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# **The Russian Constitution at Fifteen: Assessments and Current Challenges to Russia's Legal Development**

*Conference Proceedings*

Edited by F. Joseph Dresen and William E. Pomeranz



OCCASIONAL PAPER # 304

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Washington, D.C.

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# Preface

The troubled birth of the 1993 Russian Constitution remains one of the most controversial aspects of post-Soviet Russian history. What was originally conceived as a deliberate, collaborative process was ultimately resolved by violence when, in the aftermath of the October 1993 shelling of the White House, a new constitution backed by President Yeltsin was quickly adopted through a national vote. Yet despite its inauspicious beginnings, the Russian Constitution celebrated its 15th anniversary in December 2008.

The present Russian Constitution represents a clear break with its most direct predecessor, the 1977 Brezhnev Constitution. Gone are the references to the supremacy of the Communist Party and the requirement that citizens comply with standards of socialist conduct. Instead, the Constitution contains specific sections devoted to civil rights, the division of powers, property rights, and an independent judiciary. Yet despite such lofty principles, many commentators point to the obvious gap between paper and practice when analyzing the implementation of the Russian Constitution.

The 15th anniversary of the Constitution's adoption marked an appropriate time to assess its impact on Russia's post-Soviet political, economic, and legal development. The Kennan Institute, working with the Moscow-based Foundation for Constitutional Reforms and its

director, Oleg Rumyantsev, organized a one-day conference at the Woodrow Wilson Center on March 19, 2009 entitled "The Russian Constitution at Fifteen: Assessments and Current Challenges to Russia's Legal Development." Participants included former President Mikhail Gorbachev, several "founding fathers" of the Russian Constitution, and leading western scholars on Russian law and society.

In opening the conference, President Gorbachev characterized the introduction of this new constitution as a "watershed event" in Russian history, although he added that its adoption remains part of a transitional process that Russia has yet to complete. The wide-ranging discussion presented in this edited transcript explores this evolutionary process from the point of view of not only law, but also society, politics, economics, governing elites, and international influences. It includes not only participants in the drafting of the Constitution, but critics as well.

The conference was made possible through the generous support of Woodrow Wilson Center federal conference funds and the International Institute of Global Development, as well as institutional and expert support from the Foundation for Constitutional Reforms.

*F. Joseph Dresen and  
William E. Pomeranz*



# The Russian Constitution at Fifteen: Assessments and Current Challenges to Russia's Legal Development

Cosponsored by The International Institute of Global Development,  
The Foundation for Constitutional Reforms (Russian Federation), and the  
Kennan Institute

Thursday, March 19, 2009

9:00 to 5:00 PM

Woodrow Wilson International Center  
for Scholars, Washington, D.C.

## OPENING REMARKS

**Lee Hamilton**, President and Director,  
Woodrow Wilson Center

**Mikhail Gorbachev**, President, Gorbachev  
Foundation

## PANEL I: Constitutional Guarantees of the Rule of Law State: Problems of Implementing the Russian Constitution

**Alexei Avtonomov**, Editor-in-Chief,  
*Gosudarstvo i pravo*

**Sergei Pashin**, Federal Justice (retired),  
Professor, Moscow Institute of Economics,  
Politics and Law

**Oleg Rummyantsev**, President, Foundation for  
Constitutional Reforms

**Peter Solomon**, Professor, Department of  
Political Science, University of Toronto

**Alexei Trochev**, Law and Society Fellow,  
University of Wisconsin Law School

## COMMENTARY

**Alexander Lebedev**, President, International  
Institute of Global Development

## PANEL II: Problems of Political-Legal Culture and Civil Society

**Eugene Huskey**, William R. Kenan, Jr.  
Professor of Political Science, Stetson  
University

**Andrei Illarionov**, Senior Fellow, Center for  
Global Liberty and Prosperity, Cato Institute

**Victor Sheinis**, Chief Research Fellow,  
Institute of World Economy and International  
Relations, Russian Academy of Sciences

**Regina Smyth**, Associate Professor,  
Department of Political Science, Indiana  
University

**Leonid Volkov**, Editor-in-Chief,  
*Konstitutsionnyi vestnik*

## PANEL III: Constitutional Guarantees of Social, Economic, and Regional Development

**Jeffrey Kahn**, Assistant Professor, Dedman  
School of Law, Southern Methodist  
University

**Vladimir Mazaev**, Professor, State  
University-Higher School of Economics,  
Department of Constitutional and  
Municipal Law

## PANEL IV: Globalization and the Role of International Law in the Development of the Russian Constitution

**William Butler**, John Edward Fowler  
Distinguished Professor of Law, Dickinson  
School of Law, Penn State University

**Viktor Kuvaldin**, Head, Department of  
Political and Social Sciences, Moscow School  
of Economics, Moscow State University

**Vladimir Lafitsky**, Deputy Director,  
Institute of Legislation and Jurisprudence  
under the Government of the Russian  
Federation

**William Pomeranz**, Deputy Director,  
Kennan Institute

# Panelist Biographies

## ALEXEI AVTONOMOV

Alexei Avtonomov is the Editor-in-Chief of *Gosudarstvo i pravo*, one of Russia's leading legal periodicals. He also is the head of the Sector of Comparative Law Studies at the Institute of State and Law, Russian Academy of Sciences. He has published over 200 works, including: *Issledovanie opyta i perspektiv razvitiia Federal'nogo Sobraniia*, *Osnovnye kategorii i instituty izbiratel'nogo prava*, and *Pravovye i finansovye osnovy mestnogo samoupravleniia*. In addition, he has assisted in the drafting of numerous pieces of federal legislation, such as the laws "On Social Associations," "Election of the President of the Russian Federation," and "On Political Parties." Professor Avtonomov is a graduate of the Moscow State Institute of International Relations.

## WILLIAM BUTLER

William E. Butler is the John Edward Fowler Distinguished Professor of Law at Dickenson School of Law, Penn State University. He is the preeminent authority on the law of Russia and other former Soviet republics and the author, co-author, editor, or translator of more than 120 books on Soviet, Russian, Ukrainian and other Commonwealth of Independent States legal systems. He also edits the journal *Russian Law*, published by the Russian Academy of Legal Sciences; the journal *Sudebnik*, published by The Vinogradoff Institute and the Moscow Higher School of Social and Economic Sciences; the *East European and Russian Yearbook of International and Comparative Law*, published by The Vinogradoff Institute; and is on the editorial board of a number of other journals.

The former Chair of Comparative Law at the University of London, Professor Butler is

the founder and director of The Vinogradoff Institute, which operates as a unit of Penn State Dickinson. Under Professor Butler's direction, the Institute coordinates research and teaching activities related to Russian and CIS legal systems and publishes the journal *Sudebnik*.

The recipient of numerous honors for his service to Russian and international law, Professor Butler is an Academician of the National Academy of Sciences of Ukraine and the Russian Academy of Natural Sciences and is serving his third term as a member of the Russian International Court of Commercial Arbitration. He recently was appointed to the Panel of Distinguished Neutrals as an arbitrator of the International Institute for Conflict Prevention and Resolution. He teaches Russian Law; Foreign Investment in Russia and the Commonwealth of Independent States; Law of Treaties, Law of the Sea; History of International Law; and Comparative Approaches to International Law.

## MIKHAIL GORBACHEV

Since January 1992, Mikhail Gorbachev has been president of the International Nongovernmental Foundation for Socio-Economic and Political Studies, better known as The Gorbachev Foundation. Since March 1993, he has also been president of Green Cross International—an international independent environmental organization with branches in more than twenty countries. In September 2008, Gorbachev cofounded the Independent Democratic Party of Russia with Russian businessman Alexander Lebedev.

Gorbachev was trained as a lawyer and in agricultural economics, and embarked on a career

in regional and national politics. In March 1985, after three General Secretaries in a row had passed away, Gorbachev was elected General Secretary of the Party Central Committee – the highest post in the Soviet Union and party hierarchy. Gorbachev initiated a program of sweeping reforms in the Soviet Union known as *glasnost* and *perestroika*. Gorbachev also instituted a new foreign policy which is widely credited for the peaceful end of Soviet control over Eastern Europe. His diplomacy with President Ronald Reagan resulted in landmark arms control treaties and substantially contributed to the peaceful conclusion of the Cold War in the late 1980s.

As a result of Gorbachev's domestic reforms, the Congress of People's Deputies of the USSR—the first competitively elected parliament in Soviet history—was seated. On March 15, 1990, the Congress of People's Deputies of the USSR elected Gorbachev as President of the USSR.

In recognition of his outstanding services as a great reformer and world political leader, who greatly contributed in changing for the better the very nature of world development, Mikhail Gorbachev was awarded the Nobel Peace Prize on October 15, 1990. On December 25, 1991, Gorbachev stepped down as head of state, and the Soviet Union was formally dissolved the next day.

### **LEE H. HAMILTON**

Lee H. Hamilton is president and director of the Woodrow Wilson International Center for Scholars, and director of The Center on Congress at Indiana University. Hamilton represented Indiana's 9th congressional district for 34 years beginning January 1965. He served as chairman and ranking member of the House Committee on Foreign Affairs, chaired the Subcommittee on Europe and the Middle East, the Permanent Select Committee on Intelligence, the Select Committee to Investigate Covert Arms Transactions with Iran, the Joint Economic Committee, and the Joint Committee on the Organization of Congress. As a member of the House Standards of Official Conduct Committee Hamilton was a primary

draftsman of several House ethics reforms.

Since leaving the House, Hamilton has served on several commissions including serving as Vice-Chair of the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission), co-chair of the Iraq Study Group, the National Commission on the War Powers of the President and the Congress, and the Congressional Commission on the Strategic Posture of the United States. He is currently a member of the FBI Director's Advisory Board, the Defense Secretary's National Security Study Group, and the U.S. Department of Homeland Security Task Force on Preventing the Entry of Weapons of Mass Effect on American Soil.

Mr. Hamilton is a graduate of DePauw University and Indiana University law school, and studied for a year at Goethe University in Germany. Before his election to Congress, he practiced law in Chicago and Columbus, Indiana.

### **EUGENE HUSKEY**

Eugene Huskey is William R. Kenan, Jr. Professor of Political Science and Director of Russian Studies at Stetson University in Florida. He received his Ph.D. from the London School of Economics and Political Science and taught at Bowdoin College and Colgate University before coming to Stetson in 1989.

Professor Huskey's research and writing focus on politics and legal affairs in the Soviet Union and the postcommunist countries of Russia and Kyrgyzstan. He is the author of more than forty academic articles or book chapters and the author or editor of four books: *Russian Lawyers and the Soviet State*, Princeton, 1986; *Executive Power and Soviet Politics* (editor and contributor, Sharpe, 1992); *Presidential Power in Russia* (Sharpe, 1999); and *Russian Officialdom: Bureaucracy, State, and Society from Alexander III to Putin* (editor and contributor, with Don Rowney, Palgrave Macmillan, forthcoming). He is currently researching the politics of the opposition in Kyrgyzstan, a project supported by a grant from the National Council for Eurasian and East European Research. Huskey is associate editor of *Russian Review* and a member of the editorial board of *The Journal of Postcommunist and Transition Studies* (Glasgow)

and *Demokratizatsiya: The Journal of Post-Soviet Democratization* (Washington, D.C.).

### **ANDREI ILLARIONOV**

Andrei Illarionov is a senior fellow at the Cato Institute's Center for Global Liberty and Prosperity. From 2000 to December 2005 he was the chief economic adviser of Russian President Vladimir Putin. Illarionov also served as the president's personal representative (sherpa) in the G-8. He is one of Russia's most forceful and articulate advocates of an open society and democratic capitalism. Illarionov received his Ph.D. from St. Petersburg University in 1987. From 1993 to 1994 Illarionov served as chief economic adviser to the prime minister of the Russian Federation, Viktor Chernomyrdin. He resigned in February 1994 to protest changes in the government's economic policy. In July 1994 Illarionov founded the Institute of Economic Analysis and became its director. Illarionov has coauthored several economic programs for Russian governments and has written three books and more than 300 articles on Russian economic and social policies.

### **JEFFREY KAHN**

Jeffrey Kahn is an assistant professor of law at the Dedman School of Law and a Colin Powell Fellow at the John Goodwin Tower Center for Political Studies. Kahn teaches and writes on American constitutional law, Russian law, human rights, and counterterrorism. In 2007-2008 he received the Maguire Teaching Fellow Award from the Cary M. Maguire Center for Ethics and Public Responsibility at SMU for his seminar, "Perspectives on Counterterrorism." He is also a member of the founding Advisory Board for the SMU Human Rights Education Program.

Kahn's doctoral dissertation was published by Oxford University Press while he was a law student as *Federalism, Democratization, and the Rule of Law in Russia* (2002). During law school, he also served as a lecturer on European human rights law at summer training programs in Moscow for Russian lawyers sponsored by the Council of Europe. Following graduation, he was a law clerk to the Honorable Thomas

P. Griesa of the United States District Court for the Southern District of New York. Kahn served as a trial attorney in the Civil Division, United States Department of Justice from October 2003 until April 2006. In 2005, he was briefly detailed to the Criminal Division to conduct research in Russia on Russian criminal procedure for the Justice Department's Office of Overseas Prosecutorial Development, Assistance and Training.

### **VIKTOR KUVALDIN**

Viktor Kuveldin is the head of the Department of Social Sciences and Humanities, Moscow School of Economics, Moscow State University. Among his previous positions, Kuveldin worked for many years at the Institute of World Economy and International Relations, USSR Academy of Sciences. In addition, from 1989-91, he worked as a consultant on foreign policy issues to the Central Committee and also worked as an advisor and speechwriter to President Gorbachev. Kuveldin graduated from Moscow State University and has published over 50 scholarly articles.

### **VLADIMIR LAFITSKY**

Vladimir Lafitsky is the deputy director of the Institute of Legislation and Jurisprudence under the Government of the Russian Federation. He participated in the drafting of the Russian Constitution and served as an expert for the Constitutional Commission of the Russian Federation from 1992-93. A graduate of the law faculty of Moscow State University, Lafitsky has published widely on issues of constitutional law dealing both with Russia and with other foreign countries. His scholarly publications include: *Kongress SShA*, *SShA: Konstitutsiia i zakonodatel'nye akty*, *Ocherki metodologii zakonotvorchestva*, and *Osnovy konstitutsionnogo prava SShA*.

### **ALEXANDER LEBEDEV**

Alexander Lebedev is considered one of the top business figures in Russia, with major interests in the banking, communications, energy, and tourist industries. He is the largest shareholder in Aeroflot after the Russian Government, and

has media holdings including *Novaya Gazeta* and Britain's *Evening Standard*, as well as a significant stake in Russia's gas monopoly, Gazprom

Lebedev is the founder and president of the International Institute of Global Development, an independent research institute dedicated to studying comparative democratic systems. He is also the cofounder, with Mikhail Gorbachev, of the Independent Democratic Party of Russia.

### **VLADIMIR MAZAEV**

Vladimir Mazaev is a professor at State University–Higher School of Economics in the Department of Constitutional and Municipal Law. He also is the Director General of the BMB law firm. A graduate of Voronezh State University, Mazaev has written widely on issues of democracy, political systems, and the constitutional rights and freedoms of citizens. Between 1990–93, Professor Mazaev served as a People's Deputy in the Soviet and Russian parliament, where he also was a member of the Constitutional Commission and a member of the Commission of the Council of Nationalities on Repressed and Deported Persons.

### **SERGEI PASHIN**

Sergei Pashin is a professor at the Moscow Institute of Economics, Politics and Law. During the 1990s, Pashin played an active role in the legal reform process. He served as head of the Department of Judicial Reform in the office of the Russian President and co-authored of the *Conception of Judicial Reform of the Russian Federation*. Pashin also played a critical role in the introduction of jury trials in the Russian Federation, and went on to serve as a federal judge on the Moscow City Court (now retired). For his many contributions, he was named an Honored Lawyer of the Russian Federation. The author of over 80 scholarly publications, Pashin is also a member of the Moscow Helsinki Group and the Independent Council on Expertise and Law.

