**Russian specifics**: Here I do not have much to add. The independence of the Central Bank is of course an important issue. Basically, I believe that this is a constitutional matter. The discussion on significance of the budget process is perhaps more political science than rule of law. What the constitution must contain, I imagine, is a Bill of Rights. Here, the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights are often used as models. Budget allocation is basically a political matter and is hardly suitable for legislation (by which I mean rules of general application for a foreseeable future). The fact that in some countries the annual budget is issued through legislation is not relevant for this position; it is a technical matter. Also in this situation the disposition of the annual budget is a political question. Those who make the decisions will be held responsible at the next general election, if not sooner.

*Attachment*

**Elements relating to the concept «Rule of Law»**

Informal working paper compiled by Hans Corell on the basis of a more elaborated paper (in Swedish) by Swedish government officials. The purpose of the paper is only to facilitate a discussion in a preparatory meeting within the American Bar Association multidisciplinary Rule of Law Meeting on 28 February 2007

In connection with a seminar in the Swedish government office in January 2007 my attention was drawn to the following elements that might be of interest in our planning of the future work for an international rule of law movement.

The material in the paper is based on the concept *rule of law* within the UN, the EU, the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE).

**The United Nations and the rule of law**

*UN*

« Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law»

Universal Declaration on Human Rights, Preamble, second paragraph

To strengthen respect for the rule of law in international as in national affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties.[1]

*United Nations Millennium Declaration*

*The reports of the Secretary-General*

In the Secretary-General's report *In larger freedom — towards development, security and human rights for all*[2] three important priorities are mentioned for the work of the UN: *rule of law*, human rights and democracy. The UN Charter acknowledges these three interdependent components. The Secretary-General has dealt specifically with the *rule of law* topic in two reports, *Strengthening the rule of law* and *The rule of law and transitional justice in conflict and post-conflict societies.*[3]

*The Secretary-General's report Strengthening the rule of law (2002)*

In the report it is emphasized that the responsibility for coordinating UN activities in the field of human rights, democracy and *the rule of law* rests with the UN High Commissioner for Human Rights (HCHR). The Commissioner has pointed to the strong connection between human rights

[1] A/RES/55/2

[2] A/59/2005, In larger freedom

[3] A/57/275, Strengthening the rule of law (2002) samt S/2004/616, The rule of law and transitional justice in conflict and post-conflict societies (2004)

and *the rule of law* and the importance of *the rule of law* for ascertaining respect for human rights. In his report, the Secretary-General presents certain core elements that must be components of *the rule of law*:

Independent judiciary

Independent national human rights institutions

Defined and limited powers of government

Fair and open elections

A legal framework protecting human rights and guidelines governing the conduct of the police and other security forces that are consistent with international standards[1]

*The Secretary-General's report The rule of law and transitional justice in conflict and post-conflict societies (2004)*

In this report, the Secretary-General stresses that it is important that the international community is in agreement with respect to the elements that are essential for the implementation of *the rule of law*.

«Principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, an which are consistent with international human rights norms and standards. It requires as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, procedural and legal transparency.»[2]

The Secretary General concludes that together with the UN Charter, human rights, international humanitarian law, international criminal law and international law concerning refuges are the central sources of law in the development of *the rule of law*. These norms and standards are accepted all over the world, irrespective of whether the legal system is based on common-law, civil law or Islamic traditions. In other words, these norms are universal.[3]

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[1] Strengthening the rule of law, p 1.

[2] ibid. p. 6.

[3] ibid. p. 9.

**The European Union and the rule of law**

«The primacy of the law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights» [1]

Commission Communications to the Council and the European Parliament 1998

In the cases *Van gend & Loos* and *Costa vs. ENEL* of the European Court of Justice has ruled that «the EEC is governed by the Community legal rules that are binding upon its Member States with supremacy over national law and direct effect upon its citizens».[2] In the case *Les Verts v. Parliament*[3] the same court concludes that the EEC is «a Community based upon the *rule of law*, inasmuch as neither its Member States, nor its institutions can avoid a review of the question whether the provisions adopted by them are in conformity with the basic constitutional charter the treaty».

*EU*

In *Communications to the Council and Parliament (Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP states)* the Commission describes *the rule of law* as follows:

«The primacy of the law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights. The principle of placing limitations on the power of the State is best served by a representative government drawing its authority from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers. It implies, for example:

A legislature respecting and giving full effect to human rights and fundamental freedoms

An independent judiciary

Effective and accessible means of legal recourse

A legal system guaranteeing equality before the law

[1] (COM (98) 146), Se ockse, http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/presentation_rule_of_law.pdf

[2] Case 26/62 (1963) ECR 1, Case 6/64 Costa v. ENEL (1964) ECR 585.

[3] Case 294/83 Les Verts v. Parliament (1986) ECR 1339, 1365 p. 23.

A police force serving the law

An effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society»[1]

Reference should also be made to Council Regulation (EC) No **975/1999** of 29 April 1999 laying down the requirements for the implementation of development cooperation which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, and to Council Regulation (EC) No **976/1999** of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries. The enumeration of activities that the EU should perform in order to strengthen the *rule of law* contains the following:

«2. Supporting the processes of democratisation, in particular:

(a) Promoting and strengthening the rule of law, in particular upholding the *independence of the judiciary* and strengthening it, and support for a humane prison system; support for constitutional and legislative reform; support for initiatives to abolish the death penalty;

(b) Promoting the *separation of powers*, particularly the independence of the judiciary and the legislature from the executive, and support for institutional reforms;

(c) Promotion of *pluralism both at political level and at the level of civil society* by strengthening the institutions needed to maintain the pluralist nature of that society, including non-governmental organisations (NGOs), and by promoting independent and responsible media and supporting a free press and respect for the rights of freedom of association and assembly;

(d) Promoting good governance, particularly by supporting *administrative accountability* and the *prevention and combating of corruption*;

(e) Promoting *the participation of the people in the decision-making process* at national, regional and local level, in particular by promoting the equal participation of men and women in civil society, in economic life and in politics;

[1] COM (98) 146 s 4.

(f) *Support for electoral processes*, in particular by supporting independent electoral commissions, granting material, technical and legal assistance in preparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, in the electoral process, and by training observers;

(g) Supporting national efforts to *separate civilian and military functions*, training civilian and military personnel and raising their awareness of human rights;»[1]

**International organizations**

Reference could be made to the joint statement by the United Nations, the Council of Europe and the OSCE from February 2005, in which they pledged to work together to strengthen *the rule of law*.[2]

*The Council of Europe*

«Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy»

The Charter of the Council of Europe, preamble paragraph three

*The Organization for Security and Cooperation in Europe (OSCE)*

«[The participating States] consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme values of human personality and guaranteed by institutions providing a framework for its fullest expression. «[3]

1990 OSCE Copenhagen Document, par. 2, OSCE Commitments relating to the rule of law

Some components in the OSCE *Commitments relating to the rule of law:*

«(5.3) — the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;

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[1] Emphasis added.

[2] Multilateral organizations rule of law pledge, http://press.coe.int/cp/2005/078a(2005).htm

[3] http://www.osce.org/documents/odihr/2002/02/2156_en.pdf

(5.4) — a clear separation between the State and political parties; in particular, political parties will not be merged with the State;

(5.9) — all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;

(18.1) Legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or trough elected representatives.»

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**Geoffrey Vos**
*Chairman of the Bar Council of England and Wales*

# RULE OF LAW AND ECONOMIC DEVELOPMENT

## Introduction

This morning, Francis Neate has already grappled with the true meaning of the 'Rule of Law'. One thing is for sure: there will always be as many definitions as there are lawyers speaking about it. Just this year, there have been 3 new and authoritative definitions that I have come across, in addition to the IBA resolution to which Francis has referred. I have put these three definitions in an appendix to this paper so that 'rule of law definition junkies' can study them at leisure. They emanate from the American Bar Association, Lord Bingham, the senior Law Lord in England, and an important and widely supported UK think tank called 'Justice'.

I do not wish, however, to say any more this afternoon about definitions. But a quick glance at the appendix will show that definitions vary in terms of their parochial content. Some are so general as to be hard to interpret, because they have attempted universality. Some are so specific as to be inapplicable outside the UK or Europe or the US. This problem has a bearing on what I shall be saying later.

I want to address a very important question for lawyers practising in this country, namely how does a country's perceived adherence or non-adherence to the rule of law affect its economic development? There are many examples around the world to draw upon in this debate.

First, you might ask about my qualifications for considering this thorny issue. They are probably somewhat thin. I am basically a commercial lawyer. But over the last few years, I have had quite a lot to do with the Bar Council's international activities and with its human rights agenda.

The English Bar is privileged to be invited to practice as advocates and advisers in many counties overseas. We act both in overseas Courts and Tribunals when temporarily admitted to do so, in international Courts and

Tribunals, and in advising corporations and individuals from very many parts of the world. I have tried to do as much as I can to enhance the Bar's international profile generally.

I believe that we have much to offer as a profession, but I also believe that we have a great deal to learn from the overseas jurisdictions in which we operate. It enables us to gain a valuable international perspective of legal business. It is from that perspective that I want to talk this afternoon.

## What do we mean by adherence to the Rule of Law?

This is a preliminary. Before we can consider the effects of adherence to the Rule of Law, we must understand what we mean by such adherence. As Francis Neate pointed out earlier, there is probably no country that can claim total adherence to the Rule of Law. And many would question the right of people in glass houses to throw stones.

I think we can all acknowledge that there are obvious gradations of adherence to the Rule of Law: from totalitarian states where numerous people disappear for political reasons at one extreme, to democratic countries where trial procedures are less than perfect as an example at the other extreme — and all stages in between.

It is undoubted that all lawyers have a central duty to do everything we can to uphold the Rule of Law. Few of us would question that. Our former Attorney General, Lord Goldsmith QC, who we had hoped would be addressing this symposium, has powerfully supported this proposition. Indeed, how can lawyers justify their existence except by supporting the supremacy of the legal system within which they operate?

But adherence to the Rule of Law is not even mainly in the hands of the lawyers. We all know that politics and politicians play the leading role in adherence. Indeed, it is the politicians who are normally responsible for breaking down or, at least, finding ways to circumvent the implementation of the Rule of Law.

I want, however, to make one thing crystal clear. Some of the things I am going to say may sound as if I am depreciating the value of the Rule of Law. I am certainly not. I regard the Rule of Law as fundamental, and the lawyers' duty to uphold the Rule of Law as the substratum of our pro-

fession. None of that, however, means that, whilst we must all work towards a day in which the Rule of Law is adhered to in all nations, we cannot be pragmatic. It is pointless to refuse to acknowledge reality, and in reality, many (probably most) nations are way behind in adherence to the Rule of Law.

## How does non-adherence to the Rule of Law affect economic development?

What I want to do this afternoon is to examine various aspects of the Rule of Law to see how non-adherence to them affects economic development.

I will concentrate on three main areas borrowed from Lord Bingham's 6th, 5th and 4th principles:-

(1) *Proportionate political power*: Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers.

(2) *Fair judicial systems*: Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

(3) *Human rights*: The law must afford adequate protection of fundamental human rights.

## Proportionate political power

«*Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers.*»

'Predictability' is the key to this element of the Rule of Law. Investors and businesses are always looking for stability. They want a business situation without unpleasant surprises.

It is obvious that the unpredictable exercise of political power does not create a favourable investment environment. It leads to the potential for expropriation, and excessive Government involvement in busi-

ness dealings. Bankers looking to lend for the purposes of overseas investments will want a better return if their money is to be hazarded in such a risky situation.

In purely economic terms, the nature of the Government may not matter as much as might at first appear. Numerous examples demonstrate that huge economic growth is possible without democracy. China is the obvious case. Of course, businesses investing in China are aware of the possibility of disproportionate exercise of political power, but they hope and assume it will not happen. Truthfully, they mostly do not expect it to happen. There is a widespread belief that the Chinese Government is carefully controlling liberalisation (and everything else) in a way that many bankers and professional observers admire. There is, therefore, sufficient predictability to allow massive investment and sufficient Government proportionality to give overseas businesses confidence in their future in China.

China has recently introduced an insolvency law that enables companies to be liquidated for the benefit of creditors rather than workers. This is the kind of incremental development which provides huge encouragement to investors.

It is also interesting to note that overseas law firms and other professionals investing in China are not, as I understand it, generally making much money there as things stand, but we do not see signs of their wanting to pull out. They think it is crucial to stick around until creeping liberalisation enables them to participate profitably in the huge economic development in that country.

In my professional practice, I have always undertaken a fair amount of insurance and reinsurance work. And I well remember one of the first such cases I ever did in the 1980s. It concerned the political risk insurance of Saddam Hussein's contract for the building of a number of nuclear air raid shelters for, if I remember correctly, some $250 million — a fairly large sum in those days. Saddam had not paid some part of the price, and insurers had been subrogated to the banks' claims. Much litigation ensued, but eventually the unpaid instalments were duly paid by Iraq. That was, of course, some years before the first Gulf War.

Another case concerned an Israeli timber concession in Liberia exploiting nearly one tenth of the area of that country. The concession insured against political risk, and made a claim under the policy when it was ex-

propriated by Charles Taylor's insurgent forces. The question was whether the terms of the policy were engaged, since Charles Taylor occupied that part of Liberia but had not formally become the Government at that stage. The question was whether his forces were the de facto Government of Liberia for the purposes of the policy.

The lesson to be learnt is that political stability is a crucial feature of what investors are looking for. Without it, contracts do not get performed, political risk premiums rocket sky high, and investors are unwilling to commit to long term projects.

One would imagine that a stable democratic government adhering closely to all aspects of the rule of law would create the most attractive environment for foreign investment and, therefore, local economic development. History has not necessarily demonstrated this to be the case. China is, of course, the classic example. But China does have a stable Government, if not a democratic one. And the likelihood of political change is probably less in China than in some democratic states.

Conversely, instability can be created in even the most democratic of states. The social agenda of the recently elected democratic government in France will, I have no doubt, produce some very uncomfortable years ahead for the economy in that country. Of course, business may be prepared to look ahead to the sunny uplands after Sarcozy's reforms.

So, economic development probably depends primarily on stability, rather than strict adherence to the Rule of Law. The reasonableness of the exercise of Government powers (to which Lord Bingham pointed as an element of the Rule of Law) does, of course, contribute to stability in economic terms. It may be, in fact, that this is a key requirement for the Rule of Law as Lord Bingham has pointed out in his second rule: «*Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion*».

In essence, too much discretion creates uncertainty. Uncertainty creates instability. Instability produces an unattractive environment for investment, whether it be internal or external. The application of appropriate laws, rather than fickle discretions, is what is required to give commercial men the confidence they require to produce economic growth.

## Fair judicial systems

«*Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve*.»

How important then is a developed and reliable system of private law? The answer is that such a system is crucial to the Rule of Law, but probably less important to the cause of economic development. The reason I say this is because many countries worldwide have attracted significant investment without any such legal system. China is again the best example. The availability of international arbitration procedures makes the municipal private law less important. In China, Stockholm arbitration has been widely used for many years. Provided outside investors can litigate any disputes outside the country in an international arbitral tribunal agreed before the dispute arises, they are not so concerned about the domestic legal structures.

That said, of course, unstable Government can affect the ability to enforce arbitral awards, and can render such awards nugatory, so Government and political stability is in this area also crucial.

Again, I do not mean to negate the importance of proper domestic dispute resolution procedures — only to point out that there are work-arounds if such procedures do not exist.

By way of digression, I might take a moment to point out that the English Bar has made great efforts, as some of you may know, to help other countries establish respected and respectable international tribunals to enhance their dispute resolution procedures. We have set up such a tribunal in Dubai led by a retired English Commercial Judge; there are talks aimed at something similar in Kazakhstan.

## Human rights

«*The law must afford adequate protection of fundamental human rights*».

Human rights are a very thorny issue. Plainly investors do not want themselves to be involved in countries which flagrantly violate human rights. But do these abuses actually impede economic development? The Chinese model would argue that they do not. I do not agree. I am sure that invest-

ment in China would be greater and the terms would be less onerous if human rights were better adhered to in that country.

This brings into sharp relief the distinction between economic development in India and in China. Many suggest that the long-established democracy in India, and its positive human rights record, makes the development of the economy in India more resilient and durable than it is in China. It certainly makes the growth rather slower in India. But this maybe a good thing if sustainability is what we are looking for.

The widely held belief amongst the multitude of businesses and professionals queuing up to get a slice of Chinese economic action is that, it is only by non-Communist engagement in China that it will be persuaded to improve its approach to human rights. This may well be a unjustifiably optimistic view, motivated more by the desire for profit than by any genuine assessment of the likelihood of the Chinese Government's willingness to move towards any kind of real respect for human rights.

## Conclusions

Some of you may find what I have had to say depressing. It leads to the conclusion that business is not obviously principled. Probably the more pragmatic amongst us had realised that long ago.

I conclude that the Rule of Law can certainly enhance economic development, but is not, in itself, always a prerequisite. Indeed, as I have said, the pace of economic development in the two fastest growing economies in the world is slower in the one that adheres more closely to the Rule of Law.

Leaving India and China aside for a moment (if any of us can really afford to do so), the relationship in other countries between adherence to the Rule of Law and economic development is probably closer. I believe this is primarily because of the effect that the Rule of Law generally has on political stability. Political instability and unpredictable discretionary Governmental decisions sound the death knell of economic progress. Business confidence can only flourish where the future can be confidently predicted. The confidence is everything.

You may wonder why I have said so little about Russia. There are two reasons. First, like Francis Neate, I am unwilling to presume to tell my

hosts what they know far better than I. Secondly, I am looking forward to hearing Russian views on the questions I have raised.

The safest, if not the most accurate, position for Russia to adopt is that adherence to the Rule of Law will be necessary for stable Government, and, therefore, for sustainable, long term economic development. Certainly as a lawyer who believes passionately in human rights and the Rule of Law, I hope that Russia will adopt this approach.

I conclude by coming back to something I mentioned earlier. It seems to me that Lord Bingham's second principle is crucial to the Rule of Law in the context of economic development If «*[q]uestions of legal right and liability [are] ordinarily ... resolved by application of the law and not the exercise of discretion*», commercial men will have confidence in the future stability of the economy.

If, as for example in many countries in Africa, everything is resolved by political decisions in the exercise of presidential or official discretion, the future is uncertain and unstable, and the economy has no foundation for successful growth. If you over-regulate as in some countries in South-East Asia and Saudi Arabia, the balance is wrong again, but not in a way that will necessarily jeopardise the economy.

*Attachment*

## Rule of Law Definitions

**Lord Bingham delivering the Sir David Williams lecture on 16th November 2006: [2007] 66 CLJ 67**

1. Lord Bingham suggests 8 sub-rules:-

(1) The law must be accessible, and so far as possible, intelligible, clear and predictable.

(2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

(3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

(4) The law must afford adequate protection of fundamental human rights.

(5) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

(6) Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers.

(7) Adjudicative procedures provided by the state should be fair.

(8) The existing principle of the rule of law requires compliance by the state with its obligations in international law.

**American Bar Association: Bill Neukom, Vice President of the ABA**

2. Four principles as follows:-

(1) A system of self government subordinate to the citizenry.

(2) A system based on fair, public, understandable and resilient rules (laws).

(3) A robust and accessible legal process providing the framework for transactions and dispute resolution.

(4) Diverse, competent and independent lawyers and judges.

**Justice's Manifesto for the Rule of Law**

3. Justice has seven principles:-

(1) The UK should adhere to international human rights standards both in its domestic and foreign policy.

(2) The independence of the legal profession and the judiciary must be upheld

(3) Due process and the right to a fair trial must be protected.

(4) Every person has the right to equality before and under the law.

(5) Every person in the UK, however poor or disadvantaged, has the right of access to justice

(6) Parliament should have greater powers to scrutinise legislation and hold ministers to account.