### **WILLIAM POMERANZ**

William Pomeranz is the deputy director of the Kennan Institute, a part of the Woodrow Wilson International Center for Scholars located in Washington, D.C. In addition, Pomeranz

has taught Russian law at the Center for Eurasian, Russian, and East European Studies at Georgetown University. Prior to joining the Kennan Institute, Pomeranz practiced international law in the United States and Moscow, Russia. He also served as Program Officer for Russia, Ukraine, and Belarus at the National Endowment for Democracy from 1992–1999. Pomeranz received his J.D. *cum laude* from American University in 1998. In addition, he was awarded a Ph.D. in Russian History from the School of Slavonic and East European Studies, University of London, where he wrote his dissertation on the emergence and development of the pre-revolutionary Russian legal profession (the *advokatura*). His research interests include Russian legal history as well current Russian commercial and constitutional law.

### **OLEG RUMYANTSEV**

Oleg Rumyantsev is president of the Moscow-based NGO Foundation for Constitutional Reforms. He was educated at the Moscow State Lomonosov University and the Moscow State Legal Academy, and has also studied at the ELTE University in Budapest, the London School of Economics, and the University of Toronto. He served in the Russian Parliament from 1990–93, where he was the Executive Senior Secretary of the Constitutional Commission and the head of its drafting Working Group. From 1994–96, he was a legal advisor to the State Duma Committee on Legislation, and from 1996–98 he was Deputy Secretary to the Parliamentary Assembly of the Union of Russia and Belarus. In addition to his government service, Rumyantsev's corporate career has included senior positions with Mars LLC, Shell EP Services (Russia), and TNK-BP Management. He is a widely published expert on political science, Russian constitutional law, and on Russia's investment climate. He is also co-founder and director of the Rule of Law Program at the International Institute of Global Development, chaired by Mikhail Gorbachev and Aleksander Lebedev.

### **VICTOR SHEINIS**

Victor Sheinis is chief research fellow, Institute of World Economy and International Relations,

Russian Academy of Sciences. A graduate of Leningrad State University, Professor Sheinis has had an illustrious career both in academia and in politics. He served as a People's Deputy of the RSFSR in 1990, and was a member of the Supreme Council of Russia between 1992–93. He later served as Deputy Chairman of the Commission for Draft Legislation under President Yelstin, as well as a State Duma Deputy from 1993–95.

### **REGINA SMYTH**

Regina Smyth is an associate professor in the Department of Political Science at Indiana University. Smyth's research explores the relationship between democratic development and electoral competition by focusing on candidates, political parties and party systems in post-Communist states. Her work is based on original data collection that has been supported by the National Science Foundation, Social Science Research Council, Smith Richardson Foundation, and the National Council for Eurasian and East European Research. Her book *Candidate Strategies and Electoral Competition in the Russian Federation: Democracy without Foundation* (Cambridge 2006) explains the failure of Russian democracy in terms of the factors that impeded cooperation among candidates and party leaders and failed to produce a viable opposition to the ruling party. Her study of Russian party organizations examines the inability of parties to articulate coherent policy positions or frame policy debates. Her current work on party and party system consolidation across the post-Communist states examines the processes that produce congruence between key political alignments or power centers and partisan competition. Smyth's work has been published in *Politics and Society*, *Comparative Politics*, and *Comparative Political Studies*. Her teaching interests extend from her research. She has taught courses on Russian and Soviet Politics, Democracy and Elections, Comparative Democratic Institutions, Comparative Parties and Party Systems, Voter Turnout, and West European Politics. She has taught at Penn State University and Harvard University before coming to Indiana University in 2006.

### **PETER SOLOMON**

Peter H. Solomon, Jr. (Ph.D. Columbia University) is Professor of Political Science, Law and Criminology at the University of Toronto. He specializes in post-Soviet politics and in the politics of law and courts in various countries, including Canada and the USA. He is the author of *Soviet Criminologists and Criminal Policy* (1978); *Criminal Justice Policy: From Research to Reform* (1983), *Soviet Criminal Justice under Stalin* (Cambridge: Cambridge University Press, 1996 [a Russian-language edition *Sovetskaia iustitsiia pri Staline* was published by "ROSSPEN" in 1998 and reprinted in 2008]); *Reforming Justice in Russia, 1864-1996: Power, Culture, and the Limits of Legal Order* (Armonk, NY: Sharpe, 1997), editor and contributor; *Courts and Transition in Russia: The Challenge of Judicial Reform* (Boulder CO: Westview Press, 2000) with Todd Foglesong; and *Crime, Criminal Justice, and Criminology in Post-Soviet Ukraine* (2001) with Todd Foglesong. Solomon's current research includes judicial and legal reform in contemporary Russia and law and courts in authoritarian and transitional states. He is an active participant in judicial reform projects, including the Canada-Russia Judicial Partnership and the Canada-Ukraine Judicial Cooperation Project, both funded by CIDA. He is also a member of the Board of Trustees of the *Institut prava i publichnoi politiki* (Moscow) and the editorial boards of three journals, and a former Director of the Centre for Russian and East European Studies at the Munk Centre for International Studies.

### **ALEXEI TROCHEV**

Alexei Trochev is a Law and Society Fellow at the University of Wisconsin Law School. He received a bachelor's degree in Russian law from Syktyvkar State University in northwestern Russia. He went on to obtain a master's degree in public administration from the University of Kansas and a doctorate in political science from the University of Toronto. He has taught at the Queen's University in Canada and the Pomor State University Law School in Russia. In addition to several chapters on the informal dimensions of Russian judicial politics, his articles on post-Soviet constitutional courts have appeared in the *American Journal of Comparative*

*Law, Law & Society Review, I-CON International Journal of Constitutional Law, and East European Constitutional Review.* His book, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006* (Cambridge University Press, 2008), received an Outstanding Academic Title Award from *Choice* magazine.

#### **LEONID VOLKOV**

Leonid Volkov is currently the Editor-in-Chief of *Konstitutsionnyi Vestnik*. Volkov graduated from Moscow State University and was one of the founders of the Russian Social Democratic Party. He was elected a People's Deputy in 1990, and later served as a member of the Constitutional Commission. Volkov presently lives and works in Germany.

# OPENING REMARKS

## LEE H. HAMILTON

Good morning to all of you and thank you very much for coming. I am Lee Hamilton, president and director of the Woodrow Wilson International Center for Scholars. I am pleased to welcome each of you here today to attend a conference on the Russian Constitution at Fifteen. I would especially like to welcome back to the Center President Mikhail Gorbachev as well Alexander Lebedev, president of the International Institute of Global Development, both of whom have the expertise that undoubtedly will enrich the conversation that follows. I want to thank this conference's co-sponsors: The International Institute of Global Development, The Foundation for Constitutional Reforms, and of course the Wilson Center's Kennan Institute under the outstanding leadership of Blair Ruble and his exceptional staff—they are a source of great pride for the Wilson Center.

You meet here today to discuss the Russian Constitution after one-and-a-half decades. Nothing is more fundamental to the survival of a free society than the rule of law, which is codified in the Russian Constitution. This, of course, lends great significance to your task. We are fortunate to have a historic figure with us to steer the dialogue. President Gorbachev is undoubtedly one of the most consequential figures of the 20<sup>th</sup> century. As one of our former Wilson Center's Fellows, a Russian scholar, has written: "No one is more responsible for ending a Cold War than President Gorbachev, for his leadership during this tumultuous era the world owes him a debt of gratitude." He served as leader of the Soviet Union from 1985 to 1991, during that time as General Secretary of the Central

Committee of the Communist Party of the Soviet Union and later, of course, as president of the Soviet Union.

His new approach to foreign policy—emphasizing major arms reductions, global interdependence, and detente with the West—tempered the hostile environment that characterized much of the Cold War. These policies permitted the Soviet Union and the United States to move away from confrontation towards reconciliation and cooperation.

His reform program of *glasnost* and *perestroika* within the Soviet Union initiated a series of events that dramatically transformed Eastern Europe, the Soviet Union, and indeed the world. Opportunities to use force were resisted and the threat of a catastrophic European or global war was lifted. His political, intellectual, and moral leadership during this time ensured a more peaceful transformation of the world order and admiration across the globe. That leadership was recognized in 1990 when he was awarded the Nobel Peace Prize. He continues to work on behalf of reconciliation and responsible global governance. He is the founding president of Green Cross International, a non-profit, non-governmental organization that has worked since 1993 for sustainable development, environmental awareness and peaceful resolution of conflicts. Through his work as president of the Gorbachev Foundation he, of course, remains a very important and highly respected international figure.

Unfortunately, I have to attend a meeting at the State Department and in a very few minutes I will be leaving, but I certainly wish you all a very productive conference, and we take a great pride in welcoming back to the Center President Gorbachev.



## MIKHAIL GORBACHEV

Good morning.

This is a great event. I know everyone here is very busy, but it is nice to see people who have made the time to come here, even from Russia, to take part in this discussion on the Russian Constitution. I should point out this young man sitting here, Oleg Rummyantsev. During *perestroika*, he was still learning his way around the corridors of power, and now he is the head of a foundation on constitutional reform. I am very happy that he and other people here who worked with me, like Professor Viktor Kuvardin from my presidential team, who is now with the Gorbachev Foundation at Moscow State University, are still actively involved. This is especially important now, when the future is so uncertain, because these people are prepared, they have been through serious crises before.

I would like to thank the Woodrow Wilson Center, Oleg Rummyantsev's Foundation for Constitutional Reforms, and the Kennan Institute. I have good contacts with all of these organizations, and we work together from time to time. I would like to pay special tribute to the Kennan Institute and the Woodrow Wilson Center. I think this is my second or third time here, as those who have worked here for a long time will remember.

This conference marks the 15th anniversary of the Russian Constitution. For Mr. Rummyantsev, the Constitution is all there is in his life and in history, so it takes up the entire agenda. One might think everything began with the Constitution and there was nothing prior to it. However, it appeared at a very specific point in history, after the shelling of the Russian parliament. It took the efforts of those who cared about the cause of reform to say, "No, we must live by the Constitution and by the law, and not by the rule of might makes right."

I would like to gently remind you that the Constitution was a fact, an event, and an entirely new constitution in a different country—not in the USSR, but in Russia. It was a watershed event in our history, but it was particularly important, in the chaos and confusion as the USSR disintegrated, to find a way to hold the society together with common goals and legal

foundations. In this sense, I believe that, despite its faults, we needed this Constitution, and so it was adopted. But for all its importance, this is only a process or rather a particular stage in the process through which all countries in the transitional period must pass.

In Madrid, I had the opportunity to work with the king of Spain to organize and start a club for countries in transition. There were 35 members—leaders, presidents, and prime ministers. The club is still active. But it was very important to find the right language: "transition period," "democratic transition," and the "road map" for democratic change and democratic processes. This club played and continues to play a role in maintaining contacts among these countries. They are very different countries in many ways, but they also have much in common, so it is very important for them to have opportunities to meet and share their experiences.

The Russian Constitution is a document whose roots reach back to the time of *perestroika*. Prior to that time we had had only two constitutions—the Stalin Constitution and the Brezhnev Constitution. They were very similar, they complemented each other. I took part in the drafting of the Brezhnev Constitution, I spoke in favor of it, and I praised it. Of course, it would have been impossible to say anything else then. Besides, it did make some progress in comparison with the Stalin Constitution.

It was during the years of *perestroika* and *glasnost* that the foundation for the transition to democracy, rule of law, and a market economy was created. Anyone who knows our country will agree that if this was all we did, i.e. just laid a foundation, this would have been sufficient to be recognized and praised by future generations, because it was very difficult to do.

First of all, it was an enormous risk, and second, it was an extremely complex task. Consider that our country was under the Tatar-Mongol Yoke for 250 years, followed by two and a half centuries of serfdom, and then communism to bring it to three centuries. Our task was to take this country, with its complex history, and make a decisive break. It was not easy to act decisively, because there were constant differences of opinion and each step was debated. Perhaps

this was good, because things could have gone very wrong. If the country had not taken the evolutionary path but had tried to change by force, it could have ended very badly, not only for the country but for the whole world. You understand why. Yet this task was difficult in every respect. The process of democratic transition is difficult everywhere, but in our case it was many times more complex.

I felt this personally, because much of it happened while I held positions of responsibility in the government, and these steps could not have been taken without my participation and consent. Why do I say “consent?” In the mid-1980s, the whole country called out for change. It was not just the intelligentsia, which should always play the role of critically assessing the existing power structure. No, in this case the entire society was united in the belief that we could not go on living as we had. This is the simple, paramount social consensus of the time that will go down in history: we cannot keep living this way.

I visited this country several times in recent years, including during your recent election, and one time after I gave a speech someone asked me: “You implemented reforms in your country. What advice would you give us? What should we do here?”

“Well,” I would reply, “giving advice to Americans can be a risky business. You sometimes think you are better than everyone else and know more than anyone else. I would not want to interfere; I will just wish you success.”

“But still,” the questioner insisted. “What is your advice?”

“You know,” I said, “you need your own *perestroika*.”

And that audience of twelve thousand people stood up and applauded. That is when I realized that you also felt you could not keep living as you had. The country had reached that stage. This was three or four years ago.

I still come to the U.S. once or twice a year to give speeches, and I travel around the country. I once joked that I know America better than the presidents of the United States, because I have more time to talk with people. So I knew that people here were calling for change. In our country, this desire was expressed not

only in the newspapers, but also in music, in songs. We had a great rock musician, who later died young, who sang: “We demand change! We demand change!” It rang out like a bell. It could not be ignored. Any person capable of reflection had to respond. When you hold that office, you understand that power was not given to you for your personal enjoyment, but in order to respond to these challenges and meet these expectations.

So I was at the center of these events. And the first thing I did in response to this demand for change was to begin a nationwide discussion under the well-known policies of *glasnost* and *perestroika*. Many people still argue about whether *glasnost* was necessary on such a large scale, or whether it was a factor in the chaos, whether it unleashed the forces that made the country ungovernable. All these years after *perestroika*—over twenty years have passed now—I am now convinced that without *glasnost*, we would not have been able even to start the process of change.

Clearly, this was a project that would take decades, but the most thoughtful people among the supporters of democracy—some of whom are sitting here today, including our distinguished professor, one of the smartest and most talented people—they were all demanding that we go faster and faster. “Why are you hesitating?” they would say. “Are you indecisive? Nothing is happening, the conservatives are organizing...” And in many cases their warnings proved true. But it was still impossible to do it that way. We needed 30 years, but I was only there for six years, and all of this happened in that short time.

I listened patiently to all of Alexander Solzhenitsyn’s comments. I had a good relationship with him, even though we are very different people in terms of our character, the way we see the world, and our views on reform in Russia. He said publicly that Gorbachev’s policy of *glasnost* ruined everything. At an international conference of major newspaper editors, I finally responded that I do not know what would have happened without *glasnost*. I think everything would have proceeded gradually or even stagnated, and I probably would have held the office of General Secretary of the

Central Committee of the Communist Party for much longer. Or perhaps not. But I know for sure that Solzhenitsyn would have remained in Vermont, chopping wood to stay warm in the winter. But he returned to Russia, and we listened to what he said and read everything he has written.

We moved forward with great difficulty, but I think we should still give credit to the people who responded to the challenges of the time and helped to implement the policy of *glasnost*, which became freedom of speech. Think about how many things we had to handle! This was a shock to the nation; we had to get through this first. No constitution could survive there on its own. These young people who were prepared to do everything on their own—they could not have created a constitution back then. They would not have been able to do anything.

At the very least, this laid the foundation for the fundamental changes that began in politics, the economy, and society. Laws were enacted on freedom of conscience, free elections, and changing the status of the party. I am referring to the notorious Article 6 of the the previous Soviet Constitution, which gave the Communist Party the right, without the consent of anyone else, to decide any issue in the country. The Communist Party's monopoly on power came to an end. And everything changed immediately: we saw what our party really was—a very weak organization propped up only by that monopoly on power.