(7) Greater cooperation between European Union member states must be accompanies by greater protection for the rights of individuals affected.

**Peter Barenboim and Natalya Merkulova**

# 25TH ANNIVERSARY OF CONSTITUTIONAL ECONOMICS: THE RUSSIAN MODEL AND LEGAL REFORM IN RUSSIA

*If we do not enforce legal reform in Russia now, all other ongoing reforms, especially the creation of legal, constitutional economy will eventually freeze in their tracks.*

Valery Zorkin,
President of the Constitutional Court of Russia

## 1. Introduction

The 21st century will witness a significant development in constitutional economics. It is almost impossible to enforce democracy and the rule of law in transitional and developing countries without finding a way to help facilitate economic development and visibly increase prosperity of individuals. The Rule of Law movement has spiritual grounds but without its direct implications for the economic development it may be viewed as quite utopian in most of the developing countries. We believe that legal reform is a vital mechanism to facilitate growth in transitional economies and a practical instrument to enforce the rule of law in developing countries.

In the epigraph to this article Justice Valery Zorkin acknowledges the connection between legal reform and constitutional economics. However, the importance of constitutional economics is still underestimated and misconceived in jurisprudence. We argue that constitutional economics is a vital bridge between economics and the rule of law, and serves as a connecting point for the rule of law and legal reform worldwide.

The term «constitutional economics» was suggested (exactly 25 years ago) by the American economist Richard B. Mackenzie as a description of the main topic of discussion at a conference held in 1982 in Washington, DC. The Mackenzie's coinage was later utilized by another American economist James Buchanan to become a name for the new research meth-

odology and theoretical approach[1]. Constitutional economics studies the «compatibility of effective economic decisions with the existing constitutional framework and the limitations or the favorable conditions created by that framework.»[2] It could be fairly characterized as a practical approach, to apply of the tools of economics to constitutional matters[3]. For example, a major concern of every nation is properly allocated of available national economic and financial resources. The legal solution to this problem falls within the scope of constitutional economics.

In order to start discussion about the rule of law and the ways of its implementation worldwide, we believe it is necessary (even critical) to shift the focus of the analysis from merely corporate law and problems of attracting foreign investment to a broader discussion that encompasses aspects of domestic economic prosperity and well-being. Consideration of the Rule of Law as a mechanism for attracting foreign investment may be viewed in transitional and developing countries as something «foreign» and even imperialistic or paternalistic. Many countries, especially in Asia and Latin America, have not met strict rule of law criteria but in fact successfully attract substantial foreign investments due to political recognition, market perception and economic potential. Many transitional countries, such as Russia and some other oil-producers are less interested in foreign investment than in the development of their own domestic economy which will ensure stability as foreign investments ebb and flow. In fact, some developing countries often do not have anything to offer in order to attract foreign investments.

We believe that one of the ways for the Rule of Law and economic development to expand beyond the business and corporate law perspective is through adopting fundamental principles resulting from constitutional and institutional analysis. The constitutional approach is not purely theoretical and is meant to be utilized to serve more practical tasks discussed within the Rule of Law concept. A country will be more sensitive to Rule

[1] James Buchanan, The Domain of Constitutional Economics, Constitutional Political Economy, vol. 1, no. 1, 1990.

[2] Peter Barenboim, Constitutional Economics and the Bank of Russia, Fordham Journal of Corporate and Financial Law, Vol. 7, Number 1, 2001, p. 160.

[3] Christian Kirchnez, The Principles of Subsidiary in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics, 6 TUL. J. INT'L. & COMP. L. 291, 293 (1998).

of Law ideas if they prove their value first of all in respect of the constitution and general constitutional principles.

Initial implementation of the Rule of Law in respect of economic development will naturally occur at the constitutional level. This level of study provides a common set of principles for many countries that could not be achieved through corporate law. Constitutional law includes textual provisions of constitutions, constitutional principles, «constitutional» precedents and decisions of the supreme national courts[1], international human rights treaties and conventions, and the legal practice of international courts. In contrast, corporate laws vary significantly across the countries. Corporate laws in civil and common law countries have significant differences, whereas constitutional law is basically very similar. It is well established that constitutions and constitutional law have supremacy over other laws.

It is argued that the constitutional economics approach allows for a combined economic and constitutional analysis and helps to avoid a one-sided understanding. Still, it was noted that the term «constitutional policy» was rather poorly suited to designate the interrelation between economics and constitutions.

Constitutional economics standards for the annual budget process and its transparency are the primary guidance of the Rule of Law. Access of civil society to an effective court system in a situation of unfair governmental spending and executive impoundment of the previously distributed budget resources is critically important for the Rule of Law. The Rule of Law for the budget process is primarily an issue of constitutional and budget laws and then fitters down to specific corporate law principles and rules. Such problems as the size of governmental reserves and central bank independence are key issues for the Rule of Law in Economics for countries in transition.

Constitutions of the majority of states grant citizens a broad spectrum of civil, political, social and economic rights. Most of these rights and freedoms are in UN conventions and other international human rights agreements. This is one of the greatest achievements of the second half of the 20th century. However, the 21st century must ensure that these rights are enforced alongside economic development, which is a critical issue for some 140 or more «new democratic states».

[1] I.e., the final instance national courts for constitutional matters, regardless of formal name.

The American Bar Association *The World Justice Project* confirms this view:

We live in a world with a rule of law deficit. This shortcoming undermines efforts to ensure basic human security, fight poverty, eradicate corruption, improve public health and enhance public education. On the other hand, communities that adhere to and invest in the rule of law can minimize these problems and indeed offer sustainable economic opportunity and fair government.

## 2. Economics and the Rule of Law

a/ James Buchanan

The Rule of Law and economic development has been deeply studied by several economists. This field of research has been considerably developed in economics by James Buchanan, who was awarded the Nobel Prize in 1986 «for applying constitutional and contract thinking to economic theory and the political process.»[1] He is considered to be the founding father of constitutional economics.

Buchanan introduced rich cross-disciplinary concepts of «constitutional citizenship» and «constitutional anarchy». Constitutional anarchy is a modern policy that may be best described as actions undertaken without understanding, or taking into account the rules that define the constitutional order. This policy is justified by references to strategic tasks formulated on the basis of competing interests regardless of their subsequent impact on political structure[2]. At the same time Buchanan introduces the concept of «constitutional citizenship,» which he designates as compliance of citizens with their constitutional rights and obligations that should be considered as a constituent part of the constitutional policy. He also outlines importance of protection of the moral principles underlying constitutional norms.

James Buchanan wrote «the ethics of constitutional citizenship is not directly comparable to ethical behavior in interaction with other persons

[1] http://www.nobel.se/economics/laureates/1986

[2] Buchanan, J. Logical Formulations of Constitutional Liberty. Vol. 1. Indianapolis, 1999. P. 372.

within the constraints imposed by the rules of an existing regime. An individual may be fully responsible, in the standard ethical sense, and yet fail to meet the ethical requirement of constitutional citizenship.» The individual may be faithful, honest, respectful, and tolerant in communication with others. Yet the same individual may not be thinking about maintenance and improvement of constitutional norms.[1]

Buchanan considered the term «constitutionality» in the broadest sense and applied it to families, firms and public institutions, but, first of all, to the state. Most likely, at that time he did not have any allies among lawyers. He emphasized the possibility of analysis and promotion of constitutional economics as driven by economists only.

Buchanan's Nobel lecture quoted the work of the late 19th century Swedish economist Knut Wicksell, who greatly influenced Buchanan's research: «If utility is zero for each individual member of the community, the total utility for the community cannot be other than zero». In epigraph to the chapter of Nobel lecture entitled «The Constitution of Economic Policy» Wicksell states that «. whether the benefits of the proposed activity to the individual citizens would be greater than its cost to them, no one can judge this better than the individuals themselves».

After these citations, we could start to comprehend the basic definition of constitutional economics, found by Buchanan in the Wicksell's book published in 1896 in German, which the former accidentally came across in his university library in 1948. The above discovery happened thanks to the coincidence of two facts. First, the library had once purchased the book by an unknown Swedish economist, and second, Buchanan could read German. Buchanan writes, «Wicksell challenged the traditions of the public finance theory», and this coincided with his own views. The first reaction of Buchanan upon reading the book is also worth mentioning: he immediately had the book translated in English to become widely accessible to the American public.

«Stripped to its essentials, Wicksell's message was clear, elementary, and self-evident. Economists should cease proffering policy advice as if they were employed by a benevolent despot, and they should look to the structure within which political decisions are made. Armed with Wicksell, I, too,

[1] James Buchanan. The Logical Foundations of Constitutional Liberty. Indianapolis, 1999. P. 371.

could dare to challenge the still-dominant orthodoxy in public finance and welfare economics. In a preliminary paper, I called upon my fellow economists to postulate some model of the state, of politics, before proceeding to analyse the effects of alternative policy measures. I urged economists to look at the «constitution of economic policy,» to examine the rules, the constraints within which political agents act. Like Wicksell, my purpose was ultimately normative rather than antiseptically scientific. I sought to make economic sense out of the relationship between the individual and the state before proceeding to advance policy nostrums... The implied approach to institutional-constitutional reform continues, however, to be stubbornly resisted almost a century after Wicksell's seminal efforts.»

Buchanan elevated these problems to the constitutional level, while Wicksell did not advocate the reform of legislative authorities even in the event they justified their financial and tax decisions with a principle other than equity (which he understood as an analogue to the modern concept of «efficiency»). A special place in the Buchanan Nobel lecture belongs to the problem of achieving balance between the economic possibilities of adjacent generations, which, even living concurrently with one another, still do not have equal access to the process of decision-making on financial issues, thus influencing other generations both directly and indirectly.

Buchanan's idea is well illustrated by a Russian example. Old people *de facto*, and those under 18 *de jure* do not have any influence on the current financial policy of the State. As for the yet unborn generations, they will simply have to consume whatever was cooked for them by the «chefs of yesterday» in their former political kitchens. Buchanan believe, and correctly so, that a constitution, intended for the use by at least several generations of citizens, may adjust itself for pragmatic economic decisions, and also balance the interests of state and society with those of individuals and their constitutional rights of personal freedom and private happiness.

In the conclusion to his Nobel lecture James Buchanan compared Knut Wicksell to the legendary constitutional thinker and one of the first American presidents — James Madison. He writes:

«Both rejected any organic conception of the state as superior in wisdom, to the individuals who are its members. Both sought to bring all available scientific analysis to bear in helping to resolve the continuing question of social order: How can we live together in peace, prosperity, and harmo-

ny, while retaining our liberties as autonomous individuals who can, and must, create our own values?»

This philosophical question is in fact close to the subject-matter of constitutional economics. The issue of balance between the rights of an individual and those of the state is the basic issue of democracy in general and of constitutional law in particular. Constitutional economics connects idealistic, forward-looking and sometimes almost utopian, constitutional demands with the practical material conditions of life and in so doing essentially supplements and develops traditional constitutional analysis.

Buchanan clearly prefers the term «constitutional economics» to «constitutional policy» or «political economy». However, when publishing in 1990 a new scientific journal, Buchanan used for its title not «constitutional economics» but more traditional wording «constitutional political economy». (Maybe he did this because the word «constitutional» almost overshadows linguistically the word «economics» in the definition «constitutional economics»).

The constitutional norms and principles, earlier interpreted as limiting factors for rational economic activities, have now turned into permanent cultural values, insistently demanding their maximum possible endowment from the economy. Economists, aided by self-initiated constitutional economics, have «discovered» a world of new concepts and a new area for analysis, where their previous approaches might sometimes fail. Thus, by making this long overdue step without participation of lawyers, a sort of «economic imperialism» resulted not in a «seizure» and annexation of the arid legal fields, but, on the contrary, in an unexpected large-scale intrusion of categories and concepts of constitutional and other types of law into the blossoming gardens of economics that have been showered with Nobel Awards in last decades.

In addition, we should emphasize that it would be rather misleading to approach constitutional economics in the same way as the theory of public choice, which was also developed by Buchanan. In fact, his ideas for constitutions as the fundamental laws of countries have separate and very important practical as well as academic application.

We think that the invasion of economics into the development of legal, political and social disciplines has actually happened due to a fact seemingly unrelated at the first glance. Of all the social sciences including economics, law, management and others the Nobel Prize is awarded only to the econo-

mists. On the one hand, this encourages economists to explore many marginal areas far beyond traditional economics and, on the other hand, pushes many experts from other fields to link their studies to economics. Recently one economist, who wrote a book on sex and its safety, was a little nervous about the suggestion of a reviewer of his book to spend more time with epidemiologists. The title of his remarks was quite symbolic: *The Bedside Economists* (*New York Times Book Review*, July 29, 2007). Actually, we can see «the bedside economists» everywhere in any field of any science and we support such activity because it stimulates a development of other disciplines, including constitutional law. But economic «activism» in the constitutional area can not replace constitutional law as a well-established and solid field of knowledge. Any efforts to avoid cooperation with constitutional lawyers will only create many dead ends on the path of economic research of state and governmental institutions. Time has passed for the old-fashioned division between economics and law, first of all, in the area of governmental economic decision-making, which must be balanced between constitutionally grounded public demand and the real economic capacity.

The 21st century and the third millennium demand complex analysis of issues that go beyond the scope of one discipline, which have increasingly emerged in the last 5-10 years. In this situation economists may and must continue their very useful expansion, whereas lawyers should be encouraged to do the same. For instance, we know quite well that constitutional law experts often ignore and even dismiss developments that take place beyond their area of expertise, even when it is directly related to their work. As a result, judges who actually practice law can not use legal expertise in complicated cases when, for instance, it is necessary to establish a balance between constitutional rights and economic development.

Ex President of the International Bar Association Francis Neate regards the Rule of Law movement, first of all, as a movement inside of the World legal community. In fact, he raises a very important point that national bar associations should be not a self-interested professional organizations but institutions of civil society fighting for the Rule of Law. This is a serious challenge for the bar in the 21st century. But, at least until the Moscow Symposium in July 2007, the IBA had not discussed the relationship between the Rule of Law and economic issues.

In April 2007 a Working Group of the American Bar Association (ABA) issued for limited distribution and purposes of preliminary discussion a

White Paper entitled *The Rule of Law and Economic Development*. It advocates joint work of economists and lawyers on Rule of Law issues and suggests that the Nobel Prize should be awarded not only for economics but also for «law and economics». The paper quotes Jeffrey Sachs that lawyers and economists working together have a great role to play in projects of judicial reform and that the economy is far too important to be left only to the economists.

The ABA President in 2007-2008 Bill Neukom said in August 2006 that the ABA is going to commission «a Nobel-quality study and paper to answer simple, straightforward questions: does the rule of law matter, and how does it matter? Is it truly a platform for economic development.?» Addressing such fundamental requires some common ground for lawyers and economists. Constitutional economics could provide such common ground since it was initially established to embrace economic issues and their constitutional and legal implications. Bill Neukom also expressed willingness to spread the Rule of Law movement beyond the legal community across the globe and link it to such areas as social justice and culture. In fact, he is talking about a new ideology and creation of the Rule of Law movement as an alternative to the old options of capitalism or communism or any other kinds of «ism», in order to make it pragmatic rather than utopian. He seems to be hoping for a miracle, which by definition is possible only because it is impossible. Sometimes an aspiration for «impossible» is the most realistic way to achieve something really great. We believe that the constitutional economics may become in this situation one of the keys which can help this happen.

b/ Richard Posner

If the Bank of Sweden chooses to award a Nobel Prize for law and economics, there is little doubt that the first candidate will be Richard Posner. Another founding father of the combined legal and economic approach Richard Posner emphasized the importance of a constitution for economic development.[1]

He examines the interrelationship between a constitution and the economic growth. Posner approaches constitutional analysis mainly from the

[1] Posner R. The Constitution as an Economic Document. The George Washington Law Review. November 1987. Vol. 56. No. 1 (further references to Richard Posner are made in respect to this paper).

perspective of judges, who constitute a critical force for interpretation and implementation of a constitution, thus de facto creating the body of constitutional law. He emphasizes the importance of constitutional provisions «in setting broader outer bounds to the exercise of judicial discretion».

Thus a judge, when trying a case, is guided firstly by the spirit and letter of the constitution. The role of economics in this process is to help «identify the consequences of alternative interpretations» of the constitution. This is particularly important when we analyze the effect of constitutional law on economic growth. However, Posner argues that constitutional law can not «be made to conform to dictates of economic efficiency». He further explains that «economics may provide insight into questions that bear on the proper legal interpretation». Effectiveness for the sake of effectiveness could not be seen as a stable basis for constitutional development. Therefore a balance between economic efficiency and equity, a fundamental concept of constitutional law, should be sought. In the end, as Judge Posner emphasizes, «the limits of an economic approach to deciding constitutional cases [are] set by the Constitution».

Posner outlines that there are certain costs attributable to rights and other concepts outlined in the Constitution such as federalism or separation of powers. At the same time protection of economic rights facilitated by these fundamental doctrines fosters economic development. In practice, the two are interacting with each other giving either a positive or a negative net effect. Richard Posner argues that separation of powers, one of the fundamental principles of any democracy, bears incremental transaction costs of governing. As a consequence of this dualism a positive effect from economies of specialization and segregation of duties is offset by transaction costs that arise from the effort to keep the powers separated.

Finally, Posner states that economic value of the Constitution is its stability and 'by reducing uncertainty it facilitates investment'. In addition, he argues that 'effective protection of basic economic rights promotes economic growth'. This statement was empirically proved by the works of a Nobel Prize winner Amartya Sen.

c/ Amartya Sen

The concept of the Indian economist Amartya Sen is probably the most deep, elegant and spiritual continuation of the development of constitutional economics. Constitutions are very much spiritual documents focused on the present but even more oriented toward the future, which is

why some people consider many constitutional provisions unrealistic and even utopian. Because of the spirituality of constitutional texts others say that a constitution is like the Bible, in particular the Ten Commandment, or for purposes of this chapter we may say like the Upanishads. Sen, studiously avoiding the language of religion, ends up groping for a faith-free yet faith-based terminology to describe how people can put aside their own immediate material needs in order to enjoy political and legal freedom. But his approach is also strictly scientific. Thus Amartya Sen's approach fits easily within the framework of constitutional economics.

Amartya Sen, a Nobel Prize winner in economics, came to the conclusion in his book *Development as Freedom* that 'even with relatively low income, a country that guarantees health care and education to all can actually achieve remarkable results in terms of the length and quality of life'[1], and therefore economic stability and growth.

According to the Index in the end of this book, Sen does not have a reference to the word «constitution». We found the word «constitutional» just once on p. 157. However, at the same time Amartya Sen gives a deep definition of the essence of a constitution, which can be fully applied to the constitutional economics.

«Political rights, including freedom of expression and discussion, are not only pivotal in inducing social responses to economic needs, they are also central to the conceptualization of economic needs themselves» (p. 154)

Most countries have quite lengthy texts of constitutions. Indian Constitution, for instance, is about 300 pages long. However as the word «constitution» particularly in English has more meanings than just a fundamental law of the country, many American and British economists avoid mentioning it even if they discuss purely constitutional matters.

Sen argues that «use of public resources for purposes where the social benefits are very far from clear»[2] should be eliminated. Thus, an enforceable right in the civil society is an expression of opinion on the allocation of national financial resources through the judiciary, the media or through other democratic institutions is a milestone for the Rule of Law.

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[1] Amartya Sen. Development as Freedom.Oxford University Press. 2001. P. 144.

[2] Ibid. P. 145.