This ultimately led to free elections in 1989 and to the creation of a real, as opposed to a merely decorative, parliament. We now had the separation of powers. But all of this was just the beginning; the outlines were drawn. However, it was still a long way before the substance could be added to these new forms and before they could begin to function effectively.

Among the most important laws that were enacted were the laws on freedom of conscience and religion, the freedom to leave the country, freedom of the press, and the law on private property. This is what created a new environment for people to live in and made them think about the future. What began next was the massive process of putting these new laws into effect. But the more we went up against the

massive Soviet system and tried to fully comprehend it and begin to change it, the greater the political resistance we faced.

After the Communist Party lost its monopoly on power, the party nomenklatura and then the government nomenklatura realized that their entitlement to power, their ability to receive power from the top rather than earning it in democratic elections, was over. This was the main thing that caused all of these social layers to move. These are huge layers and millions of people. The new life, the new situation, and the new rules of the game forced them to think: what is next? Ultimately, the Communists lost the elections. They were not Communists—that is an interesting story, but I will not digress.

The next speakers will tell you all about the Constitution and how things are now. But I should tell you that we reformers were in a situation where not even all those close to me agreed with me. At the beginning, everyone was in favor of *perestroika*, *glasnost*, and solving all these problems. But when the reforms began to take effect, and the laws began—just began!—to be implemented, society could not withstand it. The elections of 1989 were competitive elections. Before, there would be one person on the ballot and we voted for that person, and we called that an “election.” Now there were from 7 to 20 names on the ballot. Everyone wanted to be in the parliament and welcomed those elections. Thirty-five regional and provincial committee secretaries, career officials who had a firm grip on power in rural areas, lost in those elections, even though they controlled all the resources. That really got the attention of the Politburo! But the most interesting thing was that, despite this, 86 percent of the members of parliament elected were Communists. That had never happened before. So the people found other candidates they trusted.

This was in “my” Politburo, in which I served until 1989. But in the beginning of 1989 it began to fall apart. There were schisms in society, from resistance to *perestroika* by the conservatives to splits among the reformers, and people began to express serious doubts. The ship of state was listing, and it became very difficult to steer. The attempted coup of August 1991 occurred at the

height of this schism and conflict, radically accelerating the process of collapse and the disintegration of the Soviet Union.

The disintegration had terrible consequences, including harm to the process of democratic reform. Yes, we desperately needed to decentralize our reforms. If this had been done more rapidly, the disintegration could have been prevented. But this did not happen. We lost time. The main mistakes were: delays in reforming the Communist Party, delays in reforming the USSR as a union of different nations, problems with the market, and providing for the needs of the population. These were the most urgent issues, but we were trapped by the situation we were in.

Still, I am convinced that the Soviet Union could have and should have been preserved. Incidentally, the reformers were not proposing anything new on this issue. If you read the Stalin and Brezhnev constitutions and the constitution adopted before the 1989 elections, they all state that the union republics are sovereign states with the right of self-determination up to and including the right of secession. We did not add anything new to that. We simply created opportunities to address constitutional challenges that were embedded in the constitution itself. But these processes required very skillful implementation of policy, and that did not happen.

Those who took power rejected evolutionary change and called for rapid, immediate change. As Boris Yeltsin, my successor in Russia, said: "Be patient. We will be in decline until November 1992, but then we will start rising again, and in three or four years we will be one of the four most developed countries on earth." Of course, everyone understood that this was reckless talk, nothing more. But by then the people were so tired of being disappointed that they did not think about what was in Yeltsin's head. They thought: "Yeltsin is a tough guy ready to govern with a strong hand. Nothing would get in his way—everything would get done."

After the collapse of the Soviet Union, the process of building independent sovereign states in the post-Soviet environment began. This was a historic new process, but they could

do it, because they had the resources to do it. They were not like the states that are being formed now and are not viable. Those states had an elite, a culture, and an economy. But those economies were all intertwined as parts of the Soviet economy.

The democrats who ended up in power in Russia were unable to implement reform, and the situation continued to worsen. They were working on the constitution during this time. The first meetings on the drafting of the new constitution were held in May 1990, and in 1991 the Soviet Union collapsed. Passions were running very high, and the culmination of all these transitional processes was the confrontation between the executive branch and the Supreme Soviet, the first freely elected parliament in Russian history.

We have come here today to assess the current status of the democratic transition. People in the United States often ask me: "What is the problem with democracy in your country? You should create democracy more quickly!" And the American press constantly criticizes us for problems in the development of democratic processes, institutions, and so forth. These criticisms are valid, of course. But my answer here in the West is this: "Listen, you have been building your democracy for 200 years. And if you are so content with it, I would just say I think there are things to be less than content with, even though I have a high opinion of the democratic achievements of your country. But you have been building it for 200 years. Why do you expect us to build it in 200 days? We know you are Americans, you are very talented, but perhaps not quite as talented as you believe."

We have come a long way. But as I have begun to say only recently, we are probably not more than halfway through the democratic transition process. Now you will discuss the agenda of this conference. This is all very important to us, I should say. If for many of you these are theoretical issues, you will make comparisons and express very precise and scholarly opinions. But life is not like that for us, and we will once again debate these issues with the same passion as before.

One interesting outcome of this conference, which brings together both Russian and

American scholars, would be to determine, based on your discussions and analysis, what role the Constitution played in the events that have brought us to where we are today. What successes were achieved, what caused the failures? Other important topics for discussion here are the Constitution and the functioning of democratic institutions, and the exercise of sovereign rights by the people and the protection of the rights of individuals. How can we help these rights take root? How can we move more quickly through the transition process toward its completion? And an issue that is being hotly debated in our country now: do we need to amend the Constitution to achieve these goals?

Overall, senior government officials are happy with the powers the Constitution gives to the president and other branches of government. And the parliament, which is dominated by United Russia, the party of the former president and current prime minister, is happy because they have a monopoly on power, which they amassed by using any and all means and resources. They have not only a super-majority required to adopt constitutional laws, but nearly total control. But they are not worthy of such power. This is my opinion, which I have stated in my article and in television interviews.

Improving the electoral system is another important topic. I say this at home and I say it here, because you cannot hide from the truth: it was a mistake to make the major changes to the Constitution in the past few years. There have been over twenty of them, I believe, am I right, Oleg? Of course, Oleg will be cautious.

#### **OLEG RUMYANTSEV**

The changes were not made by the amendment process. The Constitution was changed by amending laws; the laws were changing.

#### **MIKHAIL GORBACHEV (CONT.)**

Indeed, I am talking about the electoral system. What amendments can we talk about? The situation with political parties is simply awful. It is extremely difficult to form a party, register it, and get it up and running. There are movements strong enough to form political parties, but they cannot even get them registered. We

used to have single-member districts. This introduced some diversity and gave people the opportunity to take the initiative at the local level. We no longer have this. There were many provisions that reflected the democratic nature of the electoral system, but they have all been swept away. But recently, I have the impression that they have decided to create a one-party system in our country again. If this is the ultimate goal, then what is the point of all the window dressing of democracy?

My friends, I believe this is a fundamental issue for us. The modernization of our country must be based on two basic principles, including the active participation of the people. If we do not allow democracy to grow, if we do not allow people to participate in all this, it will not work and we will face many hardships. For this reason there are many who agree with me that we need an electoral system that allows not just picking people in Saint Petersburg to go to Moscow, but to truly choose their leaders.

This conference is a good opportunity to exchange views and will be useful to the people in Russia who are wrestling with these issues, because often a fresh set of eyes can see things more clearly. I hope you will come up with some good proposals. I do not know what they will be as they will be the outcome of your discussions here. So I will limit myself to these recollections—and the rest is up to you. I wish you success at the conference. Thank you.

#### **BLAIR RUBLE**

I would like to thank Mikhail Sergeevich for a wonderful presentation. I can think of many reasons why I should be thanking him for that presentation, but I want to mention just four.

Over the past several weeks, a number of people in Washington have asked me: Why have a conference about the Russian Constitution? Why does a constitution matter in Russia? I would like to thank Mikhail Sergeevich for giving a far more eloquent response to that question than I have been able to provide.

I want to thank him for a personal reason as well, and there are some people in this room who will understand what I am about to say. As I heard him speak, I was reminded of a number of wonderful human beings who were my

mentors and his colleagues, people who taught for a number of years at the Juridical Faculty of Moscow State University – Professors Mishin, Barabashev, the list goes on. As I heard Mikhail Sergeevich speak, I was reminded of what a special institution the Juridical Faculty of Moscow State University was. It produced not only him, but it produced a number of remarkable people; people whom we now forget at our peril.

The third reason why I would like to thank him is to remind a room of academics how great the gap is between theory and practice; and how perilous it is to approach the world by imposing your own theoretical view onto a world which it does not quite fit. Over the last several decades we sadly have had numerous examples of that peril.

And finally, I would like to thank Mikhail Sergeevich on behalf of the Kennan Institute for the long and very productive cooperation his foundation has had with our office in Moscow. His colleagues have been a joy to work with and I always understood that one reason why they are so delightful is the way in which he has

organized the foundation and has promoted its mission. Many people set up foundations, but few have produced such an effective institution as has he.

There are a couple of people that I need to thank as well. I am shortly going to turn the platform over to the two people who really are responsible for this meeting: William Pomeranz of the Kennan Institute, and Oleg Rumyantsev of the Foundation for Constitutional Reforms. I want to thank both Will and Oleg. This conference has been their idea. They have provided the energy and the intellectual power behind this enterprise.

I also would like to thank the staff members who worked with them, because I think everybody in a room like this in Washington understands that it is staff work that really carries the day. So I would like to thank the staff of the Kennan Institute and our other colleagues from the Wilson Center who have been cooperating with us, as well as the staff at the International Institute of Global Development and the Foundation for Constitutional Reforms.

# PANEL I

## Constitutional Guarantees of the Rule of Law State

### ALEXEI AVTONOMOV

Good morning, ladies and gentlemen. First of all, I would like to thank the Kennan Institute for the opportunity to speak with you, and I would also like to thank all the organizers of the conference who have made it possible for us to come here to speak to you and hear what you have to say.

Much has already been said today about why a conference on the fifteenth anniversary of the Russian Constitution is being held in the United States, and this really is an interesting question. When I was going through passport control at the airport, they asked me, “Well, why are you coming here to the United States for that?” I explained as well as I could. I think the passport control officer was very satisfied with the answer I gave her. She seemed quite happy about it. And of course we are very happy that we can come here to discuss the issues we are dealing with. I think that even though we will be speaking mainly about Russia, these are issues we all share, so I think it will be interesting for you as well.

We have heard here today that our Constitution was adopted under very difficult circumstances and in a state of emergency. The draft had been worked on since 1990, and the reality was that the draft produced by the Constitutional Commission was probably the only draft that we could have worked with, because everything else that happened in 1993—the constitutional convention and other things—were attempts to modify this draft by taking some things out and putting other things in.

However, we know that writing a constitution takes more than five minutes. The drafting process requires an enormous effort, because a constitution ultimately reflects the social con-

sensus at the time it is adopted. It embodies the principles that are agreed upon if not by everyone, then by an absolute majority and even those who do not agree are generally willing to tolerate the new Constitution. We all understand that in the modern world, a constitution creates the framework for the development of the entire society. It is important. That is why it was so important for us to have a new constitution.

If the people had rejected the new constitution in the 1993 referendum, I do not know how we would have functioned. The old constitution had been abrogated by presidential order, but a new one had not been adopted yet. For this reason, I believe many people who thought the new Constitution still needed work voted for it nevertheless on the grounds that it is better to have even an imperfect constitution than none at all.

But even in those circumstances, many important principles were enshrined in the Constitution, and this is what I would like to talk about today. First and foremost is the provision proclaiming the rule of law in Russia. I am not implying that Russia today is a country governed by the rule of law, but at least it was proclaimed. This is a very important development in my view.

The whole history of the last 200 or 250 years throughout the world is the history of the advancement of the rule of law. I will not dwell on the theoretical aspects of this issue here. I would note only that the principle, of which the Russian phrase “*pravovoe gosudarstvo*” is a translation from the German or French, is called the “rule of law” in English. And although the concept of the rule of law is not identical to the German *Rechtsstaat*, the French *état de droit*, or the Russian *pravovoe*

*gosudarstvo*, they all reflect the basic idea that the law must be the foundation of the normal development of a modern society.

The rule of law is a principle on which everyone agrees. The law is a sort of control device that establishes a framework, sets boundaries, and creates an equal playing field for everyone. Therefore, the rule of law cannot exist in a society with an official policy of inequality. We know that the rule of law is an ideal goal toward which all countries that have adopted it as a governing principle must strive. But no society has or could achieve this goal completely, because it is impossible to achieve the ideal. Still, we cannot live without an ideal, because it is the horizon toward which we are always striving. The horizon is always receding, but in order to move forward, we need this horizon, we need something to strive for.

What implications does the proclamation of the rule of law have for Russia? In any country, the effort to create the rule of law involves two components. I am not sure which one is more important. The first is legislation or regulation, by which I mean the enactment of laws and other regulatory acts on the basis of a constitution. The second is the application of the law. Any law, no matter how well it is drafted, will fail to promote the rule of law if it is applied incorrectly or contrary to the spirit of a constitution. I would like to discuss these two aspects and the development of these two components over the last 15 years.

At the beginning of this conference, we heard a lot about *perestroika*, democracy, and social participation. We understand that if the law sets the boundaries for everyone, then it is important that as many people as possible, representing the most diverse interests, be involved in the process of creating the laws. The public interest does not mean that one private interest prevails over all others. The public interest is a consensus among all interests, in which all interest groups are treated equally. This is why I have always believed it was so important to involve all political parties and social movements in the legislative process, so they will all have a stake in the adoption of any given law.

During the 1990s I had the opportunity to take part in the drafting of a number of laws. I

was a member of various nongovernmental and nonprofit organizations, and I have spent my career as a legal academic. Since I wear these two hats—as a representative of NGOs and as a lawyer with some experience in both theoretical and practical work—I think I am in a position to analyze what happened.

Before 1993, the membership of the Supreme Soviet was quite diverse. This continued after 1993, but in early 1994 an interesting thing happened; many members of parliament—both those who supported President Yeltsin and those in the opposition—expected Yeltsin to dissolve the State Duma. This was because at that time, the Duma as a whole, or at least a majority of its members, took a somewhat different position on the issues than the president and his administration. But fortunately, this did not occur.

So from 1994 until the elections of 1999 (this period includes the first two sessions of the State Duma, because its members were initially elected for two-year terms and then for four-year terms), the center of gravity of legislation was in the State Duma. This was very important and very beneficial, because the parliament is always more accessible to the people, so its membership really is very diverse. I remember when we—academics, lawyers, economists, historians, political scientists, and representatives of nongovernmental organizations—would testify on proposed legislation before the working groups chaired by members of parliament. This was very important for us, because the members of parliament listened to us. Of course, since the president signs the laws, the presidential administration had input too. But over 70 percent of the laws that were enacted during this time originated in the State Duma. I also worked on some drafts that never became laws, but I will not go into the details. If you have questions, I will be happy to answer them.

After the 1999 elections for the State Duma, the situation began to change. The change was gradual at first. Then we had a presidential election in 2000, and after that we seemed to start following the model of certain European countries, where much of the legislation is initiated by the administration. However, as this practice became common in our country, it was forgotten that in Great Britain and other countries,



legislation can be sponsored by members of parliament serving in the administration, not by the administration itself. Unlike in the United States, this dual role is possible in some European countries, but we tend to forget that even in these European countries, the parliament still has a role in the legislative drafting process.

Our situation is somewhat different. Legislation may be introduced by members of parliament, of course, but also independently by the president and his cabinet members. So the presidential administration gradually began to monopolize the legislative initiative. This was during the transition period from 1999 through about 2003, when a fair variety of working groups were formed to work on legislation, and even though those groups were controlled by the administration, the general public and academic experts had the opportunity to give input.