## 3. The Russian Model of Constitutional Economics

The Russian Constitution of 1993 is indeed more than a mere set of declarations, which tended in soviet days to separate constitution from the realities of society. Russian society as a whole needs to exert prodigious efforts to counter the three major negative tendencies –constitutional nihilism left over from the Soviet era; the constitutional infantilism typical of liberal economists and politicians; and the constitutional cynicism which is a recent Russian development. The latter is a particularly serious threat to the development of Russian constitutionalism and stability of the Constitution now in effect. Some politicians are tempted to play with different ideas such moving of the Constitutional Court from Moscow to Saint Petersburg, lifting restrictions on reelection of the President for the third term, the effective liquidation of Russian federalism by lumping together regions wholesale and reducing in fact financial powers of regions, and so on.

The President of the Constitutional Court of Russia Mr. Valery Zorkin published in 2004 an article entitled «The Thesis of Legal Reform in Russia» that calls for development of constitutional economics as a separate research field and an educational course. In addition, Mr. Zorkin emphasized the importance of development of legal reform and constitutional economics as key elements in creation of a legal state (the term used in the Russian Constitution for the Rule of Law).[1] Executive authorities simply ignored his ideas and recently pushed through the Russian Parliament a law on relocation of the Constitutional Court of Russia from Moscow to isolate it from the relatively liberal Moscow legal community.

It has been noticed however that research in constitutional economics somehow slowed down in the West in recent years. At the same time in Russia, India and some other countries the popularity of this approach, in contrast, has been constantly growing in recent years. Economic development poses new challenges for traditional Russian constitutional law. Without timely answers to those challenges Russian constitutional law may soon become an obsolete science and a classroom discipline. This is reinforced by the fact that the international concept of constitutionalism is much broader than the Russian one. The word «constitution» in the English language

[1] Valery Zorkin. The Thesis on Legal Reform (in Russian) // magazine Zakonodatelstvo I Economica (Legislation and Economics). 2004. № 2.

has more accepted meanings, which encompass not only national constitutions, but also charters of corporations, public organizations, and also informal and unwritten rules of various clubs, encounter groups, family traditions, etc. The Russian model of constitutional economics focuses only the concept of constitution in the sense of the Fundamental Law of the State, as is customary in contemporary Russian. In this respect, constitutional economics demands a multidimensional economic strategy within and out of the country, instead of often arbitrary economic decisions made for the sake of momentary benefit without respect to constitutional values. Here we should note that the introduction of constitutional economics in Russia is «stubbornly resisted» by traditional approaches reigning in economics and jurisprudence.

The Russian model of constitutional economics is based on an understanding that it is necessary to narrow the obvious gap between practical enforcement of the economic, social and political rights granted by the constitution and the annual and mid-term governmental economic policy, budget legislation and policies of governmental bodies. It is problematic to have real transparency in the budget process and to establish governmental economic priorities without using constitutional economics as a measure of balance between constitutional economic and social rights and the practical instruments to enforce of constitutional rights.

Twenty five years have passed since the term «constitutional economics» was used for the first time in the West. The July issue of the Russian journal *Vorposy Ekonomiki* (Problems of Economics) (#7, 1997) and the Russian publication of the book entitled «Nobel Prize Winners in Economics. James Buchanan» (M., Alpha Taurus, 1997) introduced «constitutional economics» formally into Russia exactly 10 years ago. The human-established chronology of events and the concept of anniversary can hardly influence anything but human psychology. Still, we cannot help but recognize the timeliness of «constitutional economics» as a new school of economic and legal thought on the eve of the 21st Century and third millennium of history.

Russia is probably the only country where constitutional economics has already been implemented as a separate educational course in hundreds of Moscow schools and in several universities. In 2006 the Russian Academy of Science includes constitutional economics in the list of research areas which a seat may be taken in the Academy. The most comprehensive ba-

sic description of the Russian model of constitutional economics can be found in the textbook for economic and law departments of universities (Petr Barenboim, Gadis Gadzhiev, Vladimir Lafitsky, Vladimir Mau *Constitutional economics.* M, YustitsInform, 2006, [in Russian]). In addition, textbooks on constitutional economics for schools of higher learning were published in 2002 and 2006 and for non economic and legal departments of universities in 2002 and 2003.

Three major sources used for development of the Russian model of constitutional economics are the works of James Buchanan, Richard Posner and Amartya Sen. In addition, one of the leading Russian experts in constitutional law, Moscow State University Professor August Mishin (1924-1993) advocated use of economic issues in constitutional research since 1971. Moreover, one can regard the ideas of ex President of the Central European Bank Jean-Claude Trichet on central bank independence as a source of inspiration for development of a similar Russian approach.

The major characteristics of the Russian model of constitutional economics are as follows:

1. Constitutional economics is a bridge between the Rule of Law and economics;

2. Constitutional economics is a practical and theoretical bridge between economists and lawyers;

3. Economics and constitutional law both have equal claims in the constitutional economic analysis;

4. Constitutional economics is a basis for legal reform in Russia as well as in post-Soviet and other transitional countries;

5. Constitutional economics is developing in three major directions: education; constitutional law and economic theory; and practical methodology for evaluating legislation, especially annual budget legislation;

6. Research is conducted by joint efforts of lawyers and economists;

7. Authors of textbooks in constitutional economics for use in economic and law departments of universities are both lawyers and economists;

Independence of the Central Bank of the Russian Federation is one of constitutional guarantees against the bureaucratic voluntarism of the executive branch and the populism of the legislative branch. The independence of central banks is a relatively new but crucial idea within the theme of Rule of Law and economic development. Richard Posner introduced the term «philistinism» to describe a situation where lawyers are captured by

the slogan: «what I do not know is not knowledge».[1] The term, of course, originates from the Bible, which is not accidental. Lawyers show a little interest in the spiritual roots of modern law. Such attitudes create some misunderstanding, especially as regards the nature of constitutional law and especially in Russia.

Lawyers frequently employ the words «spirit» and «letter» when discussing the text of legislation. However it rarely occurs, at least to Russians that with regard to the Constitution the word Spirit can be stripped of quotation marks and capitalization. This is crucial for the development of spirituality in Russia and therefore for its future. The idea of the constitution as «fundamental commandments» and as «a normative and legal faith» governing the life of a state has also come down to us from the Bible. The psychological barrier between the society and the Constitution has being removed through the persistent efforts of constitutional law experts, the Constitutional Court, and all of Russia's courts. Atheists and followers of any faith both should recognize the constitution as a country's highest spiritual value. But considerations of common sense and state expediency will be immediately brought to bear on the issue.

Vladimir Nabokov, a prominent Russian constitutionalist and father of the world famous writer wrote in 1912:

Expressing respect for legality while trampling it in actual fact is an exercise in futility. In Russian life, this trampling is the worst of all plagues. It infects the entire state organism, making itself felt every minute and corrupting both the rulers and the ruled... The most general results of this situation are disrespect for law while singing its glory, a disrespect that the whole administration is permeated with. Precisely the last few years have been characterized by the raising of this disrespect to a principle — people flaunt it, openly stressing that laws and legality must always, and without question, bow to the demands of 'State expediency'. This evil could be counterbalanced by the work of the courts that would restore the effectiveness of law in all cases of its violation, courts that are independent and impartial, free from politics, ignoring everything except the injunctions of law, and seeing the triumph of law as their first and principal task. Do we have such courts?[2]

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[1] Overcoming Law. Harvard University Press. Cambridge, 2002. P. 97.

[2] Russian Constitutionalism at the Time of the Duma Monarchy. Moscow, 2003. P. 103, 107, 108. (In Russian).

Of course, no one will openly subordinate now the status of courts to «state expediency,» of which Vladimir Nabokov wrote 90 years ago; but apparently many Russian governmental officials are thinking of it. If Russia proves unable to develop and maintain its constitutional values, given its increasing backwardness in various other areas, it will lose the basis for its revival.

Even a cursory glance at the Encyclopedia Britannica Almanac 2004 gives little cause for optimism. Life expectancy of Russian men born in 2001 (!) will be just 59 years, six years less than in El Salvador, Latvia, Kyrgyzstan, Romania and Uzbekistan; 10 years less than in Peru, Ecuador, the Philippines, Poland, North Korea, Lithuania and Turkey; 13 years less than in Canada, the U.S.A., Norway, Spain, and Great Britain; and a whole 20 years less than in Serbia (!). In 2050 the men-to-women ratio in Russia's population will be roughly 37:63, while the population itself will shrink from 147 million to some 100 million people. In 2050 there will be less than 150 million Russian speakers in the world, instead of 320 million in 1991.

In 2007 Russia's gross domestic product reached its 1990 level for the first time since the USSR collapsed. At the same time authorities (including Russian Central Bank) accumulated currency reserves of $413 billion. Even though this was a considerable achievement of the Russian economy among countries with the largest per capita currency reserves, Russia still ranked behind 60 countries by index of infant mortality. Furthermore, significant part of the Russian population still lives under level of poverty, particularly elders.

Education spending is a major index of a country's outlook for spiritual and intellectual progress. In absolute terms, Russia spends on education 10 times less than Great Britain, just half of what Finland spends, many times less than Mexico or Brazil, and 80 times less than the United States.

Educational intensity ensures the advance of science, and of intellectual and spiritual values, which together determine both the economic development and the very future of a country. In the United States, Japan and most of Europe, any student or employee can use the Internet, which vastly improves these countries' production and educational opportunities. Moreover, the Internet ensures one's right to information, which is an important constitutional value in this country.

Russia's emphatic lack of ambition in its expenditure on education, the Internet, and teaching English is impossible to justify. This statistic has a

relationship to judicial and legal reform. Against the backdrop of the general «degradation statistics» our legal community ought to put more energy into the fight to preserve, maintain and develop constitutional values and the 1993 Constitution itself. One of the key issues of establishing democracy in Russia is giving constitutional and legal substance to the principles and the articles of the Russian Constitution.

In the EU it was financial practitioners who initially developed a concept very similar to the approaches of constitutional economics and this was connected to the principle of central bank independence, mainly from executive power. In this one of the main ideas of constitutional economics has distinctly manifested itself: the financial assets of the state belong not to the state, but to its people. This means that public funds should be spent in conformity with the national constitution, which is the only legal document directly authored by the people as specified, for example, in the preambles of the Constitutions of Russia and the United States of America.

This abstract idea has very practical financial implications. The independence of central banks is incorporated in the legislation of the most developed countries and even partly in Article 75 of the Constitution of Russia. Constitutional economics gives theoretical support for these provisions. At a symposium dedicated to the 200th anniversary of the Banque de France this was explicitly mentioned by its governor Jean-Claude Trichet: «We shall wait till a new Montesquieu shows that modern democracy can naturally go hand in hand with nonparty independent financial power». He went on to declare that central banks do not belong to any branch of state and are accountable directly to the people, to the citizens of the country. The traditional doctrine of separation of powers in this case is supplemented and developed not by means of traditional constitutional law, but by using approaches of constitutional economics.

Many lawyers do not fully appreciate the value of constitutional economics. If lawyers do not adopt the principles of constitutional economics, it will simply bypass them. If this ever happens, constitutional law will be downgraded to a formal systematization of constitutional texts and study of their structure and history. One could venture to say that, without a knowledge and understanding of constitutional economics, no modern constitutional jurist should be able to perform anything but legal analysis of more than half of the text of our Constitution. Thus, our jurisprudence, specializing in constitutional law, will be unable to help judges of

the Constitutional Court of the Russian Federation, authorized courts in the regions and other courts in performing any substantial analysis of the norms and principles of the Constitution in order to find correct criteria for any case affecting public prosperity and material guarantees of constitutional rights and freedoms.

In that case the absence of special knowledge about the interdependence between the principles and norms of the Constitution and state decisions directly affecting both public prosperity and that of individual citizens will be «replaced» in courts with arbitrary reasoning, conjectural approaches, or submission to pressures exerted, first of all, by governmental agencies. The latter will essentially deprive courts of the possibility of presenting independent opinions on issues connected with economics, therefore *de facto* limiting their independence, on the one hand, and damaging the material guarantees of constitutional rights and freedoms, on the other. The separation of powers will be undermined by the inability of judicial power during consideration of cases to form independent judgments on holistic issues involving a complex of constitutional and economic problems.

Constitutional economics studies such issues as budgetary expenditures on the courts, which is completely controlled by the executive power in many developing countries, including Russia. This undermines the principle of «checks and balances» on power and causes a critical financial dependence of the judiciary. One solution could be allocation to the judicial system of a fixed percentage of annual governmental expenditure. In Costa Rica, for instance, 6% of the annual federal budget must be spent on the judicial branch under a constitutional provision.

Another important area that constitutional economics covers is a latent form of governmental spending on the judiciary in the form of privileges (free cars and country houses). Such a system is completely outside the realm of transparency and creates an opportunity for corruption of the judiciary by the executive authorities. In this situation, an opportunity to «trade» such privileges or even officially allocated funds is read as the price for judicial flexibility and loyalty to governmental interests. Interestingly, the legal system of Belgium distinguishes two methods of corruption of the judiciary: by the governmental through budget expenditures and privileges (the most dangerous form of corruption), and regular (or private) corruption.

The budgetary process is a major concern of economics, which studies issues of allocation of scarce resources. At the same time, the budget should be considered also with respect to the constitutional responsibilities of the Government and the related rights of the people. This is one of the main ideas expressed by constitutional economics and suggested as one of the approaches for the Rule of Law.

Such an approach could be illustrated by another example. Social support for the military is proclaimed in the Russian Constitution and is subsequently elaborated in relevant federal law. For several years, social benefits envisaged by law for retired military have been neglected by the annual budget laws. In 2004 the Constitutional Court of the Russian Federation ruled that the rights of the former military personnel for social compensation should be restored.

The Constitutional Court expressed its opinion in respect to economic decisions taken during the annual budget process without consideration of constitutional law. In this respect, constitutional economics requires that economic decisions be taken in accordance with constitutional principles and norms. Constitutional economics is «concerned with the choice of rules as constraints to human behavior as opposed to the choice within the rules.»[1] Moreover, it argues for limiting the interpretation of constitutional principles to the extent of national economic development. Therefore, «constitutional economists are interested in the possibilities of finding sets of rights that bring the potentially conflicting interests of various actors into a balance that most of them can agree to.»[2]

Constitutional provisions that are not fully supported by economic resources at the time when they are drafted are deemed reasonable from the constitutional law perspective. The reason is that subsequent federal laws detailing these provisions will take into account existing economic resources to support relevant constitutional provisions. At the same time, the growth of economic resources should lead to expansion of implementation of the constitutional provisions. In addition, it is important to take into account principles of transparency when federal laws stipulating constitutional provisions are passed or amended.

[1] Stefan Voigt. Positive constitutional economics: a survey // Public Choice. 1997. Vol. 9. P. 11.

[2] Stefan Voigt. Constitutional Political Economy, Vol. 1 (2003). Edward Elgar Publishing. P. XI.

Constitutional economics principles are illustrated by another example that reflects the budget process and issues of federalism in Russia. The recent Budget Code of the Russian Federation states that implementation of the state budget should be carried out through the Federal Treasury. Moscow, being one of Russia's political subdivisions (constituent entities of the federation), claimed that this limited its constitutional right to execute its financial liabilities and manage its property independently. This is interpreted to mean that the spending of money collected by Moscow, or any other region, will be controlled by the center and impairs the autonomy principle, which is necessary under a federative model of government.

Examples of a constitutional economics approach are used to explain certain issues of the Rule of Law in India. Jaivir Singh argues that «the 'right of property' with respect to state takings has been weakened by the failure to uphold the doctrine of separation of powers.» He continues that «a set of social costs has emerged as a direct consequence of the violation of the doctrine of separation of powers.»[1]

Further, state expenditure on pensions, culture, education and health are critically important for economic development. In Russia the amount of these monies of social importance are too low in comparison with military (and other) spending of the government.

Such close interconnection of economics and law at the constitutional level is especially noticeable in the budgetary area where it poses practical questions. There is much discussion in modern Russia about the shortage budgetary expenditures on education and the health care system. For example, the Ministry of Finance of the Russian Federation in early 2007 proposed to create a Future Generations Fund not in the framework of one-year, but with a three-year budget for 2008—2010. At first glance this idea looks very appealing, especially from the standpoint of constitutional economics. Here we have both a strategic outlook, and a denial of short-term state benefit for the sake of future public prosperity, and also a practical solution for (using the jargon of economists) «sterilization of excessive liquidity» in order to avoid current inflation. However, viewed another way the appeal may be illusory to a situation of shrinking population, high

[1] Jaivir Singh. Separation of powers and the erosion of the 'right to property' in India // Constitutional Political Economy. 2006, Vol. 17. P. 322.

infant mortality and outright poverty among the majority of young people these expected future generations simply may not be born at all.

The facts are against the backdrop of fiscal revenues being put away into stabilization and other state funds. The Minister of Health of the Russian Federation said in a TV show aired on March 14, 2007 on Channel 1, that non-delivery of medications to the regions was due to the fact the State owed $1 billion to the suppliers during the previous fiscal year. Does this mean that people should be left to die without medications just for the sake of the Future Generations Fund replenishment?

On the other hand, a slogan calling for immediate spending of all surplus revenues can hardly answer the demands of constitutional economics either, for the latter requires a combination of economic feasibility with the greatest possible level of endowment for constitutional rights and freedoms. Therefore the issue of existence of such Fund with all of the *pro* and *contra* arguments lies entirely within the realm of constitutional economics and cannot approached analytically using only traditional economic or legal analysis.

The 1993 Constitution of Russia is the first operating Fundamental Law in the almost millennial history of this country, omitting, of course, the makeshift Czarist and Soviet Constitutions of the 20th Century. Therefore, the period in which Russia started getting used to living under a constitution coincided with the time of adoption of a market economy by the state and society. If in the West the term «constitutional economics» first appeared in 1982, when the corresponding school of thought started taking shape in 1960-70, Russia (like other post-Soviet republics) already in the early 90's experienced the necessity of balancing constitutional material guarantees granted to the citizens of Russia with current economic reality.

Another issue related to the assuring the well-being of future generations, aside from obvious expenditures on public health, involves expenditures on science and education, including especially education in economics, law, computer programming and English.

We believe that attempts to replace the concept of «constitutional economics» with that of «economic (financial) constitution» cannot be considered quite successful since the latter only commits to the presence of certain economic requirements and conditions in the text of the Fundamental Law whereas the former reflects congruence between the existing economic reality and constitutional requirements and provisions. In some

measure the concept of «economic (financial) constitution» is an attempt originally of German and now of Russian jurists of the traditional type to shut themselves off from any large-scale «intrusion» of economists into their territory. Such «shutting-off» achieves little. The jurists, by having applied new terminology still remain where they were, not a single step closer to the understanding of necessary economic categories, while the economists in turn, with no collaboration from the jurists cannot use constitutional concepts, which require long-term experience in their usage.

When economists lead sophisticated discourses on rates, interests, reserves and inflationary expectations, they generally do not view constitutional principles and norms as a precondition to problem solving. Such matters do not enter into the reference system of any specific discussion of the legal requirement that authorities at different levels, when making any annual or longer-term financial decisions, must be bound to observe the norms directly written in the text of the Constitution, as well as the constitutional principles, not directly reflected in the text, (such as federalism or separation of powers), but providing, in the long run, for economic, social and other rights of citizens and society. Constitutional jurists and economic experts in the budgetary area simply cannot understand each other although the former as a rule for purely psychological reasons more often get scared off by the equations and calculus utilized by economists. But this, of course, does not make position of economists any more correct, or the budget any more precise from the standpoint of constitutional provisions.

One of the leading economists and a former Minister of Economic of Russia the sagacious Evgeny Yasin once said the following: «In the disputes between jurists and economists, the former are usually right, but almost always it is the latter who win because if there is no money for enforcement of a certain right, it just cannot be enforced». This statement reflects a very dialectical essence to constitutional economics: both unity and the struggle between durable constitutional form and annual, economic assurance, or, to be more exact, between the constitutional content of state activity and its economic framework. However, «struggle and unity» sound rather like the traditions of Marxist Hegelianism. So it may be better to speak simply about the unity of constitutional-legal and economic content of the state activity. Such unity however may not be fully realized because of a misunderstanding of this unity during practical economic decision-making, and

also because of the isolation and mutual deafness of legal and economic experts from one another.

In constitutional economics, we talk not only of a self-evident and necessary mutual complementing of legal and economic analysis, but also of their partial merging and interpenetration, both in the theory and in practice, that is (again following the formula of Marxist Hegelianism) methodological unity with a view to eliminating their actual contradiction.

The ex-chairman of the Constitutional Court — Vladimir Tumanov in a conversation raised a deeply insightful question on whether constitutional economics, in particular, and the economic approach, in general, would bring down to earth, or in other words, downgrade the high values of constitutional law. Here we have something to really think about. Constitutional values should have a service life and be a resource for the future. Therefore, not all of them are intended for immediate realization, due to the absence of necessary material possibilities or for other reasons. By bringing them down to earth to reflect the conditions of modern economic reality, we may create a certain compromise situation influencing the timeless content of higher constitutional values. However, an excessive departure of constitutional norms and principles from objective economic reality will be even worse because it creates the basis for ignoring constitutional requirements and provisions in the everyday activity of the State.

Since constitutions in many countries with transient systems are still being considered as abstract legal documents, not directly connected to the practical economic activities of the state, the introduction of constitutional economics becomes a fundamental and crucial aspect of democratic development of both state and society of such countries. At the same time we decline to consider any quasi-scientific or political reasoning referring to successful industrial development of societies such as the USSR during Stalinist regime or Chile under the rule of Pinochet, or to the «economic wonder» demonstrated by modern, undemocratic China. In the 21st Century, one must not compromise basic human rights and freedoms, including the well-being and happiness of each citizen for the sake of promoting the economic development of the state. The history should not repeat itself, especially in the countries like Russia, where several generations in succession had been living in actual poverty (compared with the level of advanced countries) and in terrible fear of state power.

Most likely, constitutional economics may be necessary primarily for political systems in transition, where the state during the practical economic decision-making does not yet respect constitutional norms and principles in the way that it should.

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# 4. THE RULE OF LAW AND PSYCHOLOGICAL TORTURE

**Moscow Rule of Law Symposium White Paper:**

## THE RULE OF LAW AND PSYCHOLOGICAL TORTURE: ABSENCE OF A LEGAL DEFINITION, PROSPECTS AND PROBLEM

*«Moscow» working group for preparation of the Rule of Law Symposium of the International Bar Association, which took place in Moscow, 6 July 2007*

Recent Rule of Law Global Initiatives

The «rule of law» is becoming a mainstream and global 21st-Century concept thanks to combined and individual efforts undertaken by both the International Bar Association and the American Bar Association. Our working group believes that an important gap exists in the on-going discussion of the Rule of Law. Despite more than 20 years of activity by the United Nations against the subject of torture, no legal definition of psychological torture exists or a methodology for distinguishing it from legitimate psychological pressure during interrogation. This gap could be identified and discussed as a part of the Rule of Law agenda.

Some state jurists in different countries make a distinction between «torture» and «cruel, degrading and inhuman treatment.» But a study of professional psychologists uses data obtained from survivors to prove that the distinction does not exist in practice and such efforts only provide a justification for torture.

Some mental-health professionals, even within the military, are growing concerned that colleagues who have helped interrogators may have broken the first rule of medical ethics: Do no harm. The American Psychological Association has organized a task force to investigate interrogations--much of which is shrouded in secrecy--and to craft ethical guidelines for it. Many professionals working in the field of mental health signed the Petition to the American Psychological Association to end the involvement of mental health professionals in torture connected to military interrogations.

This Petition says:

«We are concerned about persistent allegations that some of our colleagues in psychology and other areas of mental health may have been involved in cases of torture and/or cruel, degrading, and inhumane treatment of detainees; involvement which, if proven, is in direct violation of the American Psychological Association's code of ethical conduct. We call on all of our colleagues to take an unambiguous stance against torture and against the participation of psychologists and other mental health workers directly or indirectly in physical and psychological torture or cruel, inhuman, and degrading treatment of detainees. As professors, clinicians, researchers, and others dedicated to promoting mental health and human rights, we commit ourselves to work within our professional organizations to ensure that standards are established clearly stating that members of our professions may not ethically take part in any way in interrogations involving cruel, inhuman and degrading treatment, as defined by the Geneva Conventions and UN Convention Against Torture. We call on the APA to state its opposition to and condemnation of methods of coercive interrogation such as sleep deprivation and harassment focused on detainees' religious, ethnic, sexual orientation, or gender identities, and to establish a task force charged with educating policy makers about the psychological damage done to individuals by use of these and other methods that fall in the category of cruel, degrading, and inhumane treatment. We demand that the APA establish an independent nonpartisan commission to investigate the alleged involvement of psychologists directly or indirectly in physical and psychological torture and abuse of detainees in U.S. custody (whether as advisors, consultants, teachers, researchers, or care providers) and hold accountable any psychologists found to have been involved in such practices.»

There is good reason to believe that psychologists and psychiatrists have been involved in the cruel interrogations that have taken place in Guantanamo Bay and elsewhere in the war against terrorism. Both the American Psychological Association and the American Psychiatric Association have therefore made clear that it is unethical for members of their profession--whether in the military or not--to participate in torture. Many questions were asked by mental health professionals. Are prolonged isolation, sexual humiliation, sleep deprivation, forced nudity, growling guard dogs, sensory deprivation and strobe lights psychological torture?

And what about using coercive methods based on psychiatric evaluations that reveal the fears, concerns and anxieties of the detainee? Or having a Behavioral Science Consultation Team (biscuit team) hidden behind a one-way mirror guiding interrogators on how best to exploit the psychological vulnerabilities of the detainee they are interrogating? According to the Physicians for Human Rights, all of these measures, which they describe as «systematic psychological torture,» have been used at Guantanamo Bay with the participation of psychologists, psychiatrists and other physicians.

However, that ethical injunction has little force unless there is a clear legal definition of what constitutes psychological torture. This is a field for involvement of professional organizations of lawyers as IBA and ABA, and other national bar associations. Further discussion on psychological torture in the framework of the Rule of Law Global movement should deal with psychological torture in the context of interrogation practices globally, and not just the fight against terrorism.

Apparently, not only so-called «preventive» beating, which, unfortunately, so many policemen in so many countries are never hesitant to resort to, but even the application of psychological pressure, which is quite often taught and practically recommended to investigators as a basic questioning technique, also qualifies as psychological torture in some circumstances. The definition of psychological torture is discussed today only among some medical and psychology specialists, but not among lawyers and theirs professional organizations. One will not find the definition of «psychological torture» in encyclopedias or in modern specialized law, medical or psychology dictionaries.

## Psychological Torture

Russia and Ukraine from the Soviet period have had an unfortunate history of using psychiatrists against political dissidents and any politically suspicious persons. Nobel Laureate poet Josef Brodsky was tortured with the assistance of psychiatrists in Saint Petersburg when he was only 22 years old. A recent study by Russian sociologists and human rights activists shows that ill-treatment and torture are endemic in the country's detention facilities. According to a new study published on March 28, 2007

by the Russian Academy of Sciences and the Russian Committee Against Torture, a human rights organization, every 25th person in Russia is tortured, beaten, or harassed by law enforcement officials each year. The report is based on opinion polls carried out in five Russian regions over the past three years, and does not cover Chechnya, where Moscow's military campaign against separatists has resulted in what rights groups describe as massive torture and abuse against civilians.

Yakov Gilinsky, a sociology professor with the Russian Academy of Sciences who supervised the study, disclosed the findings at a news conference in Moscow:

«So, has the adult population been subjected to torture within one year? The results — in St. Petersburg: 3.4 percent, in the Pskov region: 4.7 percent, in Nizhny Novgorod: 3.4 percent, in Komi: 4.6 percent, in Chita: 4.5 percent,» Gilinsky said. «The average result for all the regions are that 4.1 percent of people have personally been subjected to torture, or illegal physical or psychological violence. The average result for all the regions are that 4.1 percent of people have personally been subjected to torture, or illegal physical or psychological violence.» [1] The respondents were also asked whether someone in their circle of friends and relatives had been beaten within the same year by law enforcement officials in an effort to extract testimonies or to intimidate them. Between 9.3 and 17.7 percent of respondents said yes.

Psychological pressure, to which most of the accused and suspects, as well as witnesses and even victims of a crime are exposed during questioning (whether in custody or not), accounts for numerous investigatory and judicial errors. In most cases, such pressure even against witnesses qualifies as a form of psychological torture, as this term implies any act by which severe mental pain or suffering is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.[2]

To those who may consider as torture only such things as «breaking on the wheel» or «searing with an electric iron,» it is instructive to look at the definition of torture given in the UN Convention against Torture and Oth-

[1] Yakov Gilinsky, News Conference, Radio Liberty, Moscow, 2007.

[2] Peter Barenboim, How to Avoid Psychological Torture. Human Rights for Arrested People (Moscow, Yustizinform, 2000).

er Cruel, Inhuman or Degrading Treatment or Punishment.[1] «'[T]torture' is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.»

The Optional Protocol to such Convention (OPCAT, 2006) is an important addition to the United Nations Convention. It establishes an international inspection system for places of detention modeled on the system which has existed in Europe since 1987 (the Committee for the Prevention of Torture). The idea for this scheme of torture prevention goes back to the Swiss Committee for the Prevention of Torture (today, the Association for the Prevention of Torture, APT), founded in 1977 by Jean-Jacques Gautier in Geneva. It envisaged the establishment of a world-wide system of inspection of places of detention, which later took the form of an Optional Protocol to the UN Convention. For a long time, however, the necessary support for such an optional protocol was not forthcoming. As a consequence, the UN Committee Against Torture (CAT) had at its disposal only relatively weak instruments: it could analyze and discuss the self-reports of the respective governments and create the institution of a Special Rapporteur on Torture. But neither CAT nor its Special Rapporteur had the power to visit countries, let alone inspect prisons, without the respective government's permission. In 1987, the Council of Europe realized the original idea on a regional level with its European Convention for the Prevention of Torture. On this basis, the European Committee for the Prevention of Torture has demonstrated the viability of this model through regular visits, reports and recommendations to the governments as well as the publica-

[1] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984). The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted on 10 December 1984 and, following ratification by the 20th state party, it came into force on 26 June 1987 exactly 20 years ago. To date, 142 nations are parties to it, with another nine having signed but not yet ratified.

tion of these reports and the governments' reactions. This in turn led to a breakthrough within the United Nations: OPCAT was created and opened for signatures on January 9, 2003 by the UN General Assembly.

After ratification by the required number of states, the Optional Protocol came into force on 22 June 2006. On 30 March 2007 Cambodia became the 34th State Party to OPCAT. By the end of April 2007, 57 states had signed OPCAT of which 34 of these states had also ratified the Convention. The states that had ratified the convention were Albania, Argentina, Armenia, Benin, Bolivia, Brazil, Cambodia, Costa Rica, Croatia, Czech Republic, Denmark, Estonia, Georgia, Honduras, Liberia, Liechtenstein, Maldives, Mali, Malta, Mauritius, Mexico, Moldova, New Zealand, Paraguay, Peru, Poland, Senegal, Serbia, Slovenia, Spain, Sweden, Ukraine, United Kingdom and Uruguay. States that had signed, but not yet ratified the convention were Austria, Azerbaijan, Belgium, Burkina Faso, Chile, Cyprus, Finland, France, Gabon, Germany, Ghana, Guatemala, Guinea, Iceland, Italy, Luxembourg, Macedonia, Madagascar, Montenegro, Netherlands, Nicaragua, Norway, Portugal, Romania, Sierra Leone, South Africa, Switzerland, Timor-Leste, Togo and Turkey.

The UN Convention against Torture requires states to take effective measures to prevent torture within their borders, and forbids states from returning people to their home country if there is reason to believe they will be tortured.

**Article 1**

1. Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

**Article 2**

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

There are several points which need highlighting:

**Section 1**: Torture is defined as severe pain or suffering, which means there must be levels of pain and suffering which are not severe enough to be called torture (often termed «cruel, degrading or inhumane treatment»). However, «cruel, inhuman or degrading treatment or punishment» is independently proscribed by Article 5 of the Universal Declaration of Human Rights. Discussions on this area of international law are influenced by a ruling of the European Court of Human Rights (ECHR) on sensory deprivation.

**Section 2**: If a state has signed the treaty without reservations, then there are no exceptional circumstances whatsoever where a state can use torture and not break its treaty obligations. However the worst sanction which can be applied to a powerful country is the publishing of the information that they have broken their treaty obligations. In certain exceptional cases the authorities in those countries may consider that with plausible deniability that this is an acceptable risk to take as the definition of severe is open to flexible interpretation.

**Section 16**: This section contains the phrase «territory under its jurisdiction,» so that if the government of a state authorizes its personnel to use sensory deprivation on a detainee in territory not under its jurisdiction then it is suggested that that government has not broken its treaty obligations.

The Optional Protocol to the Convention, adopted by the General Assembly on 18 December 2002 and in force since 22 June 2006, provides for the establishment of «a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment,» to be overseen by a Subcommittee on

Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The Committee Against Torture (CAT) is a body of independent experts that monitors implementation of the Convention by State parties. The Committee is one of seven UN-linked human rights treaty bodies. All State parties are obliged under the Convention to submit regular reports to the CAT on how the rights are being implemented. Upon ratifying the Convention, States must submit a report within one year, after which they are obliged to report every four years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of «concluding observations.» Under certain circumstances, the CAT may consider complaints or communications from individuals claiming that their rights under the Convention have been violated. The CAT usually meets in May and November each year in Geneva.

The current membership of the CAT is:

Chairman — Andreas Mavrommatis (Cyprus) — term expires in 2007

Vice Chairman — Guibril Camara (Senegal) — term expires in 2007

Vice Chairman — Claudio Grossman (Chile) — term expires in 2007

Vice Chairman — Alexander Kovalev (Russian Federation ) — term expires in 2009

Rapporteur — Felice Gaer (USA) — term expires in 2007

Luis Gallegos Chiriboga ( Ecuador) — term expires in 2007

Nora Sveass (Norway) — term expires in 2009

Xuexian Wang (China) — term expires in 2009

Essadia Belmir (Morocco) — term expires in 2009

Fernando MariЯo Menendez (Spain) — term expires in 2009

We believe that it is important for national bar associations to know the names of the members of this important UN body.

We have this international legal document (adopted by a majority of the UN member states) which can serve as an important guide and motivator for the development of the Rule of Law movement, as it imposes serious legal restrictions on the already habitual arbitrariness that so often directly infringes constitutional rights of a person in many of the countries around the world.

## Scientific Effects of Psychological Torture

According to the latest research, scientists report that prisoners subjected only to psychological torture report as much mental anguish as those who are beaten. Different forms of torture still appear widespread around the world: a 2005 report by Amnesty International found that systematic torture occurred in more than 100 cases from 150 countries surveyed.

It is reported in the scientific press that «The study of nearly 300 survivors of torture from the former Yugoslavia found that those who experienced no physical torment later developed equally high levels of post-traumatic stress disorder (PTSD) as those who did. The survivors also rated the distress caused at the time by the two types of torture equally highly. Researchers say the findings provide a strong argument against the use of psychological maltreatment of prisoners — referred to by some as «torture lite.»[1]

It might be very useful for legal experts to study the research carried out by Basoglu of King's College London, UK, and his colleagues. They investigated the impact of purely psychological torture of 279 survivors of torture from the former Yugoslavia, including both soldiers and civilians from the previously war-torn region. Between 2000 and 2002 the survivors answered questions about the nature of the torture they endured. The majority of them had endured beating and other forms of physical torture, including electric shocks, tooth extractions and suffocation. But about 20 of the survivors experienced purely psychological manipulations, such as sham executions or the torturing of family members and threats of rape. The researchers collected medical assessments of whether the torture survivors showed signs of PTSD — a form of lasting anxiety. They found no difference in the prevalence of this disorder between the two groups.[2] The researchers also asked the participants to rate their distress during torture on a scale of zero (no distress) to four (maximum distress). Both those who suffered physical torture and those who experienced physiological torment alone rated their overall level of stress as 3.5.

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[1] Roxanne Khamsi, Psychological Torture as Bad as Physical Torture, NewScientist.com News Sevice, Archives of General Psychiatry (vol. 64, p. 277).

[2] Ibid.

Basoglu reported that the findings challenge the common perception that physical torture is more distressing than psychological torture. «Implicit in this distinction is a difference in the distressing nature of the events. The evidence takes issue with that,» he says. «And since psychological torture is as bad as physical torture, we shouldn't use it.» US Senator John McCain, who experienced torture as a prisoner of war in Vietnam, has said that if he were forced to make a decision between enduring psychological or physical torture, he would not hesitate to pick the latter.[1]

At the same time the authors point out that aggressive interrogation techniques or detention procedures involving deprivation of basic needs, exposure to adverse environmental conditions, forced stress positions, hooding or blindfolding, isolation, restriction of movement, forced nudity, threats, humiliating treatment, and other psychological manipulations do not appear to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects. These findings do not support the distinction between torture and «other cruel, inhuman and degrading treatment.» Although international conventions prohibit both types of acts, «such a distinction nevertheless reinforces the misconception that cruel, inhuman and degrading treatment causes lesser harm and might therefore be permissible under exceptional circumstances. These findings point to a need for a broader definition of torture based on scientific formulations of traumatic stress and empirical evidence rather than on vague distinctions or labels that are open to endless and inconclusive debate and, most important, potential abuse.»[2]

## The European Convention

Article 3 of the European Convention is absolute in its scope. In the *Ireland v. the United Kingdom* case,[3] the European Court stated: «The Con-

[1] Ibid.

[2] Psychological Torture Seems to Cause as Much Mental Suffering as Physical Torture, American Medical Association (Mar. 16, 2007), http://socialworktoday.com/ezine/index.php?blog=1& title=psychological_torture_seems_to_cause_as_&more=1&c=1&tb=1&pb=1.

[3] 18 January 1978, Series A no. 25, p. 65, para. 163.

vention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the European Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and, under Article 15 para. 2, there can be no derogation there from even in the event of a public emergency threatening the life of the nation.» Furthermore, Article 3 may be applicable even in the event of a mere threat to use inhuman treatment and that is prior to any actual use of such treatment, according to the Court in *Campbell and Cosans v. the United Kingdom* case,[1] a case involving the threat of corporal punishment at school.

The European Court has applied Article 3 in cases where there are justified and serious reasons to believe that a person is in real danger of being subjected to torture or inhuman or degrading treatment or punishment. In the *Soering v. the United Kingdom* case,[2] the threat hanging over the applicant was such that it could lead to a violation of that Article. This case concerned extradition to a country (the United States, in particular Virginia) where the applicant might possibly have had to await carrying out of the death penalty in harsh conditions on what is known as «death row.» The Commonwealth's Attorney of Virginia had himself decided to seek and persist in seeking the death penalty because the evidence supported such action. The European Court observed, «If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the European Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the «death row phenomenon»[3].