Many major reforms were enacted during this period. For example, the working group on judicial reform, chaired by Dmitry Kozak, did some very important work in bringing together representatives from all branches of government to draft legislation. I think some of the other members of the panel will talk in more detail about the law on the courts. But suffice it to say that important laws were adopted, based on this consensus process. Not every proposal passed, but things do not always go as you hope they will. The local government reform of 2003 is also worth mentioning. I remember the intense debates that occurred. But the legislation was still shepherded through the drafting process in the State Duma.

Unfortunately, sometime around 2003-2004, the situation began to change. Today, when I speak with people from various backgrounds—the business community and NGOs—they tell me bluntly: “The law is not helping us and we do not know what to do about it.” I hear this particularly from small business owners. I tell them that they need to work through the presidential administration. It is a waste of time to approach the parliament with problems like this, because most of its members are in the majority, the ruling United Russia party, and they normally do not do anything without di-

rection from the administration. You need to work through the presidential administration if you can find a way to reach them. Of course, the executive branch agencies are less accessible than the parliament, so it is much harder to get access there than with a member of parliament. Members of parliament hold weekly office hours, and at one time this was a good way to make contact with them.

At that time laws were enacted more rapidly, but the quality of these laws left much to be desired. I will not go into the details, but there are many examples. The Land Code was adopted quickly, but it contains many provisions that are inconsistent with other laws, so it does not work properly and we have a huge number of problems with land and property in general. Many provisions are vague and not well understood, but I do not have time here to discuss the details.

Let us move on to the second component of the rule of law: the implementation of the laws. During the Soviet period, we had a constitution, and we had a system of applying the law, but these two things had nothing to do with each other. They were like parallel universes. Theoreticians would discuss the constitution, and the people implementing the law would do their own thing. Of course, this changed after 1993. Now we have a Constitutional Court with which appeals may be filed. Still, we cannot say that the lofty goals proclaimed in our Constitution, or even in the laws enacted pursuant to the Constitution, are fully realized in practice.

Many times, the general principles that everyone believes in are implemented in our country in a very different way than in other countries. Here is one example. We had a problem with the publication of judicial decisions that are made in open proceedings. Some judges released them for publication and some did not, and the issue arose whether we needed a law to address it. To be honest, I was very surprised. I am familiar with the practice of courts in Europe and many other countries, including the United States and Canada. If a decision is made in an open proceeding, it is generally available to the public. No special laws are necessary to give the public access to these court

documents. They have been considered public documents since the 19th century. Attorneys and any member of the public can have access to these documents. But in our country it was not so simple. I was a member of the Supreme Soviet's working group to draft a law on this topic. This is just one example. When the Deputy Chairman of the Supreme Soviet invited experts to provide comments on the draft law, I was one of them, and I told them: "Why do we need a law on this? We already have the principle of openness of court proceedings. We have always proclaimed this principle, and it is enshrined in the Constitution. We just need to implement it!" They replied, "Yes, we tried, but there was opposition within the Supreme Court." So the law was drafted, although it was substantially modified later.

There are many more examples when the way in which the law is implemented distorts the principles set forth in the Constitution. As a lawyer, I am always saddened when this happens, because if the Constitution establishes certain principles of law, those principles should be applied in real life.

I will end there. I have described problems more than I have proposed solutions. But as academics say, identifying the problem is an important first step, even if it sometimes takes a millennium to solve it.

## **PETER SOLOMON**

I will speak about one part of the realization of the Russian Constitution of 1993, namely the challenge of making judges in Russia independent. One of the goals of the Russian Constitution of 1993 was to make courts and judges independent so that they would deliver impartial judgments even in cases that were controversial or involved powerful players. Since the end of the Soviet era, Russia has put into place most of the institutional protections associated with judicial independence—including security of tenure with removal only for cause upon approval of peers; decent funding of the courts, including judicial salaries; and control by judges of organizational support for the courts. But as of 2009, observers of justice in Russia, including its president, recognized that, such institutional protections notwithstanding,

most judges still faced pressures that sometimes compromised their neutrality—both outside attempts to influence their decisions and systematic biases in the work of courts. How and why is this the case?

One reason is the persistence of informal practices in the administration of justice that dilute the impact of institutional protections and shape the conduct of judges. Another is the limits on the practical meaning of judicial reform set by cultural factors and by the larger political context. Today I will speak about both, explore potential remedies, and conclude with observations about President Medvedev's statements on court reform.

Let us start with security of tenure as an example of what can happen once informal practices are taken into account. The law states that after a three year probationary period judges who pass fresh scrutiny of their bureaucratic and political masters as well as their peers receive appointments for life. But if those judges ever seek promotion to a higher court or appointment to the post of chair or deputy chair of a court, they must face the same careful scrutiny by the same set of players, including the heads of the relevant high court and officials in the presidential administration. The result is that making a successful career as a judge requires meeting the expectations of the figure who must write the crucial recommendation (the chair of the court), as well as judges on higher courts. Suppose that our judge is not ambitious. Even so, he must avoid offending the chair of his court because in reality that figure can engineer the judge's dismissal. To be sure, a judicial qualification commission must find in the judge's conduct grounds for dismissal, but the commissions are commonly under the thumb of the corresponding chair of the regional court, who in turn tends to respect the views of chairs of district courts, and the latter often find pretexts to dismiss judges whose real sin lies in lack of deference to the chair or to the informal norms of conduct for judges, such as the avoidance of acquittals.

Moreover, the power of chairs of courts over their judges plays a vital part in the process of outside influence on judges. Often, powerful politicians or business people approach the

chairs of courts for favours, which the latter feel compelled to provide in order to maintain good working relations. Usually chairs can assign cases to judges known to be cooperative (although experiments with random case assignment could temper this). For their part, most judges acquiesce to the chair's bidding. Failure to do so could result in losing discretionary perks and in critical reference letters, if not also to disciplinary measures.

Another informal practice that affects judicial impartiality is the accusatory or prosecutorial bias, reflected in the avoidance of acquittals and use of alternatives such as compromise decisions and sending cases back to investigators or procurators for new evidence. In practice judges in Russia avoid acquittals because they lead to negative evaluations of the judge's performance. Judges are also expected to avoid overrules, a norm that encourages conformity with the anticipated view of higher court judges. These expectations are built into the system of evaluating the performance of judges. (The rate of acquittal in judge only trials remains less than one percent; in contrast to the 15 percent at trials by jury).

The development of informal practices that undermine the formal protections of judges did not take place in a vacuum, but reflects contextual and cultural factors. One such factor is the attitudes of politicians and officials toward law and courts. Within public administration in the Russian Federation the status of law remains murky, and regulations are based less on the laws than on officials' involvement in networks of exchange. Policing includes much private activity by public police. Many officials and politicians treat laws as instruments to serve the interests of anyone who can mobilize them. It is hardly necessary to give examples.

There are also problems with the mindsets and culture of judges. In part because of the organization of the judiciary in a bureaucratic hierarchy, in part because of deficiencies in training, judges in Russia lack a strong sense of professional identity. They see themselves more as functionaries than as professionals with a distinct mission. Yet, judges who thought of themselves as professionals would be more likely to care about the quality of reasoning in their

decisions, and to resist inappropriate attempts to influence them.

So, what steps might be taken to improve the conduct and effectiveness of judges? During the Putin years some reformers emphasized measures to strengthen the accountability of judges, often at the expense of their independence. For example, adding non judges to the judicial qualification commissions was meant to break the alleged power of the judicial caste, which some observers saw as too prone to protect its members. Even now, proposals to force judges to declare sources of income, their own and that of family members, and to keep diaries of their contacts with litigants are in the air. Making courts more transparent through the publication of judges' decisions, a move that has support from Chief Justice Ivanov of the Supreme *Arbitrazh* Court, strikes me as a measure that might improve accountability in a productive way.

I am especially interested in measures that would reduce the power of the chairs of courts or improve the professionalism of judges in Russia. Following a reform in 2002, chairs of courts now serve for two six-year terms (plus the remainder of previous terms). While the need for reappointment leads to some accountability of chairs, they remain bosses of their domains. I like the proposal made by jurists close to German Gref in 2006 to have chairs elected by their peers on the court (rather than appointed from above) and for terms of a mere three years. With the resulting rotation, chairs might turn into chief judges rather than bosses. To be sure, chairs would have less management experience, but this deficit could be remedied by shifting more administrative functions to court administrators, a position created only seven years ago. The latter would need higher status and pay to aid recruitment of skilled personnel. Moreover, the leaders of the judiciary would need to be convinced that gains in the independence of judges justified loss of power on their part.

Finally, I am convinced that measures to enhance judicial professionalism would help a lot. Judges with a sense of pride and commitment to an ethos of judging will be less likely to misbehave than judges for whom handling trials is

simply a job and approval of superiors more important than standing in the profession. Judicial professionalism will come from changes in recruitment (more jurists from full time day faculties and unconventional work backgrounds), in training (a serious well designed program for new judges similar to the judges school in Bordeaux, France), and from a transformation of the system of evaluating judges. Instead of statistical measures of performance, assessment should be more skills-based (as in Germany) and put a premium on how judges do their work rather than on the content of their decisions. Perhaps, judgements could be more closely associated with particular judges, so that especially good ones develop public profiles (like Anatolii Koni in tsarist times). The personal dimension of judicial activity, while less prominent in Europe than in North America, helps to make leading judges into figures of attention and respect in many Western countries, which in turn can lead to public veneration and the promotion of role models for young judges.

As most of you know, starting last spring the new president Dmitry Medvedev made strong statements in favour of judicial reform, and this fall he continued along these lines, first in the annual address to the parliament (the *Poslanie*) and then in his appearance at the 7th Congress of Judges, where he spoke twice and committed himself to a series of reform initiatives. These included already planned measures to improve the transparency and accessibility of courts (such as more publication of decisions), and to handle excessive delay in criminal cases to avoid the wrath of the European Court of Human Rights in Strasbourg, along with reforms to the JPs [justice of the peace], and measures to humanize criminal law through decriminalization of lesser offenses and reduced sanctions for others. Medvedev also called for improvements in the system of legal aid, improving the salaries of court staff, sorting out jurisdictional ambiguities between the regular and *arbitrazh* [commercial] courts, and coming to a decision about the possible creation of administrative courts.

One of his initiatives connects to the reform agenda that I am promoting, that is the need to recruit more judges from backgrounds other than court secretaries, prosecutor or investiga-

tor. But overall, the president's program for the courts falls short of addressing most of the fundamental issues that prevent judges in Russia from gaining true independence. There has been no mention of measures to deprive chairs of their power, or for that matter of undercutting the power of the Supreme Court and Supreme *Arbitrazh* Court over their respective hierarchies (similar initiatives are being discussed in the parliament of Ukraine). Moreover, a number of the most useful changes supported by the president—pay raises for court staff, remaking the system of legal aid and creation of administrative courts—will cost a lot of money. None of these is likely to materialize until the price of oil returns to the three digit range and the financial crisis in Russia comes to an end.

One can hope, however, that because of the president's personal interest, government spending on the courts will be maintained, both regular budgets and the funds allocated through the targeted Program "The Development of the Court System, 2007–2011". Perhaps, when it is time to plan the next targeted program, the financial condition of Russia will have improved and some of the initiatives supported by the president will receive funding.

(To send comments or receive a copy of the longer paper in either English or Russian, write peter.solomon@utoronto.ca )

## **OLEG RUMYANTSEV**

Earlier today, Blair Ruble raised the issue of why a conference on the Russian Constitution is being held in Washington. I have two answers to this question. First, I think it is fortunate that this event is happening at a time when we are pushing the "reset" button in Russian-American relations. There are many areas in which we have common interests, including not only the environment, Kyoto, the war on terrorism, and other important issues. It seems to me that constitutionalism is an area in which Russia and the U.S. have definitely been moving closer together in the last 20 years.

For many years, at least 15 years, we have been silent in our relationship on the topic of constitutionalism. Now it is time to begin talking about these issues again, because interesting things are happening not only in Russia,

but in the United States as well. In my opinion, you also have problems here involving the excessive concentration of power in the executive branch. Americans are saying this, and I will talk about it too, so that we have a balanced discussion. When Russians travel abroad to conferences, they usually feel a moral obligation not to denigrate our own country or our own Constitution. This really is a moral obligation, but this is a somewhat different situation. And this is the second reason why we are holding this conference: 15 years after its adoption, the debate on the status of the Constitution has begun in Russia.

President Medvedev began this discussion in his message to the Federal Assembly on November 5, 2008. With his blessing, we have kept the discussion going. President Medvedev probably thought the discussion ended with the adoption of the amendments to the Constitution that he proposed, but we feel differently. We believe that this is the time when the constitutional discussion must continue. Further, since it is best for this discussion to happen in an international forum, it is especially fortunate that we are having this conference, where Russians and Americans can discuss our common issues.

Most of the Russian participants in this conference also participated in the drafting of the Russian Constitution. Our small group includes a high concentration of these “founding fathers,” and I believe this gives us a certain moral right to consider how the Constitution we gave birth to in the early 1990s is doing.

I am very grateful to Mikhail Gorbachev, who said quite correctly that all of this began with *perestroika*. There is no doubt that Mikhail Gorbachev was the forerunner of the political reform that occurred. Perhaps we were a bit too critical back then of the “authoritarian modernization.” I am looking at Volkov and Sheinis, my colleagues on the Constitutional Commission.

Still, to get back to the topic of Russian-American cooperation, I remember that we had a great many contacts 15 to 18 years ago. In August 1990, at the beginning of both my managerial and creative effort in the Constitutional Commission Working Group, I spent a month in the United States, at the invitation of the U.S. government, meeting with senators, congress-

men, governors, mayors, scholars, professors, and teachers. I met with a wide range of people, and it was extremely useful to me. For example, I had the opportunity to hear about how these fundamental principles work in real life from Andrzej Rapaczynski of Columbia University, to whom George Soros introduced me. Here is a warning he gave me: “I urge you not to create in Russia a presidential system based on the American model,” said Mr. Rapaczynski. “They love it in the United States, but it has not been successfully implemented anywhere else in the world. It very often leads to dictatorship.” So that was one piece of interesting and largely prophetic advice we received from Andrzej Rapaczynski. We heard many different opinions during these discussions.

In 1992, I met with my old friend James Billington in the U.S. Library of Congress, and Dr. Billington made one of his offices at the Library of Congress available to me, so for a whole week I worked on the draft of the constitution in an office right next to his. In January 1993, during the inauguration of President Clinton, I was here in the Senate, along with Vladimir Lafitsky, one of our other speakers here, for a conference on Russian constitutionalism. We had good debates. As the Constitutional Commission worked on the draft, we received a large amount of very detailed material from our American colleagues. There were proposals and opinions on the constitutional provisions governing the budget process, federalism, and the vertical distribution of powers. It was all extremely interesting. Unfortunately, the recommendations on budgeting authority did not make it into the final Constitution, although they were in the draft proposed by the Constitutional Commission. We see the result today in the total power of the executive branch over the management of public resources.

When I analyze the disputes we had in the early 1990s over the draft constitution and the problems we have today in putting the constitutional principles into practice, I realize more and more that the key factor in these conflicts and the weak link that, if we had grasped it, could have resolved all of these conflicts, is the issue of popular sovereignty.

The preamble and Articles 1 and 4 of the Constitution mention state sovereignty, Article 2 mentions individual sovereignty and the supremacy of human rights and liberties, and Article 3 mentions popular sovereignty. But it seems to me that the fictitious character of, or rather the transformation of popular sovereignty into a theoretical and practical fiction, underlies certain problems that Russia has faced in trying to build the type of constitutional regime we all dreamed of.