By their very essence the notions used in Article 3 are relative. The *B. v. France*[4] judgment is not the leading case, but it is a more recent decision which sets out those notions as defined by the European Court: in order to constitute a violation of Article 3 of the European Convention the treatment in question must attain a minimum degree of severity. Appraisal of this minimum degree is by its very essence relative; it depends on all the circumstances of the case, and in particular the nature and context, and the

[1] 25 February 1982, Series A no. 48, pp. 13—14, para. 30.
[2] 7 July 1989, Series A no. 161, p. 39, paras. 98—99.
[3] Ibid, at p. 39, paras. 98 and 99.
[4] 25 March 1992, Series A no. 232-C, p. 87, para. 83.

duration of the treatment, its physical or mental effects and, sometimes, the sex, age and state of health of the person concerned.[1]

The European Court in one case considered the treatment both «inhuman», because it had been applied with premeditation and for hours at a time, and had caused «if not actual bodily injury, at least intense physical and mental suffering», and «degrading» because it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.[2]

In addition to these definitions of inhuman treatment and degrading treatment, it is necessary to mention the definition of torture already provided in the *Ireland v. the United Kingdom* case.[3] The European Court considers [.] that, whilst there exists on the one hand violence which [.] does not fall within [.] the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between «torture» and «inhuman or degrading treatment», should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

In the *Aksoy v. Turkey* judgment,[4] the European Court concluded for the first time that the treatment of the applicant could «only be described as torture.» The Court recalled that the Commission found *inter alia* that the applicant was subjected to «Palestinian hanging», in other words, that he was stripped naked, with his arms tied together behind his back, and suspended by his arms. In the view of the Court this treatment could only have been deliberately inflicted; indeed a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions of information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of

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[1] See Ireland v. the United Kingdom, 18 January 1978, Series A no. 25, p. 65, para. 162; Tyrer v. the

United Kingdom, 25 April 1978, Series A no. 26, pp. 14-15, paras. 29-30.

[2] See Ireland v. the United Kingdom, at p. 66, para. 167; Soering v. the United Kingdom, 7 July 1989,

Series A no. 161, p. 39, para. 100).

[3] 18 January 1978, Series A no. 25, p. 66, para. 167.

[4] 18 December 1996, Reports of Judgments and Decisions 1996-VI, p. 2279, para. 64.

both arms which lasted for some time.[1] The European Court held that this treatment was of such a serious and cruel nature that it could only be described as torture. A number of other cases have been tried before the international Human Rights bodies involving psychological torture, but still there is no and detailed criteria for legal definition of such torture.

As an example we can also review *Communication No. 1012/2001: Australia. 18/11/2005.CCPR/C/85/D/1012/2001* examined by the UN Human Rights Committee under the International Covenant on Civil and Political Rights (CCPR). In this case the claimant claimed that *his deportation amounted to psychological torture*, both for him, his wife and children. He argued that during the period of his sentence, he was provided with day release and week-end release, time which he spent solely with his family. During this period, his children were led to believe that this was a process of reconciliation with the family, but it was not. He also pointed out that he was not permitted to say a farewell to his family before his removal.[2] On the merits of these allegations the Government argued that the allegations were without merit as the evidence provided was not specific, pertinent and sufficient to permit the examination of the merits of the alleged violations. As to possible violation of Article 7 CCPR and the allegations of «*psychological torture*», the State party submitted that the author was informed that he would be removed from Australia upon his release from prison approximately three months before the release, and that he had visitation rights during this period. Furthermore, he was aware that he would not be in the public contact area of the airport prior to departure. He therefore had the opportunity to say farewell to his family in prison well before his release. With regard to the claim that the author's deportation constitutes «*psychological torture,*» the State party argued that its treatment of the Burgess family did not include any of the elements of torture, *i.e.* the intent, fulfillment of a certain purpose and/or the intensity or severe pain, and that the treatment was reasonable and in accordance with the State party's immigration laws. On the issue of removing the author from Australia, after permitting him to have day and week-end access visits with his family, the State party submitted that all of the author's rights as a prisoner were respected; this did not amount to a violation of Article 7.

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[1] Ibid, at para. 23.

[2] http://www.unhchr.ch/tbs/doc.nsf/0/98ce1de93ac1d2f3c12570c3004b5fd8?OpenDocument

The European Court should start considering (within the meaning of Article 3 of the Convention) this problem and trying to separate psychological torture from physical torture as an effective mechanism of protection of fundamental rights. It is obvious that the meaning of Article 3 and the attitude of the European Court in interpreting it implies a distinction between these two different forms of torture. Hopefully, the UN will also clarify as a fundamental legal definition for «psychological torture» those provisions of the UN Convention adopted more then 20 years ago.

## Calls for Action

The International Bar Association with the American Bar Association and other organizations of lawyers in the framework of the recent Rule of Law movement together with professional organizations of psychologists may adopt a resolution on psychological torture and outline the main principles of a legal definition of psychological torture.

Initiate a procedure before the UN and Council of Europe institutions to adopt legal instruments based on the «resolution» which will be the first step to clarify Article 1 of the UN Convention against and give a legal definition to «psychological torture.»

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**Christopher Tumulty**, *JD Pace Law School*

**Tatiana Varfolomeeva,** *President of the Union of Advocates of Ukraine,*

**Genry Reznick,** *President of the Moscow City Chamber of Advocates*

**Olga Zhukovska**, *Vice President of the Union of Advocates of Ukraine*

**Sergiy Goncharenko,** *Union of Advocates of Ukraine*

**Andriy Kostin,** *Union of Advocates of Ukraine*

*Attachment*

## Translation of extracts from the book of Peter Barenboim «The Case of Svetlana Bakhmina as a Mirror of Russian Legality,» Moscow 2005 (in Russian)

Psychological pressure, to which most of the accused and suspects, as well as witnesses and even victims of a crime, are exposed during questioning (whether in custody or not), accounts for quite a number of investigatory and judicial errors. In most cases, such pressure easily qualifies as a form of psychological torture, as this term implies acts by which severe mental pain or suffering is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.»[1]

There exists yet another international legal document, also formally adopted and signed by the Russian Federation—»Code of Behavior for Law-enforcement Officials»[2]--which mentions «a humane exercise of the functions aimed at maintaining the law and order,» which means that all such officials need to effectively observe the professional code of ethics and exercise utmost self-control while carrying out the above functions.

Without safeguards against pre-trial detention, all the more against questioning in the process of investigation, each Russian citizen should be fully aware of the psychological impacts of such pressure. The author knows for a fact that some investigators' offices are still decorated with would-be humorous posters saying: «If you're not in jail—consider this not as *your merit*, but only as *our underperformance*.» But, be it with or without such posters, it is the incriminating drive that yet continues to reign supreme during almost every investigation. To get rid of such a *presumption-of-guilt* attitude requires a combined effort of Russian citizens, and not only that of legal professionals. Lawfully appropriate self-defense exercised by every member of our society in response to any attempted acts of psychological pressure should play an important part in making Russia a truly civil state.

In Russia, there still live enough supporters of the centuries-old tradition to disregard any humane laws when dealing with those detained by

[1] Peter Barenboim, How to Avoid Psychological Tortures. Human Rights for Arrested People, Moscow, 2000.

[2] Adopted by the United Nations on December 17, 1979.

the authorities. Only a socially active and legally literate population led by competent and principled lawyers as a body of professional defenders can step in the way of immemorial arbitrariness and finally turn Russia into a civilized and truly judicial state.

The degree of freedom and independence enjoyed by the legal profession always clearly indicates how close a society stands to being democratic. Therefore, any compromises allowed by the Bar as a whole, as well as by its individual representatives, regarding the civil right of any person to be defended at court, are totally inadmissible.

One of the patriarchs of the struggle for the supremacy of law in the post-perestroika Russia, Professor Igor Petrukhin, was very precise in pointing out that: «The accused pleading not guilty may happen to be truly right, even if his statement is not supported by the whole body of evidence collected in the course of investigation. Therefore, by having hastily deemed such a person as his «adversary», the investigator risks waging «war» on a *bona fide* innocent person.»[1]

It appears to the author that by having declared war against the head of the corporation in which Svetlana Bakhmina was an employee, the investigation has then absolutely unfairly concentrated all of its fighting zeal on this young woman. How Svetlana Bakhmina herself estimates the position of the investigation can be clearly seen from her statement for the press, published in the «Advocate» journal by her defense attorney Olga Kozyreva:

«My client Svetlana Bakhmina asked me to inform the public that her stay in custody has already exceeded four months. During this time, the investigation and prosecution did not bother to produce any valid culpable evidence as grounds for her pre-trial detention.

Svetlana is absolutely sure that the main motive for holding her in custody was unambiguously expressed by the investigators during her first official questioning. They were demonstrating an obvious desire to obtain from her incriminating evidence against the Yukos top-rank managers, namely Khodorkovsky, Nevzlin, Trushin and some others, in exchange for her immediate freedom and reunion with her children, aged 3 and 7.

In this connection, after having been arrested at 3:00 a.m. on December 8, 2004, at the hospital (where she was receiving inpatient treatment), my

[1] I. L. Petrukhin. Personal Freedoms and Penal Compulsion, 1985, p. 23 (in Russian).

client was transported not to a custodial cell, but to an office of one of the MVD[1] departments, where some officials started making suggestions that she should cooperate with the investigation by agreeing to testify against the above-mentioned Yukos managers, then she was allowed to sleep in the office chairs in the presence of armed male guards. Thereby, she was debased and subjected to psychological torture as a woman.

Bakhmina was not allowed the right to speak to her small children over the phone, nor was she granted the right to undergo independent medical examination.

All of the above, in the opinion of Mrs. Bakhmina, was dictated by the one and only desire of the investigation which was to obtain from her, by any means, incriminating evidence desired by the prosecution against Khodorkovsky and other top executives of Yukos, which could then be used for initiation of new criminal cases against the Yukos management.

The defense of Ms. Bakhmina stands in full support of the above statement of their client and brings to public attention the fact that at the session of the Russian State Duma of March 16, 2005, as many as seventy-one MPs voted to support her and also in favor of initiating a parliamentary inquiry into the methods utilized against her by the state prosecution.

The defense also brings to public attention the fact that neither the RF State Office of Public Prosecutor nor the Ministry of Internal Affairs of the Russian Federation (MVD) have not yet provided their principled evaluation of the facts of psychological pressure and immoral attitude towards a female detainee on the night of December 8, 2004, nor have they officially expressed their opinion regarding the cruel deprivation of an opportunity for a mother to talk to her young children over the telephone.

The absence of any logical explanation for such inhumane behavior of the investigation when dealing with legally justified requests of the detainee Svetlana Bakhmina, especially when refusing to allow her to communicate with her underage children, only confirms the total accuracy of her official statement to the press.

Signed by

Olga Kozyreva (defense attorney) 19.04.2005»

[1] The Russian Ministry of Internal Affairs.

The evaluation of the methods used in the investigation as made by S. Bakhmina's lawyers can be seen from their official petition promulgated upon conclusion of the investigation. We shall quote it verbatim:

To the Government Investigator Extraordinary of the State Office of Public Prosecutor of the Russian Federation

OFFICIAL PETITION
pursuant to Article 217 of UPK RF[1]

Having familiarized ourselves with the materials of criminal case 18/346183-05, the defense believes that criminal prosecution of our client S. Bakhmina must be terminated in connection with the absence of *corpus delicti* in the acts ascribed to her by the prosecution.

Extreme abundance of materials collected in the case (constituting 59 volumes total), all of which the prosecution is trying to present as «legally obtained culpable evidence,» in reality appears to be only a set of documents, many of which are irrelevant to the charges brought against S. Bakhmina.

The unsubstantial nature of these «pieces of evidence», as well as the deliberate support of this case with irrelevant «documents», testifies, in the opinion of the defense, of the fact that the investigation is unable to provide any valid culpable evidence against our client Svetlana Bakhmina that could incriminate her either in the charges or in any wrongful acts whatsoever.

The analysis of the case materials consisting of one and a half volumes, which were presented by a petitioned request by representatives of the complainant, provides to the defense a good reason to qualify this as yet another futile attempt of the investigation to prove (by any available means) our client's implication in the charges brought. However, by these very materials, the investigation has once again convinced the defense of Svetlana Bakhmina's complete innocence.

After studying the criminal case materials, the defense has come to the conclusion that all the events and actions brought against to our client, and which the investigation has deemed sufficient for her arraignment, had actually occurred within the scope of fully legitimate civil relations, in an

[1] Procedural Criminal Code of the Russian Federation.

atmosphere of publicity, openness and legality. The truthfulness of such a conclusion for each specified case was proved by the results of independent audits and examinations.

In the opinion of the defense, the criminal prosecution of S. Bakhmina is characterized, first of all, by an originally biased decision of the investigation to use preventive punishment in the form of custodial detention for a mother of two underage children. This was aggravated by the application of psychological and physical torture in the form of sleep deprivation on the first night in custody with the obvious purpose of compelling our client to agree to testify in court against the top executives of Yukos.

The entire further course of the investigation was directed by a desire of the prosecution to justify their unlawful cruel actions committed toward S. Bakhmina on the night of December 7-8, 2004.

As a result, the investigation accuses our client and takes the matter to law based on the episodes of 1998, when a 28-year-old paralegal adviser, S. Bakhmina, fulfilling a task given to her by some manager of Yukos who «could not be identified by the investigation,» participated in a legal registration of decisions taken by voting of members of the Board of Directors, among which there was even a former USSR minister. All members of the Board, who were ostensibly influenced in a negative way by Svetlana Bakhmina (only a paralegal adviser then), were more senior and more experienced than the accused. The second episode used by the prosecution is a supposed tax evasion in as amount approximately equivalent to 20,000 USD (by 2001-2002 exchange rates). When preparing this charge, the investigation managed to «doctor» the tax periods in such a way that time limitations could not be applied to Bakhmina's income taxes paid in 2001-2002. At the same time, this act brought against her by the prosecution could be easily applied to about two thousand other Yukos employees who then were receiving similar payments from the Company.

All of the above emphasizes the obvious fact that the investigation, after the unlawful arrest aggravated by application of tortures on the first night of S. Bakhmina's detention, was aimed at grasping at any available grounds for her indictment and detention. Moreover, in response to serious complaints against Bakhmina's detention filed by international and domestic complainants (these documents are available in the case materi-

als), the investigation collected fictitious evidence of Bakhmina's would-be intentions to leave the country. The investigation based this conjecture on the fact that Bakhmina had a foreign passport, plus some «operative» data provided by an MVD official — a certain Mr. A.V. Florinsky — the head of 4th Department of GU 8 MVD RF.

Meanwhile, on Mr. Florinsky's order (as was determined during the audit performed by the State Office of Public Prosecutor of the Russian Federation), S. Bakhmina was arrested on December 8, 2004 at the hospital, where she was treated, and transferred to an MVD work office instead of a custodial ward. Our client S. Bakhmina was forced to sleep on chairs in the presence of two male guards — employees of the Ministry of Internal Affairs. The humiliation to which our client was subjected has not yet received any legal evaluation from the State Office of Public Prosecutor of the Russian Federation. At the same time, Mr. Florinsky, meaning to justify his unlawful actions during the night of arrest, fabricated a legal note to the effect that Mrs. Bakhmina had an intention of leaving the country to escape from the law (a copy of the complaint with a detailed statement of circumstances of the events is attached).

Several international organizations of lawyers in their letters to the State Office of Public Prosecutor of the Russian Federation mentioned specifically infringement by these above-described actions of international human rights pacts and conventions, which, in its turn, has led to an even greater desire of the investigation to justify their unlawful arrest of S. Bakhmina and her further prosecution and conviction.

Tendentiously collected evidence, such as, for example, carrying out of so-called inspections by persons obviously lacking proper professional qualification, full disregard of the petitions prepared by the defense and directed at elimination of investigatory bias — all are separate links in a chain showing a desire of the prosecution to get S. Bakhmina convicted at any cost in order to justify completely illegal actions of the investigation concerning her pre-trial detention and incrimination with unfounded charges.

On the basis of the above-stated and guided by Article 27, Part 1, Item 2, of Article 110 of UPK RF.

WE ASK:

to cease criminal prosecution of Svetlana Petrovna Bakhmina, as accused pursuant to Item «c» Part 2 and Items «a» and «b», Part 3 of Article

160 of UK RF[1] (as revised by Russian Federal Law of 13.06.1996), and Part 2 of Article 198 of UK RF, because of the absence of *corpus delicti*;

to vacate preventive punishment of S. Bakhmina in the form of custodial detention.

Signed by G.A. Atanesjan and O.J. Kozyreva (defense attorneys to Svetlana Bakhmina)

The first reaction to this by a Russian public can be easily predicted: What on earth was so special about the things that had happened? In August 2005, a member of the State Duma Ivan Musatov was severely beaten by patrol militiamen right on the square in front of the Paveletsky railway station in downtown Moscow (several of his ribs and his nose were broken)[2], and the newspapers are full of stories about Russian law-enforcers beating or raping detained women. Against such a «backdrop» the treatment that Svetlana Bakhmina had received could pass as «royal treatment.» This is why either Svetlana Bakhmina, or her defense attorneys lay no claims whatsoever as to the behavior of her armed escorts who were dutifully following the orders of their commander.

There are several important points to keep in mind: Svetlana Bakhmina was held in custody during the entire investigation period, although in any civilized country women on remand, especially mothers of small children, are usually set free on bail until the moment of a judgment by court. Russian prisons are almost always overpopulated. On September 13th, 2005, several heads of prison departments proposed declaring amnesty for women detained as suspects or for those convicted for nonviolent crimes.[3] Therefore, the wish of the investigation to keep Mrs. Bakhmina in custody can be explained only by their desire to subject her to constant psychological pressure by separating her from her children aged 3 and 7.

What could have motivated an official of the Ministry of Internal Affairs to order the convoy of Ms. Bakhmina at 3 am to a work office of the Ministry of Internal Affairs rather than a custodial cell? The clearest explanation is provided by the defense based on S. Bakhmina's words: there she was conveniently placed at the disposal of officials who «worked» with

[1] Criminal Code of the Russian Federation.

[2] http://www.vzglyad.ru/news/2005/8/29/5179.html

[3] Moscow Times, September 13, 2005.

her in order to intimidate her and break her will to make her testify to the effect desired by the investigators. Otherwise, why was it so necessary to keep the guards sleepless during the night instead of bringing S. Bakhmina to the custodial detention facility which would have been a 20 minute drive and was equally distant from the hospital as it was from the Ministry of Internal Affairs?

The official of the Ministry of Internal Affairs had three options:

humane — to leave S. Bakhmina in the hospital for the rest of the night under medical supervision;

inhumane, but formally legal — to transfer S. Bakhmina (in full conformity with the investigator's decision) to the custodial facility and leave her there for the rest of the night giving an opportunity for sleep both to her and to her guards — *suum quiqui*[1];

torturous-punitive — to bring S. Bakhmina to a meager office at the Ministry of Internal Affairs (obviously having no furniture except for several chairs and a desk) and to suggest that she should sleep there until the open of business hours in the presence of her guards.

The first two options can be called legal (of course, if the doctors released S. Bakhmina from the hospital on their own and not under pressure); while the third one obviously deviates from that category.

The fact that S. Bakhmina (even if there was no «private conversation» with the operatives) has been subjected to psychological torture cannot stir even the slightest doubt in the author. As taken from the wording of the definition for psychological torture in the UN Convention against Torture (1984), «moral suffering» «based on sexual discrimination» was intentionally inflicted on S. Bakhmina. She was made to sleep in the presence of strangers, which can cause severe psychological stress in any woman.

In the author's opinion, this also amounted to physical torture since sleep on chairs in an office qualifies as intentional sleep deprivation, i.e. «physical suffering.»

At the same time, there exists another important aspect, which (quite unexpectedly for the author) has come to light at a meeting of Moscow lawyers with a delegation of the International Association of Lawyers (International Bar Association) when they visited Moscow in April 2005. Based on the results of this trip the delegates have prepared the Institute of Hu-

[1] To each — his own (Lat.)

man Rights Report for the International Lawyers Association on the problems of judicial reform in Russia in which the details of S. Bakhmina's case were commented upon.[1] One British judge from this delegation voiced an opinion that S. Bakhmina had become a victim of what in English is called «sexual harassment.» Then it looked rather surprising — but later it became clear that this was due to the commonly accepted incorrect translation. Usually this term is translated into Russian as «sexual importunity,» while it would have been more correct to translate it as «sexual scoff.» This notion is much wider than just «harassment» — either physical or verbal. In the last ten years, this notion from an exclusively aesthetic or moral one — in the legally developed countries — has become a whole legal institution intended to protect the rights and interests of women.

But setting aside legally developed democracies, even China, where habits and ways are, perhaps, rougher and tougher than in Russia, in 1992 ratified the law «On protection of the rights and interests of women», which in August of 2005 was complemented with amendments protecting women from «sexual scoff.»

We, in Russia, with our medieval approaches to the rights of women are lagging behind not only the advanced legal systems, but also the countries where women are traditionally treated as «inferior sex.»

The Svetlana Bakhmina case in which immoral attitude to a detained young mother was mixed with violation of law, is especially indicative of the fact that none of the state bodies involved, especially the RF State Office of Public Prosecutor, has recognized the fact of any infringements, even in the degree of minor offences, nor has they given a principled legal evaluation of the commonly acknowledged facts. For this reason the Svetlana Bakhmina case serves as a true mirror of the situation with legality in Russia.

[1] Summary of the report is published in the «Advocate» journal, Issue #7, 2005, p. 74.

**LUND UNIVERSITY, FACULTY OF LAW**
Annual Day of Legal Science Research

**Address by**
**Dr. Hans Corell**
Ambassador, Former Under-Secretary-General for Legal Affairs andthe Legal Counsel of the United Nations

# INTERNATIONAL LAW AND CHANGING CLIMATE

31 May 2007
Lund, Sweden

Professor Träskman, Dean of the Faculty of Law, Professor Ortwein, Professor Modéer, Professor Noll, Doctores promovendi, Colleagues and friends, Fellow students,

It is with great delight that I take the rostrum today. Allow me, first, to extend my warmest thanks to the Faculty for inviting me to address you on this «Annual Day of Legal Science Research» and for bestowing upon me an Honourary Law Degree. I am deeply grateful for this award — this mark of distinction.

The title that I have chosen for my address is: *«International Law and Changing Climate»*.

As it will appear, the title is meant to cover not only the environment. It is intended to cover also the political climate, which has undergone significant changes over the past few years.

In my presentation I will make three main points:

First, that the global climate change that we are presently experiencing will require States to cooperate even more closely in environmental matters in the years to come, including by framing their commitments in legal terms;

Second, that climate change and other threats that we are facing will present even greater demands on the institutions that we have created for

the maintenance of international peace and security, in particular the United Nations; and

Third, that scrupulous adherence to the rule of law both at the national and international level is the only way forward to ensure peace and security for future generations.

In a few concluding remarks I will make some suggestions with respect to the role of Academia in the rule of law context.

**First point: Climate change requires close cooperation among States**

Climate change has played a prominent role in the media lately. Former Vice-president Al Gore's «An Inconvenient Truth» and the preparatory work for the upcoming Fourth Assessment Report «Climate Change 2007» of the Intergovernmental Panel on Climate Change (IPCC) have contributed to this focus.

So far, the reports by the three IPCC Working Groups — Group I on the Physical Science Basis, Group II on Impacts, Adaptation and Vulnerability, and Group III on Mitigation of Climate Change — have been made available.

The conclusion of Working Group I is that current warming trends are unequivocal, that it is very likely that greenhouse gases released by human activities are responsible for most of the warming observed in the past fifty years, and that the trends are projected to continue with greater intensity over the course of the 21st century and beyond.

However, this conclusion and other assumptions of the IPCC Working Groups are disputed by some. The critics maintain that the change of temperature is generated by other factors and that the effects of human activity on the global climate are marginal.

Obviously, the provision of energy for a rising world population will be one of the greatest challenges for the future. The indications are that the world population will rise from the present 6.5 billion to 9.1 billion by 2050. Millions of people are living in great poverty and without access to clean drinking water. This cannot be allowed to continue. Also these people should be allowed to live under decent conditions.

At the same time there are positive trends. India and China presently demonstrate a tremendous economic growth. But, of course, this is combined with a rise in their energy consumption. Carbon dioxide emissions from the developing world will soon bypass the emissions generated by the industrialised countries.

How should these challenges be tackled? This is basically a question of policy. However, once decisions are made they will inevitably have legal consequences.

Environmental law is a late arrival at the international level. The first significant step was the groundbreaking Stockholm Declaration of 16 June 1972. In this Declaration the participating States declared that «the protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world».

In this context it is also worthy of note that the Declaration addresses the growth of population. Having noted that the natural growth of population continuously presents problems for the preservation of the environment, and that adequate policies and measures should be adopted, as appropriate, to face these problems, the participating States included Principle 16 in the Declaration:

«Demographic policies which are without prejudice to basic human rights and which are deemed appropriate by Governments concerned should be applied in those regions where the rate of population growth or excessive population concentrations are likely to have adverse effects on the environment of the human environment and impede development.»

Since 1972, States have negotiated several conventions and protocols for the protection of the environment. These instruments are by now more or less generally accepted by the entire State community. Recently, I had reason to look at the status of ratification of some of these treaties for which the Secretary-General of the United Nations is the depositary. I updated this list on 25 May 2007, and this is what I found (please bear in mind that there are presently 192 Members of the United Nations):

The Vienna Convention for the Protection of the Ozone Layer (1985) — 191 parties

The Montreal Protocol on Substances that Deplete the Ozone Layer (1987) — 191 parties

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989) — 170 parties

The United Nations Framework Convention on Climate Change (1992) — 191 parties

The Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997) — 173 parties

The Convention on Biological Diversity (1992) — 190 parties

The United Nations Convention to Combat Desertification (1994) — 191 parties

The Stockholm Convention on Persistent Organic Pollutants (2001) — 146 parties

As it appears, there is an almost universal participation in these agreements by the State community. Five of them have 190 parties or more. One has 173, one has 170, and one, adopted as late as in 2001, has 146 parties.

However, these and related instruments will not suffice in the future. If, for example, there is agreement to reduce carbon dioxide emissions, it will be necessary to establish limits and adopt a regime to assure that these limits are kept. This would require a binding international agreement. Reference is often made to the need to establish a regime that succeeds the Kyoto Protocol. This will not be possible unless there is a well functioning international legal order.

In addition, irrespective of the reasons for the changing climate, global warming is a fact. We should not exaggerate or over-dramatise this development. But States must get together and discuss this phenomenon and develop appropriate contingency plans for the situation that will develop if the warming continues.

If it does, there will be further desertification and a rise of the sea level. This will have as a result that large areas of land will become inhabitable. Where will the people who now live in these areas go — whether they live in southern Florida, in a Pacific Island, or in Bangladesh?

It goes without saying that this development will not occur all of a sudden. Therefore, there is time for reflection and planning. How do we deal with the situation? By applying an open-minded immigration policy or by building fences around our countries like the ones presently being erected between the United States and Mexico and around Spanish enclaves in Africa?

And what do we do about the growing world population? Experience shows that one of the most effective means to address this phenomenon is to raise the level of education of the women!

Irrespective of how we attempt to solve these questions, we must realise that our politicians and decision-makers will be put under tremendous pressure in the future. Open minds, cooperation and legal commitments will be necessary.

**Second point: Climate change and other threats will present even greater demands on international institutions, in particular the United Nations**

Climate change is only one element among other threats that we are facing. Let me in this context recall the identification of threats made by the High-level Panel on Threats, Challenges and Change.

You may remember that, on 1 December 2004, this Panel presented its recommendations to Secretary-General Kofi Annan. The Panel maintained that any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security. Against the background of this definition the Panel identified six clusters of threats with which the world must be concerned now and in the decades ahead:

Economic and social threats, including poverty, infectious diseases and

environmental degradation;

Inter-State conflict;

Internal conflict, including civil war, genocide and other large-scale atrocities;

Nuclear, radiological, chemical and biological weapons;

Terrorism; and

Transnational organised crime.

A common denominator in addressing these threats is a well functioning system of collective security. Such a system was established through the Charter of the United Nations. However, a precondition for making this system work as it was intended is that the Members of the Organisation respect the Charter.

Since the UN is not always functioning as intended, it is sometimes suggested that it should be replaced by a new organisation, maybe reserved for certain States. This would be a grave mistake. Furthermore, the dilemma that I just pointed to will always be present. Either States abide by their commitments, or the system will not function.

This applies irrespective of whether the obligations are the ones laid down in the UN Charter or emanate from an agreement establishing a new organisation. In addition, nothing prevents States from establishing new organisations to look after their common interests as long as they respect the UN Charter. The North Atlantic Treaty Organisation (NATO) with its explicit reference to the UN Charter is a case in point.

The message of the UN Charter is clear. *Pacta sunt servanda!* Agreements must be honoured! The Charter also demands that all UN members respect human rights and the rule of law, even if the latter term does not appear in the Charter *expressis verbis*. It is regrettable that many UN Members are far from living up to what is required from them.

In later years, the development has actually backtracked. States that claim to be democracies and governed by the rule of law do not live as they preach. The attack on Iraq in March 2003, a flagrant violation of international law, and the undermining of the respect for human rights in the wake of the so-called «war against terrorism» have seriously damaged the confidence in the world order that we are attempting to establish.

Much and well deserved criticism has been directed against the two major Western powers that are responsible for this setback. It is important that this criticism is on record. And I am convinced that history's judgement will be extremely harsh.

But I believe that the time has now come to steer the energy that is generated by this wrongdoing in a positive direction. I also believe that we should look upon the situation as a challenge to be addressed in a positive spirit. What is needed is to channel the constructive forces that are present in many societies and organisations towards a common effort to strengthen the rule of law and the institutions that support it. To this end, it is necessary to engage in an educational effort in order to reach people in all countries at all levels, but in particular at the grassroots level.

That the United Nations needs strengthening is self-evident. But this can be achieved only if its Members adhere to the rule of law both at the national and international level. During my 10 years as the Legal Counsel of the UN it also became crystal clear to me that the absence of democracy and the rule of law are at the root of every conflict that the UN deals with — among States or within them.

**Third point: Scrupulous adherence to the rule of law both at the national and international level is the only way forward**

Much has been said about the need for reforming the United Nations. But in my view, the greatest need for reform is at the national level.

It is easy to agree with the High-level Panel when it argues that «capable and responsible States must be on the front line in combating today's threats». To focus on UN reform only will therefore not be sufficient. As I have commented on other occasions, the constant talk of UN reform is

more often that not attempts to draw attention from the shortcomings of the Members of the Organization!

No, we must start at the national level by making a systematic and organized effort in which all countries should be involved. This will not succeed unless it has the wholehearted support of the most powerful Members of the United Nations.

As I have said on many occasions before, it was with great sadness that I observed how these Members sometimes behaved. This goes in particular for the United States, a democracy and a State under the rule of law. But I believe that there is now a growing understanding among the general public in that country that its administration must rediscover the ideals upon which the United Nations was founded.

Among the positive signs is that the U.S. civil society is presently more actively engaged than ever in efforts directed towards strengthening the rule of law both within their own country and elsewhere. Suffice it to mention the efforts by the American Society of International Law and the American Bar Association (ABA).

Also the United Nations and other international organisations, such as the World Bank, the European Union, and the Council of Europe, provide assistance to help establishing societies under the rule of law. The same goes for many governments. That governments should engage actively in this work cannot be stressed enough. In the public debate I have expressed the opinion that for strategic reasons donor countries should give priority to the rule of law and legal technical assistance in their international aid activity.

But let me now turn to the non-governmental organisations engaged in this work. Let me illustrate with the following examples.

The International Bar Association (IBA) has adopted a resolution to strengthen the rule of law and is supporting a Rule of Law Movement. In that context it has also established an International Rule of Law Directory, which is the first centralized, fully searchable, online database of entities engaged in rule of law work throughout the world. It is established to provide users with reliable information and a compiled directory of Internet resources and links to organizations offering assistance to the rule of law. The IBA Human Rights Institute is engaged in extensive legal assistance work in many countries. At its Annual Meeting this autumn, IBA will devote a full day to the rule of law.

The ABA has launched a Rule of Law Initiative, which is a formal consolidation in March this year of ABA's international rule of law programs into a single entity. This entity is comprised of the Africa Law Initiative, the Asia Law Initiative, the Central European and Eurasian Law Initiative (CEELI), and the Latin American and Caribbean Law Initiative and has some 400 staff and volunteers in over 40 countries, including the U.S. The whole idea of this initiative is to strengthen the rule of law.

In September 2006, the IBA and the ABA jointly organized a Rule of Law Symposium to strengthen their cooperation.

The ABA is presently consulting with others with a view to developing a Rule of Law Index to be able to measure the adherence to the rule of law at the national level around the world.

The International Legal Assistance Consortium (ILAC), established in 2002, is an umbrella organization for non-governmental organizations and other organizations interested in promoting the rule of law. The Consortium has some 40 member organizations (among them IBA and ABA), representing over 3 million judges, prosecutors, lawyers and academics world wide, and is engaged in a number of countries focusing on challenges that justice systems face in the aftermath of armed conflict. Its working methods contains several elements, among them initial assessment of the justice system in a post conflict situation, working with the host government, making recommendations on what is needed to rebuild that justice system, assessing what resources are available in country and highlighting the assistance that is needed from the international community, and helping the host government and the United Nations to coordinate the implementation of ILAC's recommendations.

The Hague Institute for the Internationalization of Law (HiiL) is an international research institute focusing on national legal orders and how they function (or not) in a world where national borders in the traditional sense are becoming less important. The institute has organized seminars, bringing together experts from different organizations which has led to the establishment of a Network of High Level Experts on the Rule of Law.

Since I am addressing the Law Faculty at Lund University, I would be remiss if I did not also mention the Raoul Wallenberg Institute of Human Rights and Humanitarian Law. The goal of this institute, connected to the University, is to advance knowledge and understanding of international human rights law and to promote respect for and fulfillment of human rights

through research, education, and overall capacity building. This is done through an extensive program including through local offices in Beijing, Jakarta, Nairobi and Istanbul.

The Atlantic Council of the United States works to promote constructive U.S. leadership and engagement in international affairs based on the central role of the Atlantic community in meeting the international challenges of the 21st century. On 1 November 2005, the Council's Program on Transatlantic Relations organized a workshop on «International Law in an Age of Globalization and Terrorism», which brought together 26 European and U.S. experts on international law. The result of the workshop was published in an Atlantic Council policy paper in March 2007, authored by William H. Taft, former Legal Adviser to the Department of State, and Frances G. Burwell, Director of the Council. This policy paper contains a number of very constructive recommendations, among them that the United States and the European Union should demonstrate their commitment to the future of international law by launching a program of extensive legal assistance that will bolster the rule of law around the world.

In this context should also be mentioned a very interesting initiative by an intergovernmental organization. As an outflow of discussions within the Network of High Level Experts on the Rule of Law (see HiiL above), the International Law Development Organization (IDLO) is in the process of establishing the IDLO Rule of Law Assistance Directory. The purpose of this Directory, which will soon be available on the Internet, is to serve not only as a database but also as a tool to facilitate the exchange of information, generate debate and discussion, and promote harmonization of development strategies for the legal and judicial sectors. So far, several thousand technical assistance projects from 2004 onwards have been registered.

It is also interesting to note the initiatives that are now increasingly being taken by business. Many enterprises have joined the Global Compact launched by Secretary-General Kofi Annan in January 1999. Corporate Social Responsibility (CSR) has become a major issue in the decision-making at the highest level, in particular in transnational corporations. CSR now constitutes an important element in their risk management.

But needless to say, the United Nations and other international organisations must strengthen their efforts to provide legal technical assistance in order to help establishing societies under the rule of law. The same applies to the governments that are in a position to contribute in this field.

The rule of law at the national level is a precondition for a well functioning system at the international level.

**Concluding remarks**

In concluding, allow me to make a few suggestions with respect to the role of Academia in the rule of law context.

You may have noticed that so far I have not mentioned the question how to define the rule of law. This is intentional. There are books written about this, and there are many suggestions for such a definition. Some of them are quite elaborate («thick definitions»), others are more narrow («thin definitions»).

Some of these definitions are based on the precondition that the rule of law cannot exist unless there is democracy. I agree. However, in countries where there is no democracy one has to start somewhere. Therefore, in order to be able to assist such countries it may be necessary to start by developing proper legislation in areas where this is possible, even if this legislation is not adopted by an assembly elected by a popular vote. Also in an autocratic society there must be some order. And if the political conditions do not make it possible to immediately introduce a constitution based on democratic principles, it may be better to convince the leadership in such a country to adopt legislation in certain areas that will benefit the country, e.g. trade law. As the country develops, this would eventually pave the way for democracy and a State under the rule of law.

Therefore, I am not convinced that it is worth the effort to invest more energy in trying to define the rule of law. Instead, it is better to identify some key elements, without which the rule of law cannot be said to exist. Based on such identification it would be possible to make an assessment to which extent a particular State lives up to these conditions. One could then identify sectors where assistance could be extended without compromising the final goal. This is an area where more research, based on experience, might be helpful.

Furthermore, the link between the rule of law and development is important. This should be a strong argument in convincing States that need assistance to seek support. It is of great importance that States can identify their needs and take appropriate contacts with those who can provide legal technical assistance.

What I would like to see for the future, in addition to the different tools that have been developed so far, is actually a kind of «stock exchange» on

the Internet, were those who need assistance can make contact with those who can provide it and, in turn, with those who are in a position to finance the project that eventually will be the result of this matching exercise. Maybe this could also be looked at from a scientific point of view?

Furthermore, and most importantly, Academia must constantly remind us of what history teaches us. It is frightening to observe that the memory at the political level is sometimes so short. Who could believe that the lessons from the two world wars in the last century — lessons that led to the establishment of the United Nations — should fall into oblivion so quickly, especially a the highest political level where this knowledge was needed the most.

*«International Law and Changing Climate»* : My final point is that there is need for global warming — of the political climate! At the end of the day, there is no other recipe! To maintain international peace and security in the future we need a warmer political climate and «capable and responsible States» — ultimately democracies governed under the rule of law!

Thank you for your attention!

# 6. THE RULE OF LAW AND A SINGLE LEGAL SPACE FOR EUROPE AND THE POST-SOVIET STATES

**Moscow — Bruges White Paper:**

## THE RULE OF LAW AND A SINGLE LEGAL SPACE FOR EUROPE AND THE POST-SOVIET STATES

*Moscow — Bruges working group was first established by the Moscow City Chamber of Advocates, the Federal Chamber of Lawyers of the Russian Federation and the International Union (Commonwealth) of Advocates for preparation of the Rule of Law Symposium of the International Bar Association, which took place in Moscow on July 6, 2007*

### 1. The Current Global Rule of Law Movement

It appears so that process of giving priority to Rule of Law ideas is only just beginning. We regard the Rule of Law as a concept that introduces ideas for the 21st century. Indeed, it could be implemented on a worldwide basis only after most colonial nations were given independence and 21 new states emerged in the post socialist space. Both groups of countries are the first targets of the Rule of Law movement, particularly in the area of the Role of Law in Economic Development.

Our working group is considering the writing of a research paper «The Rule of Law and a Single Legal Space for Europe and post-Soviet states» as a result of the Moscow Symposium. This presents an important opportunity to involve more experts in a worldwide discussion of this issue, which finally be ultimately useful for further Rule of Law development in Europe and the post-Soviet space.

This paper is identified with the cities of Moscow and Bruges (Brugge). In fact Bruges (Brugge) and Russia have a long history in common.

The city of Bruges was a counterpart to the Russian city Great Novgorod during 15th century within the Hanseatic financial trade system. Hanseatic League (the Hanse) was medieval league of free cities in Germany and the adjoining countries, with Russian Great Novgorod as its eastern point and Flemish Belgian Bruges as its international financial center. It was a relatively short, but unforgettable, historical moment when Russia was a part of a single European market. At that time a single legal and economic space uniting Europe and Russia arose for the first time and developed until its unfortunate interruption.