In essence, there were two ways forward. One way was labeled “romantic,” and those of us here who believed in it were called “romantics” regardless of our age. It was the concept of sovereignty that was borrowed from the 18th century, when popular sovereignty was the alternative to the sovereignty of the sovereign, i.e. the king. It was also believed that it echoed the socialist approach, and that the socialist concept of “people’s power” was inconsistent with the separation of powers and so forth. The second way was to conceive of the constitution as a pragmatic weapon of crisis management. The argument went like this: Boris Yeltsin is a talented manager and he can bring Russia out of this crisis. So let us give up a few of our ideals concerning popular sovereignty, people power, and parliamentary oversight, and this crisis manager will make everything better.

In my opinion, this was the moment when genuine constitutionalism was replaced with what I would call a cynical attitude toward the Constitution and toward the basic principles of the constitutional regime, which are still expressed in the text of a constitution. So our Constitution is now becoming more and more of a manifesto, an expression of the society’s ideals. When the constitutional regime is merely an ideal, a constitution is only a plan for the future. This is the unfortunate turn we have taken. Leonid Volkov will speak here; he was one of the first to argue that the provisions of the Constitution must have direct application. From the very beginning, we argued in the Constitutional Commission that the constitution must be a document that is directly applied in reality, not merely a plan for our shining path toward the ideal.

Yet, those who changed the Constitution turned it into what it is today. For example Sergey Shakhrai, my old colleague and, traditionally, my opponent going back to our days in parliament, says that we (surprise!) have a self-evolving constitution. It is a document that evolves by itself. In other words, in the past the president had a disproportionately powerful role, but now little remains of the strong presidency. They see this as a positive sign. That is what a self-evolving constitution is in their mind. I see this, however, as extremely dangerous. I strongly opposed the disproportionate role of the president in the Constitution, but until recently at least you could say there was one institution that was functioning as it was described in the Constitution.

Time passed, and the strong political leader who had served two terms as president became prime minister. Suddenly the independent role of the government is vastly enhanced in the constitutional structure, and the presidency is relegated to a secondary role. This is my assessment. But they say that, supposedly, this was made possible by the mixed form of government created by the Constitution.

Well, even though I disagreed with the exaggerated role of the presidency, I was still happy to let the other side have this one victory. Now it turns out that even this one institution does not function properly. This is a problem that we can talk about and criticize, but ultimately we have to figure out what to do about it. In my opinion, we must pay very serious attention to the principle of popular sovereignty and resist attempts to bring about its devolution.

Mr. Gorbachev said it very well: perhaps this conference will generate some solutions. I would also like very much to believe in what Alexei Avtonomov said: “The scholar’s task is to identify the problem.” Yes, but the field we are working in is different. It is closely linked to political reality. Why shouldn’t we offer some solutions or a plan of action for the future? This could be one of the real results of this conference.

Incidentally, we want to publish the results of the conference in our revived *Constitutional Bulletin*. My colleagues from the early 1990s remember that this was a *samizdat* [self-published]

journal in the parliament. The Constitutional Commission published it as an informal bulletin in the spirit of *samizdat* journalism. It was really great and very interesting. Boris Yeltsin signed an order, and we published the journal on that very shaky legal basis. Now, after 15 years, we have revived it. In December we published international research on issues of implementing the Constitution, and some of the people who took part in that research—Peter Solomon, Will Pomeranz, and some others—are here today. We will definitely publish the proceedings of this conference in Russian, and I hope the Kennan Institute will publish an *Occasional Paper* on the conference.

The question arises: do the people really want this popular sovereignty? Indeed, our work was spirited, but we did not take into account the political culture and the state of mind of our society at the time. We would not in our worst nightmare have imagined, when we created what became the legal foundation for the theory and practice of the great property grab, that the transition to a market economy and democracy would go the way it did. And yet, behind our backs and behind the backs of the democrats who were drafting the constitution, this great property grab occurred.

I am not even sure if this term translates into English; I hope the translators will come up with something. In any case, ever since, for the next 15 years, first in the hands of Yeltsin, then Putin, and perhaps Medvedev—although I hope he might be different—the Constitution has served one legal and political function: to guarantee the results of privatization. This is how the Constitution was finally drafted in December 1993, to ensure that the results of privatization would be inviolable, and for the last 15 years it has served and continues to serve as a guarantor of the inviolability of the highly dubious process of privatization.

Responsible government is being destroyed both in Russia and, in my view, to a certain extent in the United States as well. Conducting parliamentary investigations was very new in Russia when we had committees investigating the events of September and October 1993. There were two parliamentary commissions, and the results of their investigations turned

out to be very inconvenient. Also, there was the Govorukhin Commission investigating the events in Chechnya, which was also very inconvenient. So what happened after this? In 2005, they enacted a new law on parliamentary investigations, which virtually eviscerated parliament's investigative powers. One house of parliament can refuse to recognize an investigative committee formed by the other house and can decline to approve the results of the investigation.

The parliament has an Audit Committee, which exercises parliamentary oversight of government finance and spending, but it has now essentially delegated the appointment of the chairman, members, and auditors of this committee to the executive branch. The most recent example was the amendments to the budget code, when the parliament relinquished its oversight authority over expenditures from the reserve fund. This happened, to be sure, during a financial and economic crisis. In other words, in a financial and economic crisis, popular sovereignty is for all practical purposes inoperative. It appears that first we had to conduct privatization in a crisis, and now we have to bring the country out of a financial and economic crisis again. The result of this was amendment number one, proposed by Medvedev, to increase the length of the president's term.

Yesterday we visited the Newseum, the enormous museum commemorating the First Amendment. We were amazed, and here is what I thought about the First Amendment to the U.S. Constitution: the text of the U.S. Constitution says nothing about human rights and liberties. The purpose of the U.S. Constitution was to structure the government. However, later they decided that they needed to balance this situation, so they adopted amendments on freedoms. Now, our first amendment allowed the president to serve two six-year terms; it is an amendment creating a 12-year presidency. I do not know what kind of museum you could build commemorating an amendment that creates a 12-year presidency.

This sharp distinction between our two systems is the origin of the political and legal culture that self-replicates endlessly in our country. It is not a political and legal culture of partici-

pation and civic action. My fellow Russians here remember Venichka Erofeev, who wrote in his immortal novel *Moscow-Petushki*, “My tragedy lies in the fact that I expanded my zone of privacy beyond all limit.” This is our collective tragedy today: We are ceasing to be a society and becoming merely a biological community. Our zone of privacy has expanded so far that we have no sense of community beyond consumption.

There are many possible conclusions to be made. Perhaps we need to find new forms of oversight—who will guard the guardians? There is a new form of oversight that does not exist in the traditional understanding of constitutionalism. It is possible that expert councils could become a prototype of this form. I am pleased that on February 10, President Medvedev appointed new members to the council to support the development of civil society, and a significant number of the members are dissidents. Perhaps this council will serve as a new institution of oversight. However, we must not forget the traditional monitoring institutions, which are unfortunately quite underdeveloped.

I was going to criticize the United States here a little, but I am out of time. I was here on January 20th, the day of the inauguration, and I was amazed at the heightened civic spirit I saw. Still, the questions I asked my American colleagues remained unanswered. I asked, how could the president of the United States, and I am not talking about President Obama here, refuse to let presidential advisers appear before a congressional investigative committee, and no one cared? How could the president of the United States commence military operations without the consent of two-thirds of the Senate? How did the president of the United States sign a status of forces agreement, but this international agreement was not ratified? I could cite many more examples of violations of the Geneva Conventions, torture, and so forth, which were left to the discretion of the U.S. president.

Does this indicate that this is a universal problem—this self-limitation of popular representatives? Is the endless expansion of executive power a universal problem? I hope our American colleagues will tell us what they

think can be done to revive and rehabilitate the principle of popular sovereignty.

## SERGEI PASHIN

It is a great honor for me to speak at the prestigious Kennan Institute forum and in the presence of some of the authors of the Russian Constitution, including Oleg Rummyantsev. However, I am afraid that my presentation on judicial power and the constitutional regulation of judicial power may be somewhat controversial and provocative. I beg your forgiveness for this, with the understanding that a constitution may not only be smarter than its drafters, but also more profound than its drafters. A constitution can be the functional mechanism by which the people exercise power, or it can be a shell that covers up the real gears and levers of power.

The experience of the post-Soviet countries demonstrates that many provisions of constitutions are fictitious, at least those that are not based on reforms or revolutions. However, not all changes can be called *reforms*. Many are often *deforms*, while others merely make the power structure more complex. In this regard, it seems to me that the 1993 Russian Constitution was more successful in codifying prior achievements of the judicial branch. For example, the Constitution confirmed the creation of the Constitutional Court, which had been formed in 1991, and confirmed the creation of the separate system of business courts. Still, I believe that the Constitution contains little potential for reform. Some provisions on judicial procedure have not been implemented, and their implementation is not even on the agenda. The implementation of others has been very slow, difficult, and fraught with delays. The very process of implementing some provisions rendered them essentially null and void.

Let me give a few examples. It took ten years to implement the requirement to obtain an arrest warrant from a judge. Moreover, there were plans to put off entrusting judges with this authority until 2007, but the Constitutional Court intervened, and as a result the issuance of arrest warrants by courts became a reality ten years after the adoption of the constitutional provision requiring it.



Jury trials were introduced in Russia in July 1993, i.e. before the adoption of the Constitution. The constitutions of the Soviet Union and the RSFSR also provided for trial by jury in November 1991. In 1993, before the new constitution, trial by jury was introduced in nine regions. It has bogged down since then. In 1999, the Russian Constitutional Court reminded the legislature that it was time to implement the constitutional provision on trial by jury. The legislators mulled this over until the beginning of the third millennium and finally began to gradually introduce jury trials in Russia. However, according to the plan, trial by jury will not be introduced in the Chechen Republic until 2010. It was scheduled for 2007, but was delayed by three years. At the end of last year, trial by jury in Russia was hanging by a thread. On December 30, 2008, President Medvedev signed a new law, just before the New Year's celebration, that limited the authority of the jury. In particular, three months ago, nine items were removed from the list of criminal offenses to be tried by jury.

Article 32 of the Constitution provides for the right of the public to participate in the administration of justice. However, in the courts of general jurisdiction, virtually no civil cases—and there have been nine million such cases—have been tried by a jury. Back in Soviet times, all such cases were tried by a panel including people's assessors. There have been just over 1.1 million criminal cases in the Russian Federation, and of those only six hundred have been jury trials, not to mention the five and a half million cases of administrative violations, in which the public does not participate at all. Thus, the right of the public to participate in the administration of justice has been implemented in only six hundred cases out of fifteen million cases heard by the courts of general jurisdiction.

Russia's legal system has not lived up to our expectations. In civil law, the biggest problem is the execution of judicial decisions. In 2006, the government announced that it planned to increase the rate of execution of judicial decisions from 52 percent to 80 percent and that this will happen no earlier than 2011. Perhaps then we will get somewhere.

Everyone says we must reduce the prison population, which is extraordinarily large in Russia—about 900,000 people are serving time or in pre-trial detention. Since judicial reform began with the adoption of the Constitution, our prison population has nearly doubled. Amnesty, liberalization of laws, and decriminalization has only a temporary effect. Justice Radchenko, the First Deputy Chief Justice of the Supreme Court, said last year as he resigned from that high office that since the new Constitution was adopted, one-fourth of the adult male population of Russia has been convicted of a crime. One of my colleagues on the bench joked cynically that they will soon be giving out “Not Convicted” medals.

It is interesting that judges grant nine out of every ten requests for arrest warrants. This means that prosecutors are able to make an arrest in nine out of ten cases. Once a person has been arrested, the prosecutor—or rather, the investigators and the prosecutors—are granted extensions of the period of detention in 98 percent of cases.

Judges are removed from office—this happened, for example, with judges in Gatchina and Moscow in 2006—for “failure to grant a motion to extend the period of detention.” The Supreme Court has upheld the removal of judges from office on these grounds. Judge Melikov in Moscow was removed from office on the slanderous grounds of “unusual leniency in certain decisions by the judge and persistence in explaining to the parties their right to mediation.” I am quoting the official document. The Supreme Court explained that, in deciding whether to grant arrest warrants, judges should verify the grounds for the charge but not inquire into the issue of guilt. The result is very odd decisions, including decisions of the Supreme Court. Prisoners in Yakutia complained that they were held for over a year even though they had alibis and no evidence of their guilt had been found. The Supreme Court decided that “the arguments by the accused regarding lack of evidence of their guilt and their alibis are not relevant to the appellate court's review of the grounds for extending the time of detention.” This reminds me of a phrase I have heard in America: “Innocence is not a defense.”

The same applies to the frustration over the freedom from torture. In 2004, the Committee Against Torture gave Russia a very negative rating, noting that judges essentially ignore evidence of torture and harsh treatment presented by defendants. Opinion polls conducted a year later indicated that over 50 percent of respondents think either they or someone among their friends or relatives might need protection from torture. Yet apparently they will not be able to count on the courts to protect them from torture.

When we talk about trial by jury, we must understand that the Russian Supreme Court prohibits a party from raising the issue of torture in the presence of the jury. Torture is considered a legal issue beyond the jury's authority. If a defendant even hints that he was tortured, this is grounds to overturn a jury verdict of not guilty. For example, one not guilty verdict was overturned because the defendant said that during his interrogation he "would have admitted to crucifying Jesus Christ." Another verdict of not guilty was overturned on the grounds that the attorney made subjective comments on the evidence presented by the prosecution. Apparently, an attorney is required to make objective comments and support the prosecution. The language used in the decision overturning the not guilty verdict was priceless: "The attorney influenced the jurors' opinion." Incidentally, this is not another decision that will disappear into the archives. This is a published judicial decision, available to everyone for review and guidance.

What is preventing the judicial system from becoming an effective mechanism for protecting constitutional rights and acquiring true judicial power? I think Professor Solomon demonstrated this quite clearly in his presentation. In 1992, there was a famous case in the Constitutional Court, *Yeltsin v. Communist Party of the Soviet Union*. The issue in the case was whether the Communist Party was a constitutional organization. During this case, documents were presented that clearly demonstrated what the Soviet judicial system was like. The president's team—Shakhrai, who has been mentioned here, along with Burbulis, Kotenkov, and Makarov—argued that the Communist Party had usurped the state (the party's slogan

was: "The state is the Party."). But I believe something different happened. The Communist Party sprouted trade unions, a parliament, and courts like its tentacles, like its organs. Then the CPSU left the scene. It lost power and left the political stage, but its tentacles remained, including, of course, the judicial system. These tentacles tend to look for new masters to serve, so "telephone law" is not so much an external encroachment on judicial power—it is what the judicial system wants.

I have less than a minute left, so I would like to mention one example of the procedures used in the judicial system. In December of 2008, just three months ago, the Supreme Court affirmed the removal of Judge Guseva from Volgograd, Central District from the bench. What was Judge Guseva's offense? The chief judge issued an order requiring all judges to make daily reports to him on cases when defendants are held in detention and on civil cases brought by individuals against a government agency, in order to ensure that the procedural and substantive rules of law are applied correctly. Judge Guseva refused to report to the chief judge on her cases and receive his direction, on the grounds that she is independent. She was then removed from office. She appealed to the Supreme Court, which affirmed her removal from office.

A constitution is sometimes compared to a map guiding the way to build a regime. But if you are in Solntsevo (a suburb of Moscow), what use is to you a map of the moon? I think that before we can demand or achieve compliance with the Constitution, we should probably understand who it is that we are demanding compliance from. If it is the tentacle of an octopus, it would be rather odd to count on our demands being met. Our main task is to transform the tentacle into a true government body. Perhaps then something will change. Without reform, the Constitution will have no effect.

## ALEXEI TROCHEV

I would like to speak about the question of constitutional guarantees by looking at the Constitutional Court and by looking at the reactions of powerful players to the decisions of this Court. This Court is a 17-year-old tribunal. It has a full-blown power of judicial review

and its judges are never tired of telling everyone that they are the guardians of the Russian Constitution. This Court had a difficult infancy. It was created before the current Russian Constitution, but then got quickly involved in the clashes between President Yeltsin and the parliament. In the fall of 1993, when Boris Yeltsin dismantled the parliament, this Court was nearly abolished, because it declared the dissolution of parliament non-constitutional and gave the green light to the parliament to impeach President Yeltsin.