Trade in the Hanseatic league was financed by Italian banks and was therefore a natural network for the spread of Roman law which had been revived by the Italian academics of Bologna University a couple of centuries earlier. This receptivity to the old Roman law is a remarkable example of implementing the best legal European standards in the national legislation of different countries. The post-Soviet countries today need a similar type of receptivity. This could well take the form of implementation of selected European legal standards in national legal systems, first of all, in commercial and corporate law.

## 2. The Rule of Law as a Vehicle for Integration

Establishment of the Rule of Law as a governing principle at the level of international regional organizations such as the EU or CIS will create an opportunity for development of this concept at the national level of their respective member states. In addition, achievements in economic development coupled with active integration processes create the necessary and sufficient conditions for the worldwide spread of this concept in the 21st century.

Globalization of human rights has already taken place since adoption of the Universal Declaration of Human Rights in 1948. Accordingly, one of the most important components of the Rule of Law, respect for the human rights, has already become the global principle in the international relations.

In accordance with the 1992 EU Treaty, the EU respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such rights stem from con-

stitutional traditions that are common to the Member States and serve as general principles of EU law.

The 2004 EU Treaty establishing the Constitution for Europe recognizes this concept, emphasizing that the European Union intends to promote such values within the framework of the Common Foreign and Security Policy.

The European Union was founded on the basis of economic integration of its Member States, and on principles of free trade, open market and constitutional economics. At the same time the EU respects the national identities of its Member States and contributes to the development of cultural, religious and language diversity of its citizens. This is correctly reflected in the EU motto: «United in Diversity».

These are solid reasons for confidence in the idea of a single legal space for the post-Soviet countries and the EU. It would be even better to call this a Single Rule of Law Space for Europe and the post-Soviet countries. Indeed, Russia and the other post-Soviet countries need to be receptive to European legal standards in most areas of law.

Foundation of the single legal space in Europe should be based on the Rule of Law and contain its basic elements as common principles of law. The Rule of Law concept could be implemented not only at the level of the nation- states, but also at the level of integration organizations. Maintaining the Rule of Law as an important value of European civilization is directly connected to the formation of European Law and the development of a Single European Legal Space.

This also applies to the Commonwealth of Independent States (C.I.S.) which includes all 12 post-Soviet states. A significant oversight of its creators was the absence in its statutory provisions of ideas of adherence to the common values of liberty, sovereignty and democratic ideals on the basis the Rule of Law and common cultural heritage of the republics of the former USSR. This caused a crisis in this integration organization. The C.I.S. will be able to obtain its 'second life' in the XXI century only if it adopts the ideas of the Rule of Law and creates a new basis for economic, social and cultural prosperity of the peoples for its member countries.

The question of whether the Rule of Law and other shared values become the main trend of internal and external policies in Russia and the other post-Soviet countries, will depend first of all on its peoples. But it is

critically important to set forth valid priorities in the area of legal development for a situation in which post-Soviet countries must quickly fill the gaps in legal development created over several decades.

## 3. Legal reform to provide a Rule of Law foundation for the single space for Europe and the post-Soviet states

As we mentioned earlier, the Rule of law could serve as a solid basis for interstate integration. Although it takes a great deal of effort to bring countries with different economic and legal development into one multinational organization, we should admit that the process of integration makes it easier to cooperate at all levels, i.e. economic, cultural, diplomatic as well as legal.

For the post-Soviet countries the Rule of Law could only be implemented through substantive legal reform. Any other attempt would qualify as a half measure and therefore fail to make sound changes to the legal framework. All the Soviet block countries adopted democratic constitutions that should be enforced in the way to foster economic development and poverty reduction. In this respect constitutional economics is instrumental to work out possible economic solutions that are compatible with the existing constitutional framework aimed at protection of basic rights and freedoms. We believe that legal reforms in the post-Soviet countries should be conducted based on this approach.

The post-Soviet countries have similar legal systems and encounter similar problems in carrying out legal reforms in order to create a basis for coordination of legal development among themselves and with the EU legal standards. This could become a major argument for legal reform in any post-Soviet country.

To illustrate the way in which legal reform could be developed and implemented we refer to one of the most seminal works created in the post-Soviet countries in recent years: «Theses for Legal Reform in Russia». This paper was produced in 2004 by the President of the Constitutional Court of Russia, Valery Zorkin. He states:

«The main engines of legal reform should be nation-wide introduction of economic disciplines into the curricula of law schools and active adaptation of European legal standards to those of the Russian legislation. A techno-

logical breakthrough can be possible only on the basis of compliance with international legal standards. Flagrant nihilism in respect of international legal values ends up being all too costly during the solution of any serious problem, be it privatization or regulation of the securities market.».

The problems of creating a single legal space can be solved by means of utilizing the experience of both the European Union and other international organizations. Such organizations unite countries with absolutely different standards of life, levels of economic, political and cultural development, which create difficulties for creating unified norms of the law, as is well illustrated by the case of the WTO.

The development of the concept of a single legal space is clearly reflected in its basic objectives:

receptivity to European legal standards by legal systems of post-Soviet countries for the purpose of speeding their economic and legal development up to the international level, first of all in economic and corporate law;

harmonization of law of the C.I.S. on the basis of European legal standards;

development of enforcement of the Rule of law, as a basis for integration;

establishment of a single legal base to create a single economic space uniting Europe and the post-Soviet countries;

legal integration development facilitated by constitutional economics approach.

The concept of the single legal space is not aimed at transformation or destruction of national identities of the C.I.S. states. Together with development of the single legal space as a prerequisite for the growing volume of business and investments, development of business activity and an increase in the competitive potential of national economies may have a positive effect on the social policy, culture and economic prospects of the C.I.S. states.

Possible legal vehicles for the creation of the single legal space could be multilateral agreements, the provisions of which do not conflict with national legislation and constitutions. However, differences in legislation may have serious negative consequences for development of the economy of Russia and other post-soviet states. Many former republics of the USSR have chosen European, rather then Russian legal models to create their civil codes and other standards of business and financial law.

Valery Zorkin commented on this subject as follows:

«Regarding the formation of the as yet undeveloped system of legislation in Russia, it is outdated approaches that still prevail, including those in the legislative codes. Especially lacking a holistic and systematic approach is corporate law, which is partially regulated by the Civil Code, and partially by other legislative acts, poorly coordinated among each other. In these circumstances, a reasonable internationalization of Russian law becomes extremely important.

Most logical in this connection seems the adaptation of the new Russian legislation to the European Community standards, which are currently being actively integrated into the legislation of the Baltic states and those of Eastern Europe, i.e. the legislation of countries in many aspects quite comparable with modern Russia. The concept of uniform a legal space for Russia and EC countries can become a foundation for the development of our future legislation.

More importantly, divergences in the legislation can have serious negative consequences for the development of the economic and financial integration of the Commonwealth of Independent States (C.I.S.) countries and, accordingly, also for the development of the economy of Russia. Many former Soviet republics have already chosen European, but not Russian legal models, — for example, materials for the Uniform Civil Code of Common Europe, as well as other standards for the commercial and financial law. Therefore, the concept of a single legal space of the C.I.S. and Europe, which should provide a firm basis for the development of Russian legislation is becoming very important.

In addition, the difference in legislation can have serious negative consequences for the development of economic and financial integration of the Commonwealth of Independent States (C.I.S.) countries and, accordingly, for development of the Russian economy.».

Russian jurist Oleg Kutafin and economist Alexander Zakharov produced a Concept of a Single Legal Space for the C.I.S. and Europe in 2002. This idea was fully incorporated in the resolution of the 2003 Moscow Legal Forum. The Forum gathered representatives of more than 20 countries including 10 CIS countries. In 2007 both the International Union of Jurists of the CIS and the International Union (Commonwealth) of Advocates passed resolutions that strongly support the Concept of a Single Legal Space for Europe and post-Soviet Countries.

Obviously, to improve its legislation Russia should be oriented toward the continental legal family of European law. The civil law system is much closer to the Russian and that of the C.I.S. and will be instrumental in harmonizing legislation of the C.I.S. states and the European Community.

It is suggested that the introduction of the concept of a single legal space or a single Rule of Law space for Europe and the post-Soviet countries be implemented in four steps:

1. Development plans at the national level regarding adoption of selected EC legal standards in the national legislation of post-Soviet countries;

2. Promotion of measures for harmonization of law with the goal of developing a single legal space for Europe, Ukraine, Russia and other C.I.S. countries in the area of commercial and corporate law;

3. Making the harmonization of judicial practice of post-Soviet countries compatible with Rule of Law principles;

4. Coordination of the basic requirements of the Rule of Law in Russia and other post-Soviet countries with the EU.

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**Moscow Rule of Law Linguistic White Paper**

This paper is prepared at the request of the Moscow City Chamber of Advocates for the Moscow Rule of Law Symposium held by the International Bar Association in cooperation with the Constitutional Court of Russia, Moscow City Chamber of Advocates, the Federal Chamber of Lawyers of Russia, the International Union (Commonwealth) of Advocates on July 6, 2007 in the building of the Constitutional Court of Russia in Moscow

# THE RULE OF LAW, THE WORLD JUSTICE PROJECT: WHAT'S IN A NAME?

## Background

The Rule of Law movement was initiated by the International Bar Association (IBA), which represents about 200 bar associations, and its president Francis Neate through the Rule of Law Resolution adopted by the IBA Council in September 2005 in Prague.

In an effort to explore how individuals and organizations — governmental and non-governmental — can strengthen efforts to advance the rule of law around the world, the American Bar Association (ABA), together with other organizations committed to advancing the rule of law, convened the International Rule of Law Symposium in Washington, D. C. in November 2005.

This Symposium and another one, held by IBA and ABA in September 2006, have raised awareness of the importance of the rule of law and energized much of the core constituency for this cause. The challenge now is to expand this constituency and give it the data, tools, and other resources necessary to strengthen the rule of law. Discussions at the symposia suggested an inclusive approach to advancing **the rule of law world-**

**wide** and pointed to four follow-on initiatives, including a **World Justice** Forum. These initiatives comprise the near-term work of the **World Justice** Project (WJP).

## World Justice vs. International Rule of Law

In the passages, taken almost verbally from The World Justice Project brochure, compiled and released by the American Bar Association, we witness the obvious co-existence of two terms: *World Justice* and *International Rule of Law* (the latter also comes in variations like *the rule of law worldwide* and *the rule of law around the world*). After reading this document it becomes quite clear that its authors interpret both these terms identically and, therefore, chose *world justice* to actually mean *international rule of law* in such names as «World Justice Forum» or «World Justice Project». Here is another quote from the same source to support our assumption (like before, we undertook to apply bold face for highlighting the terms in question):

«The **Word Justice** Project will also hold **international** multidisciplinary meetings in Europe and Africa in July 2007 and Asia and Latin America in September 2007.

These outreach meetings will explore how **the rule of law** impacts different disciplines' work and will create the basis for collaboration among these disciplines to advance **the rule of law**. The **World Justice** Project expects these meetings to begin a sustained dialogue among various disciplines about the implementation of **the rule of law**.»

So the primary goal of the World Justice Project according to its brochure is to promote and implement the rule of law principle internationally.

But what does the expression «World Justice Project» mean to someone, who is not familiar with this background information, nor versed in Legalese, and who has to take this name «at face value», seeing it in a small newspaper article or a in a TV news spot?

Firstly, such a person is faced with the problem of attributing the word «World» — does it belong to «Justice» or to «Project»? The present context can hardly help one in making the correct attribution.

We polled about a dozen of non-native English speakers, living in Moscow, and the overwhelming majority voted in favour of immediate interpretation as «Project for World Justice» vs. that of «World Project for Justice».

Similar preference in attribution was demonstrated by a group of Moscow-based translators (Russian nationals) who were offered to promptly translate «the World Justice Project» into their working languages. The results were «Le project de **justice mondial**», «Das **Weltgerechtigkeit**-Projekt», «El proyecto de **justicia mundial**», etc.

This poses another question: how are we to interpret the expression «World Justice»? Here is the explanation of the word «justice» taken from the 13-volume, almost 7000 pages-long, **West's Encyclopedia of American Law**, 2nd Ed., according to which justice is

«**The proper administration of the law**; the fair and equitable treatment of all individuals under the law. **A title given to certain judges, such as federal and state supreme court judges**».

If we take the definition provided by the **Random House Webster's Unabridged Dictionary**, one of the most comprehensive and authoritative lexicographical sources of American English, it is as follows:

1. the quality of being just; righteousness, equitableness, or moral rightness: to uphold the justice of a cause.

2. rightfulness or lawfulness, as of a claim or title; justness of ground or reason: to complain with justice.

3. the moral principle determining just conduct.

4. conformity to this principle, as manifested in conduct; just conduct, dealing, or treatment.

5. the administering of deserved punishment or reward.

6**. the maintenance or administration of what is just by law, as by judicial or other proceedings: a court of justice.**

7. judgment of persons or causes by judicial process: to administer justice in a community.

**8. a judicial officer; a judge or magistrate.**

**9. (cap.) Also called Justice Department, the Department of Justice.**

From the two above definitions we may deduce that, in the legal context, the word «justice» should primarily mean «proper administration of the law» (WEoAL) or «administration of what is just by law, as by judicial or other proceedings» (RHWUD).

Looking into the **Cambridge Learner's Dictionary**, 2nd Ed., we will see an even terser definition:

1. FAIR BEHAVIOUR [U] behaviour or treatment that is fair and morally correct.

**2. LAW [U] the system of laws which judges or punishes people, e. g. the criminal justice system.**

Close to this is the definition found in the **Longman Dictionary of Contemporary English**:

1. **system of judgement**: the system by which **people are judged** in courts of law and **criminals are punished**, e. g.:

*a book on the criminal justice system*

*The killers will be brought to justice* (=caught and punished).

*Acts of terrorism must not escape justice.*

Do not use **justice** when you mean the laws of a country and the ways in which these laws operate. Use **legal system** instead.

7. judge [countable] also Justice

a) American English: a judge in a law court

b) British English: the title of a judge in the High Court

An interesting twist is added by the **Oxford Advanced Learner's Dictionary**:

1. [U] the legal system used to punish people who have committed crimes: the criminal justice system.

The **European Court of Justice** (BrE). (Also compare to **International Court of Justice** (ICJ) or **World Court**. — B. M.)

They were accused of attempting to pervert the course of justice. (NAmE)

They were accused of attempting to obstruct justice.—see also miscarriage of justice

[...]

4. (also Justice) [C] (NAmE) a judge in a court (also used before the name of a judge)—see also **chief justice**

5. Justice [C] (BrE, CanE) used before the name of a judge in a court of appeal: Mr Justice Davies

IDIOM: **bring sb to justice** — to **arrest** sb for a crime and **put them on trial** in court

And finally, the most exhaustive definition of justice rendered by the academic multi-volume **Oxford English Dictionary**:

**I.** The quality of being just.

1. The quality of being (morally) just or righteous; the principle of just dealing; the exhibition of this quality or principle in action; just conduct; integrity, rectitude. (One of the four cardinal virtues.)

2. *Theol.* Observance of the divine law; righteousness; the state of being righteous or 'just before God'. *Obs.*

3. Conformity (of an action or thing) to moral right, or to reason, truth, or fact; rightfulness; fairness; correctness; propriety; = justness 2, 3.

**b.** Just claim, right *(to* something). *Obs.*

**II. Judicial administration of law or equity**.

4. Exercise of authority or power in maintenance of right; vindication of right by assignment of reward or punishment.

5. The administration of law, or the forms and processes attending it; judicial proceedings; early use, Legal proceedings of any kind *(obs.)*.

**b.** The persons administering the law; a judicial assembly, court of justice. *Obs.* (In early quots. difficult to separate from pi. of sense 8.)

**c.** Judicial authority, jurisdiction. *Obs.*

6. Infliction of punishment, legal vengeance on an offender; *esp.* capital punishment; execution, **to do justice on** or **upon (of),** to punish, esp. by death. *Obs.*

**b.** A place or instrument of execution; a gallows. *Obs.*

7. Personified, esp. in sense 4: often represented in art as a goddess holding balanced scales or a sword, sometimes also with veiled eyes, betokening impartiality. (= L. *Justitia.)*

**III.** An administrator of justice.

The name *Justitia* was applied (in the 11th cent.) in a general way to persons charged with the administration of the law, esp. to the sheriffs; it was subsequently limited to the president or one of the members of the Curia Regis, out of which the courts of King's Bench, Common Pleas, and Exchequer were developed. These judges were specifically denominated *justices itinerant, in eyre, of assize, of oyer and terminer, of jail delivery,* etc.: see these words. In the Court of Exchequer (which had a peculiar history) they were termed *barons.*

8. *generally.* A judicial officer; a judge; a magistrate.

9. *spec.* In Great Britain and the United States: A member of the judicature, a. A judge presiding over or belonging to one of the superior courts, *spec,* in England, one of the courts of King's Bench, Common Pleas, and Exchequer; since the consolidation of the courts in 1875, a member of the Supreme Court of Judicature; formerly applied also to various officers exercising special judicial functions, as the commissioners who governed Ireland during the absence of the Lord Lieutenant or the vacancy of that office.

**High Justice** (in quot.[2] 1297) = justiciar 1. **Chief Justice** or **Lord Chief Justice,** formerly, the title of the judges presiding over each of the courts of King's Bench and of Common Pleas; both offices are now merged under the title of **Lord Chief Justice of England.** The judges of the Court of Appeal are called **Lords Justices,** and have the style *oi Right Honourable;* a judge of the High Court of Justice is called **Mr. Justice,** and has the style *of Honourable*. In the United States **Chief Justice** *is* the designation of the presiding judge in the U.S. Supreme Court, and in the supreme court of each state. So elsewhere in places formerly or still under British influence. See also Justice-Clerk, Justice-General. b. A justice of the peace (see next) or other inferior magistrate; esp. in pi. **the Justices.**

10. **Justice of the peace (justice of peace):** an inferior magistrate appointed to preserve the peace in a county, town, or other district, and discharge other local magisterial functions. Abbreviated J. P. Hence **justice-of-peaceship.**

Justices of the peace were instituted in England in 1327, and are appointed by the sovereign's special commission, directing them, jointly and severally, to keep the peace in the area named. Their principal duties consist in committing offenders to trial before a judge and jury when satisfied that there is a *prima facie* case against them, convicting and punishing summarily in minor causes, granting licenses, and acting, if County Justices, as judges at Quarter Sessions. See also quorum.

IV. Phrases and combinations.

11. Phrase, **to do justice to** (a person or thing): a. to render (one) what is his due, or vindicate his just claims; to treat (one) fairly by acknowledging his merits or the like; hence, To treat (a subject or thing) in a manner showing due appreciation, to deal with (it) as is right or fitting, **to do oneself justice,** to perform something one has to do in a manner worthy of one's abilities.

**b.** To pledge in drinking. *Obs.*

12. *attrib.* and *Comb.:* attrib., as **justice-box, — business, — day, — hall, — height, — hill, — parson, — room;** objective, etc., as **justice-maker, justice-dealing, — like, — loving, — proof, — slighting** *adj.;* **justice-broker,** a magistrate who 'sells' justice; **justice-court,** a court of justice; *spec,* the Court of Justiciary; **justice-eyre (-air):** see eyre; **justice-seat,** seat of justice, judgement-seat; *spec,* (see quot. 1641).

Based on all of the above, we believe that there exists a significantly and explainably high risk that people, not previously familiar with any infor-

mation materials and documents containing a detailed description and explanation of the goals and objectives undertaken by the World Justice Project, may fall into a trap of false interpretation of its proclaimed name. Such people, both native and non-native speakers of English (the latter being even more susceptible to misunderstanding and misinterpretation than the former) may construe the World Justice concept not as something closely related both in meaning and content to the rule of law concept (which we plan to clarify further), but rather as something much closer to a category of World Order maintained by a Supranational Punitive Agency (or even to a combined role of World Law Enforcer and World Judge played by a certain superpower), all of which, I emphasize, can be deduced by an unprepared mind from the definitions provided above, as those signifying common interpetations deeply rooted in public conscience.

Now we would like to present various definitions of the rule of law in order to compare then and see whether they are indeed as close as it was surmised by those who gave to WJP its name. But first let us quote from the document entitled «Moscow Rule of Law Symposium White Paper on the Role of Law and Economic Development: constitutional economics approach», which was compiled by the «Moscow» working group for preparation of the Rule of Law Symposium of the International Bar Association, successfully held in Moscow on July 6, 2007. One of its chapters is called «Finding a Common Definition of 'Rule of Law'». It says:

«The rule of law is especially important as an influence on economic development in developing and transitional countries. However, to date no clear and global definition of «rule of law» has been articulated that can be recognized and easily translated into all languages and cultures. In many ways, this reminds us of the global discussion on «corporate governance» that was initiated by multilateral institutions and developed markets in the mid-1990s. This term had an intuitive meaning for developed markets, but did not translate into other languages and was confusing to the audience in emerging markets. Today that term has become an understandable and mainstream concept in most countries due to development of its definition and applied meaning.

Frankly, the «rule of law» doctrine is not yet fully clarified even with regard to such established democracies as, for instance, Sweden, Denmark, France, Germany, and maybe also for Japan. To date, the term «rule of law» has been used primarily in English-speaking countries. Therefore the

task of creation of clarification and definition is important. In Russia, for instance, the definition «the legal state» (derived from German legal tradition) is very close to a rule of law concept and is an important principle in the text of the Russian Constitution adapted in 1993.

A common language between lawyers of common law and civil law countries is critically important for the rule of law. This is not purely an academic task. The recent rule of law movement may be characterized as an amazing effort of the world legal community to clarify and virtually enforce through worldwide national bar associations the «ideological» and almost spiritual legal concept of the rule of law.»

We would like also to include an excerpt from the speech of Geoffrey Vos, the Chairman of the Bar Council of England and Wales, prepared for the Moscow Rule of Law Symposium:

2. This morning, Francis Neate has already grappled with the true meaning of the 'Rule of Law'. One thing is for sure: there will always be as many definitions as there are lawyers speaking about it. Just this year, there have been 3 new and authoritative definitions that I have come across, in addition to the IBA resolution to which Francis has referred. I have put these three definitions in an appendix to this paper so that 'rule of law definition junkies' can study them at leisure. They emanate from the American Bar Association, Lord Bingham, the senior Law Lord in England, and an important and widely supported UK think tank called 'Justice'. But a quick glance at the appendix will show that definitions vary in terms of their parochial content. Some are so general as to be hard to interpret, because they have attempted universality. Some are so specific as to be inapplicable outside the UK or Europe or the US.

## The Rule of Law Definitions

**Lord Bingham delivering the Sir David Williams lecture on 16th November 2006: [2007] 66 CLJ 67**

1. Lord Bingham suggests 8 sub-rules:-

(1) The law must be accessible, and so far as possible, intelligible, clear and predictable.

(2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

(3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

(4) The law must afford adequate protection of fundamental human rights.

(5) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.

(6) Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purposes for which the powers were conferred and without exceeding the limits of such powers.

(7) Adjudicative procedures provided by the state should be fair.

(8) The existing principle of the rule of law requires compliance by the state with its obligations in international law.

**American Bar Association: Bill Neukom, Vice President of the ABA**

2. Four principles as follows:-

(1) A system of self government subordinate to the citizenry.

(2) A system based on fair, public, understandable and resilient rules (laws).

(3) A robust and accessible legal process providing the framework for transactions and dispute resolution.

(4) Diverse, competent and independent lawyers and judges.

**Justice's Manifesto for the Rule of Law**

3. Justice has seven principles:-

(1) The UK should adhere to international human rights standards both in its domestic and foreign policy.

(2) The independence of the legal profession and the judiciary must be upheld

(3) Due process and the right to a fair trial must be protected.

(4) Every person has the right to equality before and under the law.

(5) Every person in the UK, however poor or disadvantaged, has the right of access to justice

(6) Parliament should have greater powers to scrutinise legislation and hold ministers to account.

(7) Greater cooperation between European Union member states must be accompanies by greater protection for the rights of individuals affected.

Now let us turn to various authoritative dictionaries and encyclopaedias to see what interpretations and definitions the «rule of law» are available to interested, but uninitiated, native and non-native speakers of English.

First definition was borrowed from the Black's Law Dictionary, mentioned in the same connection by the Chairman of the Constitutional Court of the Russian Federation — Valery Zorkin in his memorable speech delivered during the Rule of Law Symposium in Moscow. The definition is as follows:

RULE OF LAW. A legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a «rule,» because in doubtful or unforeseen cases it is a guide or norm for their decision.

Obviously, the Black's dictionary is explaining only the concept of *a* rule of law, but not that of *the* rule of law, which is the subject of our consideration.

A much more detailed and useful explanation of the rule of law is provided in the **Oxford Law Dictionary**:

1. The supremacy of law.

2. A feature attributed to the UK constitution by Professor Dicey {law of the Constitution, 1835). It embodied three concepts: the absolute predominance of regular law, so that the **government has no arbitrary authority over the citizen**; the equal subjection of all (including officials) to the ordinary law administered by the ordinary courts; and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations.

Actually, the definition #1. sounds identical to the currently accepted Russian rendition of the rule of law, which is «верховенство права» (though, unfortunately, both «закон» and «право», as objective category, are translated into English by using the same word — «law», and any differentiation is only possible in context or by adding proper modifiers, such as, for example, «*statutory* law»).

By the way, we would like to note that German language found a very interesting workaround when referring to the rule of law concept. As was

mentioned in the «Moscow Rule of Law Symposium White Paper», the original Russian approximate rendition of the rule of law concept was «правовое государство» (literally «the legal state»), derived from German legal tradition, where it sounded as «Der Rechtsstaat». So the modern **Langenscheidt-HarperCollins German-English Dictionary** translates *the rule of law* according to this tradition as *die Rechtsstaatlichkeit* instead of using calqued translations, as some other European languages. Compare: *gobierno de ley* (in Spanish) or *supremazia della legge* (in Italian). Another good example of indirect approach to translation of the rule of law is shown by the Hachette-Oxford French-English Dictionary: *séparation constitutionnelle de la justice et du pouvoir*. French lexicographers seem to have taken «the rule of law» bull by the horns.

In this connection, we would like to quote one more similarly accurate explanation of the term by the **Concise Oxford English Dictionary**, a real masterpiece of brevity and exactness, **rule of law** — *the restriction of power by well-defined and established laws.*

As we are seeing, the concepts of «justice» and «the rule of law», as explained by many authoritative dictionaries, do not seem to belong to the same semantic field or even significantly overlap. While «justice» is more focused on a consistent administration of law, which somehow needs to be just, «the rule of law» rather stresses the limitation (ideally — elimination) of arbitrary authority of executive power (especially when commanding two other powers) over individual citizens, and the implementation of constitutional separation of at least the judiciary and the executive.

Leaving conclusions and decisions to whom they belong, we would like to end this paper with one big quote containing the entire article dedicated to the rule of law in the **West's Encyclopedia of American Law**:

**Rule of Law**

*Rule according to law; rule under law; or rule according to a higher law.*

The rule of law is an ambiguous term that can mean different things in different contexts. In one context the term means rule according to law. No individual can be ordered by the government to pay civil damages or suffer criminal punishment except in strict accordance with well-established and clearly defined laws and procedures. In a second context the term means rule under law. No branch of government is above the law, and no public official may act arbitrarily or unilaterally outside the

law may be enforced by the government unless it conforms with certain unwritten, universal principles of fairness, morality, and justice that transcend human legal systems.

## Rule According to Law

The rule of law requires the government to exercise its power in accordance with well-established and clearly written rules, regulations, and legal principles. A distinction is sometimes drawn between power, will, and force, on the one hand, and law, on the other. When a government official acts pursuant to an express provision of a written law, he acts within the rule of law. But when a government official acts without the imprimatur of any law, he or she does so by the sheer force of personal will and power.

Under the rule of law, no person may be prosecuted for an act that is not punishable by law. When the government seeks to punish someone for an offence that was not deemed criminal at the time it was committed, the rule of law is violated because the government exceeds its legal authority to punish. The rule of law requires that government impose liability only insofar as the law will allow. Government exceeds its authority when a person is held to answer for an act that was legally permissible at the outset but was retroactively made illegal. This principle is reflected by the prohibition against ex post facto laws in the U.S. Constitution.

For similar reasons, the rule of law is abridged when the government attempts to punish someone for violating a vague or poorly worded law. Ill-defined laws confer too much discretion upon government officials who are charged with the responsibility of prosecuting individuals for criminal wrongdoing. The more prosecutorial decisions are based on the personal discretion of a government official, the less they are based on law.

For example, the due process clause of the Fifth and Fourteenth Amendments requires that statutory provisions be sufficiently definite to prevent arbitrary or discriminatory enforcement by a prosecutor. Government officials must not be given unfettered discretion to prosecute individuals for violating a law that is so vague or of such broad applicability that even-handed administration is not possible. Thus, a Florida law that prohibited vagrancy was held void for vagueness because it was so generally worded that it encouraged erratic prosecutions and made possible the punish-

ment of normally innocuous behavior *(Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 [1972]).

Well-established and clearly defined laws allow individuals, businesses, and other entities to govern their behavior accordingly *(United States v. E.C. Investments, Inc.,* 77 F. 3d 327 [9th Cir. 1996]). Before the government may impose civil or criminal liability, a law must be written with sufficient precision and clarity that a person of ordinary intelligence will know that certain conduct is forbidden. When a court is asked to shut down a paint factory that is emitting pollutants at an illegal rate, for example, the rule of law requires the government to demonstrate that the factory owner failed to operate the business in accordance with publicly known environmental standards.

## Rule Under Law

The rule of law also requires the government to exercise its authority under the law. This requirement is sometimes explained with the phrase «no one is above the law.» During the seventeenth century, however, the English monarch was vested with absolute sovereignty, including the prerogative to disregard laws passed by the House of Commons and ignore rulings made by the House of Lords. In the eighteenth century, absolute sovereignty was transferred from the British monarchy to Parliament, an event that was not lost on the colonists who precipitated the American Revolution and created the U.S. Constitution.

Under the Constitution, no single branch of government in the United States is given unlimited power. The authority granted to one branch of government is limited by the authority granted to the coordinate branches and by the bill of rights, federal statutory provisions, and historical practice. The power of any single branch of government is similarly restrained at the state level.

During his second term, President Richard Nixon tried to place the executive branch of the federal government beyond the reach of legal process. When served with a subpoena ordering him to produce a series of tapes that were anticipated to link him to the WATERGATE conspiracy and cover-up, Nixon refused to comply, asserting that the confidentiality of these tapes was protected from disclosure by an absolute and unquali-

fied executive privilege. In united states v. nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the Supreme Court disagreed, compelling the president to hand over the tapes because the Constitution forbids any branch of government from unilaterally thwarting the legitimate ends of a criminal investigation.

Members of the state and federal judiciary face a slightly different problem when it comes to the rule of law. Each day judges are asked to interpret and apply legal principles that defy clear exposition. Terms like «due process,» «reasonable care,» and «undue influence» are not self-defining. Nor do judges always agree about how these terms should be defined, interpreted, or applied. When judges issue controversial decisions, they are often accused of deciding cases in accordance with their own personal beliefs, be they political, religious, or philosophical, rather than in accordance with the law.

Scholars have spent centuries examining this issue. Some believe that because the law is written in such indefinite and ambiguous terms, all judicial decisions will inevitably reflect the personal predilections of the presiding judge. Other scholars assert that most laws can be interpreted in a neutral, objective, and apolitical fashion even though all judges may not agree on the appropriate interpretation. In either case the rule of law is better served when judges keep an open mind to alternative readings of constitutional, statutory, and common-law principles. Otherwise, courts run the risk of prejudging certain cases in light of their own personal philosophy.

## Rule According to Higher Law

A conundrum is presented when the government acts in strict accordance with well-established and clearly defined legal rules and still produces a result that many observers consider unfair or unjust. Before the Civil War, for example, African Americans were systematically deprived of their freedom by carefully written codes that prescribed the rules and regulations between master and slave. Even though these slave codes were often detailed, unambiguous, and made known to the public, government enforcement of them produced negative results.

Do such repugnant laws comport with the rule of law? The answer to this question depends on when and where it is asked. In some countries

the political leaders assert that the rule of law has no substantive content. These leaders argue that a government may deprive its citizens of fundamental liberties so long as it does so pursuant to a duly enacted law. At the Nuremberg trials, some of the political, military, and industrial leaders of Nazi Germany unsuccessfully advanced this argument as a defence to Allied charges that they had committed abominable crimes against European Jews and other minorities during world war II.

In other countries the political leaders assert that all written laws must conform with universal principles of morality, fairness, and justice. These leaders argue that as a necessary corollary to the axiom that «no one is above the law,» the rule of law requires that the government treat all persons equally under the law. Yet the right to equal treatment is eviscerated when the government categorically denies a minimal level of respect, dignity, and autonomy to a single class of individuals. These unwritten principles of equality, autonomy, dignity, and respect are said to transcend ordinary written laws that are enacted by government. Sometimes known as natural law or higher law theory, such unwritten and universal principles were invoked by the Allied powers during the Nuremberg trials to overcome the defence asserted by the Nazi leaders.

The rule of law is a concept explained in classical time. In Greece aristotle wrote that «law should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign in only those matters which law is unable, owing to the difficulty of framing general rules for all contingencies.» In ancient Rome the Corpus Juris Civilis established a complex body of procedural and substantive rules, reflecting a strong commitment to the belief that law, not the arbitrary will of an emperor, is the appropriate vehicle for dispute resolution. In 1215 Magna Charta reined in the corrupt and whimsical rule of King John by declaring that government should not proceed except in accordance with the law of the land.

During the thirteenth century, Thomas Aquinas argued that the rule of law represents the natural order of God as ascertained through divine inspiration and human reason. In the seventeenth century, the English jurist Sir Edward Coke asserted that the «king ought to be under no man, but under God and the law.» With regard to the legislative power in England, Coke said that «when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common

law will control it, and adjudge such act to be void.» In the United States, Alexander Hamilton applied the rule of law to the judiciary when he argued in *The Federalist,* no. 78, that judges «have neither Force nor Will, but merely judgment.»

Despite its ancient history, the rule of law was not celebrated in all quarters. The nineteenth-century English philosopher jeremy bentham described the rule of law as «nonsense on stilts.» The twentieth century saw its share of political leaders who oppressed persons or groups without warning or reason, governing as if no such thing as the rule of law existed. For many people around the world, the rule of law is essential to freedom.

The Moscow City Chamber of Advocates would like the initiators of the World Rule of Law Movement to pay a closer attention to the linguistic implications of the project naming concepts in order to avoid their possible misunderstanding, especially among non-native English-speaking nations. Such approach could be very beneficial for the advancement of the Rule of Law movement on a global scale.

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*Rossiskaya Gazeta (Russian Newspaper), July 9, 2007*
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# FRONDE[1] IN JUDGES ROBES AND WITHOUT

DURING CONFERENCE AT CC JURISTS COME TO CONCLUSION: WHILE LAWS ARE NEARLY PERFECT, ENFORCEMENT OF LAW STILL LIMPS.

«In today's Russia still exists the danger when law might turn into lawlessness, and lawlessness — into social chaos», — the President of the Constitutional Court (CC) of the Russian Federation, Valery Zorkin, openly told his compatriots and foreign guests, opening an international rule of law symposium held in Moscow past Friday.

The symposium was co-sponsored by the International Bar Association (IBA), the Federal Chamber of Lawyers of the Russian Federation, the Moscow City Chamber of Advocates and the International Union (Commonwealth) of Advocates. Since several dozens of eminent jurists and lawyers gathered in the building of the Constitutional Court, it is small wonder that CC members also actively participated in the sessions. It turned out that if foreign and domestic lawyers, jurists and judges are mixed together, they unexpectedly become a liberal, almost nonconformist (Fronde) community, ready to argue for hours on the quality of public justice and its standards.

Valery Zorkin, addressing to the audience, adopted a realistic view of the situation: «In my opinion, we do not have a guaranteed stable and mature democracy yet, nor did we make an irreversible turn towards the rule of law and democracy». It should become irreversible, this conscious choice of Russia, Mr. Zorkin explained, only when our society starts invariably solving all conflicts using nothing but legal methods: «It is necessary to create such conditions that living contrary to law would feel as disgusting to everybody as eating uncooked rotten meat». «If we interpret the rule of law simply as whatever statutory law the authorities give to society it might lead to very bad consequences, — believes Mr. Zorkin, — it is with full acceptance of the rule of law that we could overcome not only

[1] Aristocratic opposition to the King's court in France of 16 century.

country-specific challenges, but also global challenges, such as terrorism, international crime, or poverty».

«If we fail to promote elevation of public legal awareness, — the president of Federal Chamber of Lawyers, Evgeny Semenyako, said in support of the CC Chairman, — our democracy might fall asunder like a rope of sand». However, he considered equally important not to forget about the human factor — «enforcement of law can become the mire both for the bar and the court». Thus the audience was brought to discuss a very painful topic — the real independence of legal profession. «If we fail to codify the fundamentals of independence of the judicial power, all rights and freedoms should be like the lights on a Christmas tree — once Christmas is over, the tree is thrown away and the lights get stowed away in a box», — the CC judge Boris Ebzeev remarked.

Judging by the speech of English judge William Birtles, the British judicial power also has some problems with the authorities. So, the speaker had several critical remarks on the way the Home Secretary John Reid had been preparing the prison reform. However, complaints of the orators showed quite an amusing distinction: foreign guests more often criticized their legislators, while local community was unhappier with the executive power. According to Birtles, the independence of judicial system begins from the independence of each judge.

«The judicial power *de jure* is equal to other branches of power, but this equality is for some reason overlooked in the Russian Federation, — the CC judge Vladimir Yaroslavtsev observed, — but we are equal to them, and nobody must be allowed infringing this equality». The speaker believes that if we to forget «about the fine euphoria of flourishing judicial reform in the 90's», in real life our judges do not always wish to be independent: «For example, very often a judge goes to consult the court chairman — to find «whence the wind blows» or to receive an «act of grace» — for maybe the case requires a «special» procedure. Unfortunately, no legislation can replace moral courage to a judge». Also, Yaroslavtsev is very concerned about recent legislative initiatives regarding the legal profession, which reminds him of «Soviet arm-twisting styles».

«The independent legal profession corps is a very important element of any judicial system, — says Anne Ramberg, the head of Swedish Bar Association, — lawyers, as a good watch dog, should warn society about any threats to the personal rights and freedoms, and this rule applies even to the

most democratic countries». Ms. Ramberg observed that «even if a state is called democratic, human rights might be violated there just as anywhere else». With bitterness she described several cases when Sweden for allegedly antiterrorist safety reasons had refused to some foreigners the right of political asylum. «Democracy cannot provide guarantees that society should accept the rule of law; unfortunately, democracy can be used to let the majority oppress the rights of minority», — the Swedish lawyer concludes.

However, such realization dawns not on everybody. So, Genry Reznick sadly remarked, «Our society has yet a long time to come up to our advanced Constitution». But the universally recognized quality of the Fundamental Law of the Russian Federation allowed the participants to agree with Boris Ebzeev, who said that «our Constitution is not the result of a certain development, but rather an ideal model desired by ourselves and desirable for our Homeland. I am convinced that its potential is far from being used entirely, therefore I will fiercely oppose any attempts to update it».