Yeltsin kept the Court in the 1993 Constitution only because he was persuaded by his allies that he would be able to appoint more judges to the Court and that the Court would never be able to launch any threat or any attack on the presidency. Yeltsin did go on to pack the Court more or less successfully. So whether or not you like the Constitutional Court decisions, it is useful to look at the challenges this tribunal faces in implementing its decisions in order to realize and to think about the challenges of implementing the Russian Constitution.

I would like to ask you a question: what was Vladimir Putin doing around Valentine's Day in 2001? Answer: he met with the Constitutional Court judges, who complained to him that the other branches of government did not carry out the decisions of their court. The judges gave Putin a list of 10 judgments, which the Russian parliament ignored, either refusing to amend the laws found unconstitutional or adopt new laws as ordered by the Constitutional Court. President Putin agreed that he had to fix this problem of implementation, and he charged Dmitry Medvedev, then-Deputy Chief of Staff of his administration, with fixing this problem.

Here is another question: what did Dmitry Medvedev do on Valentine's Day this year? Answer: he met with Valerii Zorkin, Chief Justice of the Constitutional Court, and again they discussed the problem of non-implementation of Constitutional Court decisions. At that meeting, Zorkin handed to President Medvedev a list of 30 judgments that were being ignored by the Russian parliament. To his credit, President Medvedev was honest and he admitted, quote: "We need to set up a mechanism for implementing Constitutional Court decisions."

End of quote. But I am not sure that he would be successful, as the past has shown us.

I am not going to argue that Russian presidents and the Constitutional Court have some kind of romantic feelings, which is the subject for another conference. The question for me is why do the presidents and the Constitutional Court need each other? Why do they meet on a regular basis and air all these complaints? The Court needs support of the president, because he is the most powerful player in the game of Russian politics who can help the court implement its judgments. Former Chief Justice Baglai was very frank about this ten years ago. He said that the president was the only trump card in the hands of the Russian Constitutional Court when the court is playing the implementation game. Vladimir Putin, of course, and Dmitry Medvedev are even more powerful now, so the Court needs presidents even more today.

In his first year of his presidency Vladimir Putin clearly needed the Constitutional Court in his efforts to reduce the power of regional governors and oligarchs. "The dictatorship of law," the slogan that Putin used to fight against the regional leaders, meant the supremacy of federal law, which was supposed to be made real by the judiciary. This is why he wanted courts to become stronger and to ensure judicial decisions were really enforced and implemented. However, as Putin's popularity grew and his power became more concentrated, he needed the courts less and less. And today the president and especially the prime minister need the Constitutional Court still less, because they both have sufficient power, popularity, and authority. Thus, once those in power in Russia no longer needed the legitimacy conveyed by the Constitutional Court, they stopped paying attention to the Court's judgments.

However poorly the mechanism of implementing those decisions worked in the past, they have now stopped working almost entirely. In 2001, there were 10 judgments that were not implemented. In 2009, we now have 30 such judgments. With Russia finding itself in a deep economic crisis, the need for the Court may rise as the powerful players lose their popularity, their money, and their coercive capacity. For example, the Constitutional Court is set to

hear a complaint by Gazprom, the natural gas monopoly and one of the most powerful businesses in Russia. Gazprom claims that the law on joint-stock companies violates its constitutional right to property and violates the constitutional ban against arbitrary restrictions of this right. Why couldn't Gazprom simply lobby the parliament to change this law? Why has Gazprom gone instead to the Constitutional Court? Because it believes that with the Court on its side its lobbying will be more successful and more effective.

My central argument is that the effectiveness of constitutional guarantees largely depends on the balance of power in the game of Russian politics. This balance of power determines if the decisions of the Constitutional Court are obeyed or not. So far, eight years of economic growth and building the "vertical of power" have failed to strengthen constitutional guarantees and to strengthen the Constitutional Court as an institution. In my book, I explain how the decisions of the Constitutional Court lacked binding force under Yeltsin and under Putin. The plain point here is that executive orders reign supreme above legislation, above the Constitution, and above the decisions of the Constitutional Court. Sometimes these executive orders are published, sometimes they are secret. The decisions of the Constitutional Court acquire binding force only after powerful politicians choose to make them binding.

The prevalence of a business-oriented, militant cadre in today's ruling elite only strengthens this balance of power thinking. People there think: who against whom? Politics is a zero-sum again, and they have to win it. If constitutional guarantees help the *siloviki*, help the militants, then they will use them and turn to Constitutional Court or other courts. There are examples. The YUKOS case involved all branches of the judicial system. Also, the ruling elite do not like acquittals in the criminal justice system, however rarely they occur. So, they decide that acquittals are to be reversed by an appellate court. A few days ago, President Medvedev signed an amendment to the criminal procedure code that basically authorizes double-jeopardy. It allows courts to retry a person on the same charges and then reverse

acquittal, and it authorizes courts to impose tougher sentences.

If the Constitution in some way limits the power of the *siloviki*, then their preference is that the courts should not stand in their way. A perfect example is the persistence of *propiska*, or resident's permit, which is still very important in Russian life. Without a *propiska*, you are nobody in Russia, not even a citizen. Very few people in the government have an interest in reducing its importance. Yet the Constitutional Court has issued decisions saying that the *propiska* should be given less importance as a document. Those decisions have been in vain. Last year, the Court ruled that it was constitutionally acceptable for people to register as residing in their dacha. Yet government officials at all levels—federal, regional, local—say it would be too complicated and unworkable to do so.

Observers of the Court and human rights activists know that Russia's Constitutional Court is a cautious tribunal. It focuses on individual rights instead of the core, heavy-weight political issues. It does not interfere with the key policies of the ruling regime. Yet it still suffers from sabotage from the government, the legislature, and even the rest of the judicial system.

Why? Because the Court has very few allies. The cost of non-compliance with Constitutional Court decisions is zero, while the cost of compliance with the Constitutional Court is much higher. So far nobody in the government, the legislature, or the judiciary have faced any real negative consequences for defying, or ignoring, or disobeying the Constitutional Court.

What about benefits of complying? Simply preaching to these powerful interests that it is desirable to live under the rule of law and exercise self-restraint is not sufficient. You have to look at the real benefits of complying with judgments, and they are not very high. To the *siloviki* and businessmen in power, compliance brings fewer benefits than they can achieve through brutal force or selective prosecution through the legal system. To the rest of judicial system, the Constitutional Court is a thorn in its eye—it imposes way more obligations on judges than do regular or commercial courts. The chief justice of the Supreme *Arbitrazh* Court, Anton Ivanov, is a very good friend of Dmitry

Medvedev and a current leader of judicial reform. He is openly telling the Constitutional Court to stop reviewing and stop interpreting the tax code, stop interpreting the civil code, and stop reviewing appeals against decisions of commercial courts.

For the executive branch of the government, Constitutional Court decisions are simply a headache. They complicate governing, potentially disrupt business relationships and exchange networks with the private sector, require a great deal of external accountability, and damage the “vertical of power” by demanding respect for constitutional rights. The Court says that instead of being loyal to your superiors, you have to be loyal to the Constitution, which is so far away and so abstract that it simply does not work.

To the business community, the Constitutional Court represents one of many possible ways to protect their interests, but it is not the most effective one. This is because the Court cannot really constrain the state.

Neither are the Constitutional Court’s decisions a priority for legislators. The ruling United Russia party has its patrons in the legislature, in the prime minister, and in the presidential administration. It is willing to obey the Constitutional Court only after the Kremlin orders it to. The legislators cannot even play symbolic politics by complying with the Constitutional Court’s decisions, because regular voters simply have no knowledge of what the Court does.

Three years ago, 95 percent of Russians surveyed by the Russian Public Opinion Research Center could not name even a single case decided by the Constitutional Court. At that time, it was a 15-year-old tribunal, but nobody knew any of its decisions. Two-thirds of those surveyed reported that they knew nothing at all about this tribunal. Three months ago, the Levada Center conducted a nationwide poll and again found that 60 percent of Russians knew nothing or very little about the Constitutional Court.

Yet throughout the decade, about a quarter of Russians reported that they trusted the Court. So they do not know what the Court is up to, but trust it. But this level of trust is

below their trust in Vladimir Putin, Dmitry Medvedev, the army, the church, the federal cabinet, the regional governments, and even tycoons. Russians also trust it far less than the European Court of Human Rights, even though Russians do not know what that court does either. But it does rate higher in trust than the private sector, political parties, newspapers, police, and the rest of the judicial system.

Not surprisingly, when there is an attack on the Court, as happened several times under Putin’s presidency, nobody except the constitutional judges defended the tribunal. What happened in Pakistan last week is unimaginable in Russia. People will not go to the streets and defend their judges.

Of course part of the blame lies on the Constitutional Court itself. Judges have to advertise the work of their court and the usefulness of their court to the real people, to people on the ground.

In sum, the Constitutional Court has few allies in Russia, and these allies seem to care about the Court only when they need a favorable judgment. Russia has an instrumental approach to the law and courts and it is not new: the tsarist and the Soviet governments actively used law and courts to reform their societies. Neither is it unique to Russia, because many countries around the world do the same thing. The World Bank tells all developing countries that the rule of law and independent judiciary will bring you economic benefits, prosperity, and a happy life. The point here is that constitutional guarantees become real when the powerful interests want them to be real. But for us, for scholars, and for all those people on the ground, constitutional guarantees will become real only when people in the streets begin to believe that the Constitution delivers something real, something tangible, and something of real benefit. After all, we know that the rule of law should be about protecting the interests of the weak and disadvantaged groups of people from the whims of the powerful.

The demand for this is there. All public opinion polls in Russia show that people like judicial independence, they like the rule of law, they like individual’s rights to be protected, and they want the government to be

accountable. But the courts do not deliver all these things. The demand is there, and it is up to us scholars to convince the politicians that somehow they can actually benefit from obeying the Constitution.

### *Commentary*

#### **ALEXANDER LEBEDEV**

My special thanks to Kennan Institute for hosting this conference. I am very glad that President Gorbachev managed to come and talk to you. I think Oleg Rumyantsev is doing a very good job at the International Institute of Global Development. He helped organize it all nearly a year ago, producing a white paper on the Russian Constitution with 27 experts from all over the world. It is a good start, really. The point of my Institute is a very simple one: I think we all are challenged internationally by various new developments in the financial markets, which are not coping lately with the new acute problems that have emerged. Actually, it requires global regulation.

I think we should consider answers to the challenges of globalization by cooperating much more beyond some simple bureaucratic umbrella, which would not, I think, be efficient enough to counter the challenges we are facing. It is the same everywhere, be it in science, research, even media. I think one of the points of my making this very silly decision to buy a newspaper in London is that I think that the more authoritarian tendencies of global bureaucratic regulation should be answered by more global attitudes in media. I mean we should be doing something about stopping the

loss some of the greatest brands in this country, or in Britain, or France, or Russia.

That is why, coming back to the point, that the Institute is a good start. We will meet soon, I hope, in May, in Crimea, Ukraine. We have a good idea of actually bringing some of the people who 20 years ago participated in the Supreme Soviet to listen to what they can say about the 20 years that have passed. We hope President Gorbachev would join us.

We also hope to launch a new Yalta Initiative, and bring to Crimea, Ukraine international research centers, academics, and experts to talk about any issue on earth which is of interest to us—from the new regulation of the capital markets (which is now going to be discussed at the meeting of the G20 in London); to a master-class in the Chekhov theater with Kevin Spacey, John Malkovich, Tom Stoppard, and Kate Blanchet; to issues related to the new European security initiatives, which were partially, by the way, initiated by President Medvedev and not very much welcomed by everyone yet. I think it provides a good basis to try and transform Crimea from the old Yalta, which separated Europe into two military blocks, into a new bridge, by enlisting different minds to try and find answers to the most acute problems that face the global community.

I hope you will support us and welcome us. Hopefully we will see some of you in Ukraine in May or June, and the Yalta Initiative results in a sort of a permanent center like Davos, but one dedicated to issues other than the economy (which will also be covered, of course). Thank you very much.

## PANEL II

# Problems of Political-Legal Culture and Civil Society

### VIKTOR SHEINIS

First of all, I would like to thank the Kennan Institute for its kind invitation and the opportunity to visit the United States again and spend time with my colleagues, especially some of my old American friends. Several of them are here today. I have very little time, so I will try to give a concise summary of what would ordinarily take a long academic discussion.

The first Russian constitution was adopted in 1906. Two or three years ago we celebrated the centennial of a constitution in Russia. Over this time the constitution has been replaced five times, so we now have our sixth constitution. A simple arithmetic calculation shows that in Russia a constitution lasts for 17 years on average. Our current Constitution is approaching its 16th birthday, so it is about average in age. As you know, it was adopted in extraordinary circumstances. Constitutions adopted in such circumstances rarely endure very long. Still, our Constitution exists, and the first amendments to it were adopted several months ago. Speaking not only as one of its drafters but as a citizen of my country, I hope that this Constitution enjoys a long life.

As I said, the Constitution was adopted under extraordinary circumstances. This is reflected in its text. The Constitution is profoundly contradictory. I could speak at great length about the contradictions in the Constitution, but I will outline only the most important ones. The main contradiction consists in the fact that the first two chapters of the Constitution, entitled “Basic Principles of the Constitutional Regime” and “Rights and Liberties of Individuals and Citizens” are of very high quality, on the level, say, of the European constitutions adopted in the second

wave of post-war democratization. This fact has been recognized by international experts and the Venice Commission. However, the government system established in several subsequent chapters of the Constitution largely contradicts the democratic principles enshrined in the first two chapters of the Constitution.

In his speech, Oleg Rummyantsev spoke about Professor Rapaczynski’s recommendations to weaken presidential power and increase the power of parliament. I should say that the drafters of the Russian Constitution did not take these recommendations seriously enough. As a group, these drafters were quite democratically inclined, and if they had realized where this system of distributing power would lead, they would probably have tried to create a greater reserve of strength on the side of the individual or the citizen, on the side of nongovernmental organizations, and, ultimately, on the side of the parliament.

Still, even if we had foreseen all the consequences of the exaggerated personal power of the president, if we had realized how weak the guarantees of democracy are, it would probably have been impossible to do anything about it given the specific circumstances in which we were working. The trap we fell into was that the obvious elements of an authoritarian regime were seen at that time not as an evil, but as a necessary instrument of change. The Constitution of 1993 created a legal framework in which it was possible to move in opposite directions: either in the direction of strengthening and implementing the progressive, democratic provisions; or in the direction of strengthening the government, which was weak at that time, by entrenching the isolation of presidential and executive power from public accountability.

This could be done in a two-fold way. One way was the Constitution itself could have been amended or the laws could have been amended without touching the text of the Constitution. The other option way was to widen the gap between written law and the application of law, and between the formal constitution and the real constitution. These were the two opposing directions.

In the 1990s, there was a proposal for democratic reform of the Constitution. This proposal took the form of numerous theoretical publications and specific legal proposals contained in draft legislation that was introduced in parliament by the Yabloko party, which was still represented in parliament at that time. I had the honor of belonging to this democratic faction. The proposed amendments would have given parliament back its oversight functions, which had been taken away, and they would have increased the Duma's role in appointing members of the cabinet and its ability to influence their actions. Today the Duma can only dissolve the cabinet, but only in certain circumstances and at a certain time. It also does so at the risk of a boomerang effect, because in response to a vote of no confidence, the president can dissolve the Duma.

At one time there seemed to be a window of opportunity to amend the Constitution. In 1998-1999 not only the democratic factions but the government itself, led at that time by Evgenii Primakov, was working for its own reasons to increase the government's power vis-à-vis the president. Amendments were drafted, but the window of opportunity slammed shut right away. After 2000, efforts to move in the opposite direction began to emerge. First, a gap opened between our political and public life and the Constitution. Reality was contrary to the spirit and even the letter of the Constitution. We saw this back in the 1990s. After 2000, especially after the tragedies of Nord-Ost and Beslan and during President Putin's second term, there was a sweeping revision of the laws on political parties, elections, nongovernmental organizations, and numerous other institutions of civil society. This has already been mentioned and illustrated by vivid examples here, so I will not repeat it all. It is sufficient to say

that a long series of counter-reforms began.

Mikhail Gorbachev spoke at this conference. Like everyone here, or at least the majority of us, I have the greatest respect, and even a feeling of profound affection, for Mikhail Sergeevich Gorbachev. I consider what he did to be a great historical achievement. At the same time, I will permit myself to disagree with him on one statement he made here. Mikhail Sergeevich worded his thought very carefully. "We," he said, "are moving in the direction of democracy. But it took you Americans 200 years to get there. Be patient. We will also get there." Indeed, I am convinced—based on my own natural optimism—that we will get there in 200 years. However, given the things that are happening now before our eyes, I must say that the vector has fundamentally changed. When Mr. Gorbachev was in office, and for the first few years after *perestroika*, the country was moving in the direction of expanding democracy, creating the institutions of civil society, and building a true market economy. Of course there were many delays, mistakes, and even crimes. But that is not what I am talking about. What I am talking about is that after 2000, and particularly after 2003-2004, things began moving back in the opposite direction.

I will put it bluntly: the country was thrown back, at least in our political life, to where we were before *perestroika*, or in the best case where we were at the very beginning of *perestroika*. The residue of this process is not the stagnant Communist nomenclatura with its familiar ideological roots in Marxism-Leninism (although it had little or nothing to do with Lenin, to say nothing of Marx). Instead, we have a new, reformed political elite, which has tamed the business community and restored the eternal curse of Russia: the bond between power and property.

Before 2008-2009, the democrats framed their task this way: Dismantle the anti-constitutional regime and the so-called "managed democracy," i.e. everything that was done in violation of the spirit and letter of the Constitution. After that, the goal was to move towards the democratic experiment, primarily by reforming the laws. We said that trying to amend the Constitution would be opening a



Pandora's box, as there would be limitless opportunities to improve the Constitution, but also to make it even worse. The amendments that have recently been adopted essentially mean, in the specific circumstances Russia is in today, that the government will not have to meet with the public as frequently and will not be as accountable to its constituents. Our elections have largely become a farce, as Mikhail Gorbachev also noted, and this *is* a step back.

My time is almost up, so I will conclude. My final thought is this: We are in an economic crisis that no one predicted. The economic crisis confirms Wallerstein's view that we live in an unpredictable world. After the world, particularly Russia, emerges from the crisis, it will be different than it was before. If we stay the political course that the government is following now, there can be only one outcome: before the crisis Russia was a country of yesterday in comparison with the West. If Russia continues on its present course, then after the crisis and the structural changes that will occur [Russia] will be a country of yesteryear.

Russia faces a very complex problem: the problem of modernization. This problem has many facets, but I would emphasize two basic issues. The first is liberalization, which means breaking the bond between power and property and creating a regime of competitive political democracy in which a governing party could lose an election and peacefully transfer power to the opposition. The second issue is true integration into the community of democratic nations. No country in the second half of the 20th century has undergone a comprehensive and successful modernization in opposition to the West. The countries that have succeeded in entering the path of modernization have either joined that system or are in the orbit of the West.

Incidentally, despite the nice words of Dmitry Medvedev to the effect that freedom is better than the absence of freedom (and who could argue with that?) a different policy has been pursued and intensified in recent months. Its most alarming aspect is the growing aggressiveness in foreign policy, which is implemented under the flag of sovereign democracy. This is essentially the Brezhnev Doctrine, only

slightly modified and applied to a narrower geographic area. The Brezhnev Doctrine was that the Soviet Union would do anything to defend its border as set by Yalta and Potsdam conferences. The current Russian leadership seems to believe that Russia has the right to determine the fate of independent states that sprung up on the post-Soviet territory.

Based on all this, I am rather skeptical about the possibility that we can come up with rational solutions here that will have an effect on the decision-makers. The circle of these people in Russia today is extremely narrow. This does not mean we should not come up with ideas. Proposals of democratic change are needed either way. We need proposals for realistic and democratic amendments that would eventually correct the lopsided structure of the Constitution, even though, in the best case scenario, these proposals would be a plan for the distant future. Still, we need this plan, because one of the misfortunes that befell Mr. Gorbachev's *perestroika* was that the public did not know what it wanted, what it should want, or what their future should be. This is also an effort to improve and grow institutions of civil society that are independent of the authorities and that are germinating in Russia today despite a very difficult environment.

## EUGENE HUSKEY

Thank you very much, Mr. Chairman. It is a particular honor for those of us who study Russian law from the outside to be on the same stage with the "founding fathers" of the Russian Constitution. It really is a great privilege. Thirty years ago I arrived at the law faculty of the Moscow State University to do dissertation research, and when I told my dissertation supervisor the topic of my dissertation he was speechless. It was the history of the Russian and Soviet bar—the *advokatura*. He would have understood it if it was the procuracy, or the courts, or the MVD, but the *advokatura*... Unlike the tsarist era with its magisterial history of the Russian bar by Gessen and Gernet [I.V. Gessen and M.N. Gernet, *The Bar, The Society, and the State, 1864-1914.*], the Soviet Union produced only a handful of books on the bar and most of them were thin volumes by legal practitioners.

In every respect the *advokatura* was a stepchild of the Soviet legal order.

I start out with this personal vignette because it tells us how far Russian legal development has come in the last three decades. The bar is now a subject of serious academic research. There are many times more advocates today—whether for good or ill—than there were in 1979 or, indeed, in 1991. Advocates now enjoy more procedural rights, as you know, including participation in jury trials, and the bar has become a profession of choice for many talented and ambitious graduates of law faculties.

I also start my comments with the bar because the existence of a vibrant and effective legal profession is one of the essential preconditions for the realization of constitutional norms relating to a civil society, especially those set out in Chapter 2 [of the Russian Constitution] devoted to human and civil rights and freedoms.

Just as democracy is unthinkable without competitive political parties, a liberal order cannot be sustained without a self-confident bar that is prepared to defend the interests of the individual and groups and to challenge the actions of the state. Opposition is vital in law as well as in politics—it is just called by a different name: adversarialness. And a bar is an essential institute to maintain an adversarial system. While noting a significant distance that the bar has traveled in the last 30 years, we must also recognize the serious challenges that prevent the bar from carrying out fully its constitutional responsibility. Let me speak briefly to two of these.

The first is the place of the advocates both symbolically and practically in the current Russian legal system. The bar is no longer the stepchild of Russian law, but it is still somewhat less than a fully respected member of the legal family. For example, the reputation and effectiveness of advocates clearly suffer because of an unspoken rule that Russian judges should be drawn from the ranks of law enforcement personnel and not the bar. It is the very same point that Peter Solomon was making about the importance of the sources of recruitment for members of the bench. It is very difficult to carry out the provision of the first part of Article 19 of the Constitution, which says all

persons should be equal before the law and the court, if the court is controlled by persons who throughout their careers have looked at justice through a single lens.

In this regard, the comments earlier this year by the Ministry of Justice of Russia were encouraging. In a meeting with human rights activists, Minister Konovalov said that he favors the inclusion of advocates and even human rights activists on the bench, because it would, in his words, “bring the courts closer to the people.” If introduced, such a reform would have the potential to integrate advocates fully into the Russian legal community, which would revive a Russian tradition that was in place at the end of the tsarist era and then distorted by Soviet rule.

A second set of obstacles facing the Russian bar relate to Article 48 in the Constitution, which grants every citizen the right to qualified legal assistance. Unfortunately, instead of funding legal assistance to the needy through the state budget, the political leadership has forced advocates to devote a large portion of their practice to legal representation for little or no pay. This unfunded or underfunded mandate has a particularly deleterious effect on legal practice in the provinces, where the percentage of indigent clients is much higher than in Moscow and St. Petersburg. In one estimate, for example, 75 to 80 percent of the criminal caseload of advocates in certain regions is from court appointed cases. Further complicating life for advocates in the provinces is the distance they have to travel to represent clients in court, for which they receive wholly inadequate compensation.

It may seem strange to focus on issues that seem so minor: do you pay a lawyer for traveling to represent a client in court. But these little elements of the system are absolutely essential to creating a *pravovoe gosudarstvo*. Without changes in the small rules, no larger reform, it seems to me, is possible. Policy relating to the bar is one of the many areas where constitutional guarantees depend not so much on interpretation by the courts as on the issuance of enabling legislation by parliament and the issuance and implementation of enabling rules by executive agencies. The devilish details of governance in Article 114 of the Constitution that

are entrusted to the government and its ministerial bureaucracies have served on many occasions to undermine constitutional intent. For example, the state bureaucracy has hampered the creation and development of small business and, in so doing, has impeded the implementation of constitutional norms that encourage the development of a civil society.

When most of us think of a civil society, we probably think first of NGOs and other social organizations. But I would argue that the more fundamental foundations for a civil society lie in household economies and small businesses. Without vibrant household economies and small businesses, civil society lacks financial viability. This creates an unhealthy dependence on the Russian state, foreign organizations, or large enterprises for funding. Put slightly differently, the autonomy of civil society depends on self-financing from a wide variety of private sources.

Article 7 of the Constitution on Russia as a social state guarantees the creation of conditions that assure human dignity and the free development of each individual, but it does not suggest that the state should be the primary goods provider, at least not in my view, or that the state should serve as an incubator of civil society. In my reading, it simply holds that the state is obligated to provide a social safety net. Article 7 therefore is not inherently hostile to the market—an institution that in some form is essential for the emergence of a civil society. Indeed, Article 8 of the Constitution holds that private, state, and other forms of the property should enjoy equal protection in law. I would argue that this article also implies that various forms of private property, whether held by individuals or small businesses or large enterprises, should be defended with equal vigor. Has this constitutional provision been respected? The statistical evidence suggests that it has not. Recent figures show that employment in the private small business sector did increase somewhat, up to about 25 percent of total employment, but this figure is comparatively low by world and even regional standards. For example, the comparable figures in 2002 from the Czech Republic and Georgia were 37 percent and 58 percent. We should know that President Putin in his plan for 2020 set a

target of 60 to 70 percent of the population to be employed in the small business sector. And as President Medvedev noted at the Small Business Development conference last March, the small business sector contributes now no more than 17 percent of the country's GDP and only 1 percent of business innovation.

Now, why has small business development lagged in Russia? Major factors include a number of things that perhaps are not germane to our discussion today on the Constitution, such as the high cost of capital. It also includes such factors as the state's privileging of large firms in the energy complex, an unfavorable regulatory regime, and a tendency for state bureaucrats to use licensing and inspection powers as means of extracting bribes from the owners of small businesses. Where state and most large-scale private businesses are able to construct a reliable *krysha* or "roof" to protect them against rent-seeking by the bureaucracy—the chairman of the board of Gazprom is, after all, the first deputy chairman of the Russian government—small business have remained especially vulnerable to the greed and caprice of some state bureaucrats.

Now, there had been a few pieces of legislation that have sought to remedy these problems—including 2001 laws on state registration of juridical persons and on state inspections—and they have had some impact. However, because these laws are largely ineffective, the Procurator General noted last month that agencies conducting unplanned inspections of businesses will need first to receive permission from the procuracy. And beginning in 2010, the procuracy will start keeping a register of planned inspections as well. The procuracy has this tendency to want to remain in business and want to have as many people employed as possible. But it seems to me a classic problem in Russian history of the failure of law, which in turn prompts the proliferation of checking mechanisms—this is not law in the way that we would want to understand it.

If Russia is to develop a vibrant civil society and a mature legal culture, it will need to do much more to defend the interests of small businesses against those whose livelihood and self-importance depend on limiting the rights of citizens and enterprises.

As my previous comments suggest, it is not the Constitution or constitutional interpretation, but constitutional implementation that has been the most serious impediment to the development of a vibrant civil society and a mature legal culture. There is, however, one element of the Constitution itself that creates problems for Russia's political culture and civil society. This is what I called elsewhere a Eurasian form of presidentialism, which exists not just in Russia, but in other countries of the former Soviet Union, such as Belarus, Kazakhstan, and Kyrgyzstan. Under this system, as our Chair and others have noted, the constitutional position of the president is akin to that of a powerful monarch. He does not merely serve as head of the executive branch, and in this sense I might have a slight disagreement that this is really *not* the American presidential system. He does something quite different: the Russian president is the manager and coordinator of the entire political system.

Not only are the current Constitution's description of the president's functions disturbingly close to those of the Communist Party in the last Soviet Constitution, but the institution of the presidency has many organizational similarities with the Communist Party's Central Committee. This privileged position of the presidency in the Constitution and in political practice perpetuates what Robert Tucker identified as a tradition of a "dual Russia," where there is an active and superior state set against the passive and inferior society.

One sees this unhealthy relationship between state and society in various reform projects that are now crafted by closely held presidential working groups, as noted by Alexei Avtonomov earlier on. It is also evident in the presidential involvement in the shaping of the new cadres reserve; a talent pool that will fill key positions—not just in federal and local government, but in areas that lie squarely in the domain of civil society, such as business, science, and education. Last Friday's *Vedomosti*, for example, contained articles that detail the formation of the presidentially sponsored reserve by the current party of power, United Russia. The longest list was of business reservists, i.e. young persons in private firms that the coun-

try's hegemonic party was recruiting to become the next generation of business leaders.

It is hard to imagine a more troubling intrusion of the state into the life of the civil society. It is what I called in one publication *nomenklatura lite*. By creating a towering figure of president in the Russian political system, Chapter 4 of the 1993 Constitution has also perpetuated a personalism in government that is antithetical to the emergence of a mature legal culture, which, since the time of the Greeks, has insisted on the rule of law and not men. This traditional personalism discussed in the work of Mikhail Krasnov and others cascades down from the apex of the political system to shape the attitudes and behavior of leaders operating at each of the lower levels of Russian government. When there is a cult of the boss at the top, it serves as a model for governors and mayors along the "vertical of power." And of course the alteration of Article 1 has done nothing to lessen personalist rule.

Finally, like good monarchs, recent Russian presidents have sought in public statements to identify themselves with society and distance themselves from *vlast*, or "power." For example, recall President Medvedev's attack on the corrupt and inefficient state apparatus in his recent *poslanie* to the parliament. Unfortunately, these periodic and largely rhetorical campaigns against bureaucratic corruption never produce lasting results. Until the president himself respects fully the values enshrined in Article 1 of the Constitution, which calls for a democratic, federal, and law-based state with a republican form of government—and let's all remember what "republican" means—it is unlikely that the Russian political leadership will have much success in reorienting officialdom from self-service to public service and in transforming what Alexander Obolonsky called "a ruler's service" (*gosudareva sluzhba*) into a civil service. And without a civil service there is not room for a civil society.

#### **OLEG RUMYANTSEV**

Mikhail Gorbachev's speech today was a little bit critical that we, the members of the Constitutional Commission, do not talk about *perestroika* as the start of the whole process of

constitutional reforms. It is not very close to truth, to be honest, because in 1988, together with the several colleagues of mine like Gleb Pavlovsky, dissident at that time and today a prominent political technologist, we set up a club called *Perestroika*. Mr. Chubais together with his brother were also members of this club, and one of the founding members of the *Perestroika* Club, who is sitting there to the right of me, was Leonid Volkov. Our first involvement in constitutional reform was very simple: Mikhail Gorbachev has asked Oleg Bogomolov, an academician at the institute where I was working, to help him have a vision of the constitutional reform in the Soviet Union. Bogomolov, knowing that our *Perestroika* Club was very often sitting in his institute, invited me to his office and asked me and my colleagues to draft our vision of constitutional reform in the Soviet Union. That was done together with assistance of Leonid Volkov. And it is my pleasure now to give floor to Leonid Volkov, who was a prominent member of the Constitutional Commission.

### LEONID VOLKOV

I would like to repeat what several other people have said: There is an affinity between the Russian and the American constitutions. As a participant in the constitutional drafting process and a member of the Constitutional Commission from the very beginning, I can say with certainty that the greatest desire of the people involved in the process, especially in the working group, was to create a constitution at least as good as the U.S. Constitution—a constitution for the ages, even if the drafting process would take months or an entire year. To be honest, I was not a supporter of this approach, but there were many who were. Perhaps we could have achieved this thanks to the ideas and energy of Oleg Rummyantsev, who was the catalyst of the constitutional process. He succeeded in moving Yeltsin in this direction, after all. At least in the United States, Rummyantsev was called by Freedom House as nothing less than the “wonder child of *perestroika*.”

But let's get to the core of our problems. It has been said today and will likely be said again, as it has been said at many conferences on this topic in Paris, Moscow, and now here in

Washington, that our Constitution is not being implemented, it should have developed out of a constitutional process, it should have happened differently, and so forth.

This is certainly true, but the question is, what is the fundamental reason for it? Why is the Constitution not being implemented? Is there any way out of this situation? The answer given by most experts, both in Russia and in the West, is that this modernized constitution, built on models borrowed from the West, does not fit with our national culture. This point of view has been expressed in the *Constitutional Bulletin* and elsewhere. I am among those who would like to question this idea, both here at this conference and in the future.

I believe that the fundamental reason why the Constitution of 1993 has been decelerating and skidding along the road does not have much to do with our culture and that this stereotype is not based in reality. On the contrary, we have data from public opinion polls indicating that the legal and political culture of the Russian public is closer to this Constitution than is the culture of the elites that are now in power.

Of course, you can argue against this statement, but I would like to further comment on it. Let us look at what the Constitution of 1993 really is. It has been said here that it was adopted in a state of emergency, and many say it even rescued us from civil war. As a participant in those events and as an academic researcher, I disagree with this. It was not adopted in a state of emergency, and no real threat of civil war existed at that time. There were no forces capable of waging a civil war in Russia, either in Moscow or out in the provinces. What we had was, in fact, dual power. In other words, there was a major conflict, which was brought about not so much by deep-seated interests as by the ambitions and private interests of what political analysts call interest groups. All of this existed in reality. There were various plans for social and economic reforms in the country, but there were also serious conflicts created and exacerbated by personal and, frankly, chaotic disputes. Surely it was a very dangerous situation, as a reversal of course or even a coup was possible—but a civil war was not. Events demonstrated that there were no forces, either out

in the provinces or in the Russian capital that were capable of moving large numbers of people, to say nothing of armed people. The group of putschists led by Ruskoi and Khasbulatov failed even to take over the Ostankino television tower.

The Constitution of 1993, and the draft constitution going back to 1990 (which I worked on with Mr. Sheinis and, of course, Oleg Rumyantsev, who was one of the main drivers of that process), was a constitution whose purpose was to bring about the modernization of Russia. Russia had already gone through one round of modernization under Stalin, but this was a negative modernization. It created large industry and urbanized the country; but this industry developed like a cancerous tumor, devouring resources and producing low-quality, non-working, expensive, and energy-intensive goods. This, in turn, created a split and dysfunctional personality within the populace. This happens in every country whose goal is nothing but “to catch up with the developed countries.” But Russia is an enormous country, and in Russia a dictatorship arose on a grand scale. Like Hitler’s Germany, it wanted to take over the world and create a world empire. That is what Stalin’s modernization and industrialization represented.

As Mikhail Gorbachev said today, when his *perestroika* began, there was a general understanding that the country must be modernized anew at all levels. It must again travel the path of belated modernization; but this time in a rational way, or else it could not survive, either economically or politically. In this sense, I see no inconsistencies between the policies of Gorbachev and Yeltsin. Unfortunately, there was a hurtful confrontation on certain tactical issues, and if that could have been avoided Russia might be in a better position today.

The Constitution that was designed to modernize the country is continuing to play that same role today, only in reverse. I wrote the following about this kind of modernization: “Today the Constitution of 1993 is being used to serve the authoritarian and the “lets-catch-up-with-them” modernization, comparable in several ways with the modernization implemented by fascist regimes in the last century.”

I do not mean Germany under Hitler; I mean Italy, Spain, and so forth.

Now I would like to talk a bit more specifically about the social situation in Russia. Several extensive public opinion polls have been conducted—these were not the cursory rating polls that normally do not say much about our national mentality, for the lack of a better term. Specifically, Klymkin and Kutkovets conducted several extensive surveys that showed that only 7 percent of the public actively support the conservative view that Russia should move backward in history, which we can call “back to the 17th century,” in its approach to its political and legal life.

I could cite many other data, but my time is almost up. We will also have a roundtable discussion, so I hope we will have an opportunity to talk about this topic more. The results of many in-depth public opinion polls show that, in fact, the Russian public is deeply divided between deep-seated traditionalist views and strong modernist groups. My colleague Mr. Avtonomov wrote an article for our publication, in which he demonstrates how various civil society groups unite into organizations, interact with the government, engage in advocacy, and so forth. He analyzes both negative and positive aspects of this phenomenon, but that is a different issue. What it shows is that even under this Constitution and this regime Russian civil society is still alive.

I would make a few suggestions so that we can move forward. I think the time has come for us to revise the idea that the “backward conservatism” of the Russian public is the main reason for the failure of the Constitution and modernization of Russia. The main reason is the neo-traditionalist self-interests of a fairly small group that has managed to seize the commanding heights in our society. It is very important for academics and politicians, both in Russia and especially in the West, to try and determine whether the concept of democracy requires us to interpret this reversal and this movement backward from democracy toward empire as a consequence of our cultural tradition. That is, we must reconsider the view that this process is inevitable given the mindset of our people.

I think we would all be very interested in the results of a comprehensive, in-depth international study to determine the mindset of the Russian people today. Then, on the basis of this study, we could, if the study data warrants such action, implement modernizing policies to support the Russian public's modernization sentiment, including options involving international constitutional justice. Thank you.

### **REGINA SMYTH**

I think there was no more exciting time to start graduate school focusing on Soviet politics than 1990, when the people sitting at this table were doing such exciting and innovative work. My research program has built on that work to develop some new findings about the role of institutions in democratic transitions. Of course, I am not a constitutionalist but a political scientist, and hope that I can offer some contrary insights.

My first insight is that institutions actually constrain political outcomes; but that the amount and implications of this constraint depends on circumstances. My second insight is that contrary to expectations, the practice of politics as it plays out in different institutional settings may work to weaken—not strengthen—electoral and governmental institutions. Those insights, I believe, help us to explain outcomes such as the enactment or defeat of new laws, but also the success or failure of the larger democratic enterprise. So here, with Blair's caution to be careful about theory foremost in my mind, I am going to frame my arguments in terms of a well-known theory about the politics of new democracies—the notion that political change and in particular the development of a successful, stable democracy could be ensured given the right institutions, such as the rules and procedures set out in a constitution.

The central assumption of this theory is that institutions embody a bargain or consensus about the priorities of the country, both in terms of core policy and in terms of the way it would be governed. This consensus is thought to reflect opinions in political society and, hopefully, civil society. The idea is that institutions would constrain political behavior by reducing the uncertainty of subsequent policy outcomes (i.e. limiting the set of outcomes that were pos-

sible from bargaining or political machinations within government, such as the structure of the welfare state that would emerge or the relationship between the state and the economy). In this story, the initial bargain drives subsequent policymaking. The people who were subsequently elected to the government are not seen as important or interesting or maybe even relevant. By and large, this view lurks behind much of how we think about political change even now, where we look at some successes and failures and talk about the institutions being right, or not quite right, as we seek explanations for these successes and failures.

My work offers an alternate explanation for why some transitions may take longer than others, as well as why attempts at political engineering may have unexpected consequences. In particular, I argue that the preferences and goals of the people sitting in those institutions are at least as important as the institutions themselves. In other words, in democratic regime structures, where preferences of decision-makers are diverse and volatile and where they are not well-connected to consensus in civil and political society, institutions may not do a very good job of constraining outcomes. Thus, the art of the possible, in Bismarck's words, is not so much determined by broad constitutional arrangements as by the ideas, goals, and priorities of the decision-makers that inhibit them.

Imagine that given either some public opinion data, or some roll call voting data, or some policy position data, that you could map the set of policy outcomes that could possibly come out of legislative bargaining session. Well, it turns out you can do that given coauthors with the right set of math and computational skills. And that is what I have been working on for the past couple of years with my coauthors—mapping the outcome space of post-Communist legislatures. This work yields some unexpected insights about the ways that preferences combine with institutions to produce outcomes.

First, and again it will not surprise you, polarized party systems with an empty center in a legislature yield an extremely large set of potential outcomes. And this is exactly the picture that emerges in the maps of the Russian Duma and, I might add, the Ukrainian Rada through-

out the 1990s. In both cases you have a large set of possible outcomes that were skewed to the center left of the political space. Also, in both cases, the large number of unaffiliated deputies dispersed throughout the policy space greatly increased the size of this space.

Conversely, systems with core parties—parties located in the center of the political space—tend to have a much smaller range of potential policy outcomes and often collapse to the particular preferences of the centrist party even when there are large numbers of other parties surrounding it. This centrist position conveys a tremendous advantage to the party even when that party is quite small, i.e. even when it gets 20 to 25 percent of the vote. This explains not only the natural advantage of the early Unity Party, but also the behavior of parties in other systems—for example, the Israeli Kadima Party and the disproportional influence it was able to exert over outcomes in the past electoral session.

When we map the trends of the Russian Duma from 2000 to 2003, we see United Russia moving towards the center of that policy space and increasingly gaining influence as the party actually moves into that space. But that is not the end of the story. Because as United Russia moves to the center of the political space it does not collapse around the center: Party discipline is so weak that it keeps the space really quite large. The problem is that as United Russia cannibalizes both independent deputies and defectors from other parties, it cannot control its individual members. So what does it do? It looks for ways to increase party discipline. The problem shifts from eliminating opposition to creating control within the party.

Why does this outcome heterogeneity matter? First of all, a large policy space implies a great deal of uncertainty over potential outcomes; and that creates both incentives and opportunity for strategic and sometimes illegal behavior in order to get the precise outcome that the people with power want to achieve. Here is where institutions come back into the story. Presidential systems where executives have the capacity to introduce legislation and control the agenda give tremendous disproportionate power to the president. Essentially, when many

legislative outcomes are possible, the president can use agenda control to make sure that his preferred outcome is the only actual result. Systems with large potential policy spaces also create tremendous incentives to use pork or patronage to shape specific outcomes. Again, presidents with budgetary power have tremendous capacity to build coalitions on the basis of pork or patronage as opposed to policy. This has long-term implications for democracy.

In addition, when many outcomes are possible, there is tremendous incentive to change the rules within existing constitutional structures to limit the type of people who can be elected and therefore control the size of that policy space. Clearly, these conditions also provide an incentive to abrogate constitutional rules or move outside of its system. We see this pattern in Russia and in other democracies with the same sorts of preference configuration.

What are the practical implications? For a long time, political scientists thought that building political parties, even disciplined parties, would be enough to create stability within a political system. It turns out that political parties are not really sufficient to ensure stability. When preferences generate a large policy space, even strong political parties can be usurped or abrogated. Thus, even logically well-developed and internally logical constitutional rules may not always give rise to predictable politics. That is, when you have lots of dispersed preferences in the space, you may have some quite unexpected or even unpleasant outcomes.

Another implication is that leadership and in particular trusted leadership (and Alexei earlier used this word “trust,” which means something very particular, i.e. someone who you think is operating in your interest) becomes extremely important for shaping consensus around particular outcomes. When leadership is limited to one party or even one person, the success of the democracy is to a large extent contingent on the preferences of that person. Moreover, the elimination of both the potential for new leaders to emerge through the political party system and for new leaders to emerge from regions into the national arena has implications beyond the appointment of governors.



The last point I want to make is that when you have a large policy or a potential outcome space, the most important factor shaping outcomes may not be the constitutional rules, but the auxiliary rules that govern legislative decision-making, such as agenda setting powers or the rules that govern what gets on the floor of the legislature. So, for instance, a reform of the Duma's two-track organizational structure that privileges parties on the one hand and committees on the other, could provoke important changes in legislative power. In the case of the current Russian system, a strong committee system could balance the disproportionate power of the predominant party and provide new avenues for expertise and diverse opinions in the policy process. In other words, internal legislative rules may be as important a democratizing force as strengthening the constitutional relationship between the parliament and the executive because those institutions constitute important elements of the *de facto* checks and balances system.

In sum, my work is consistent with the notion that institutions matter, but it highlights the importance of auxiliary institutions beyond the ones we tend to focus on, such as presidential power, to look at rules that govern legislative procedure. It also underscores the fact that even in a situation in which the opposition is allowed to flourish again in Russia, it may be the case that politics will take a long time to become orderly, predictable, and even controllable. Outcomes may remain very unpredictable for a long time until that societal consensus is reached.

#### **ANDREI ILLARIONOV**

Ladies and Gentlemen, I am here almost accidentally. I was not supposed to be here, since I am not a constitutional lawyer. I am not a lawyer at all; I am not even a political scientist. I am just a representative of the poor profession of economics, and it looks like I am a stranger here and would probably speak using incomprehensible economic jargon, trying to apply it to the issues that you are talking about. As an economist, I would offer a couple of observations and also raise a couple of basic questions that we might discuss.

The first observation is this: it looks like there is no great demand for a constitution in Russia. Certainly, this demand can be measured in different ways, but here are some superficial points. First of all, this conference on the 15<sup>th</sup> anniversary of the Constitution is happening here, not there. In fact, I have seen no substantial activities devoted to the Constitution happening there. If you look at the Constitution Day, it has been abolished as a holiday. If you look at the location of the Constitutional Court, it has been exiled to St. Petersburg. Certainly, I would not argue that exiling it to St. Petersburg is much worse than exiling in Krasnokamensk, definitely not. But exile is exile, and members of the Constitutional Court who have been exiled there understand that pretty well.

Also, I have not seen much mass or even individual movement in defense of the Constitution or even some of its particular elements. There has been nothing similar to what happened, as somebody already mentioned this morning, in Pakistan a few days ago. Once again, the comparison is not with the United States, Europe, Sweden, Britain, or some continental power, but with Pakistan. Even in Pakistan there is some demand for a constitution, but not in Russia. That is why my first question is: why? Why is there such a limited, to put it mildly, demand for constitution, and, generally speaking, for the rule of law in this regard?

The second observation that I would like to make is that it looks like the Constitution that we are discussing right now, which is, as you know, 15 years old, does not look very alive to me. Certainly, we can look at some parts of the Constitution which seem good, whether it concern human rights, civil liberties, political freedoms, party systems, the parliament, the court system, or even, generally speaking, the rule of law, legal equality, federalism, and so on, and so on. We can continue this list for a long time. There will be an enormous amount of information, but what is written here in this wonderful book called *The Constitution*, actually does not exist, or almost does not exist, in the current Russian situation.

I would cite just one example, because until relatively recently most of the abuse, not use, of the Constitution happened within Russia's

borders. But some time ago it went beyond Russian borders—just look at what is written here in Article 102(g). It is very clearly stated that the use of the Russian military force outside the country can happen only after and under a decision of the Federation Council. We have all witnessed the Russian-Georgian war in August, 2008, where Russian troops were used without any consent, decision, or even so much as a discussion in the Federation Council. Even since August, the Federation Council has not discussed this issue at all. That is all the more interesting when we consider that even the decision of the so-called Security Council and the announcement of the person who is currently occupying the position of the Russian president arrived many hours after Russian military troops occupied Georgian territory. So what does reality have in common with the text of the Constitution?

This is especially interesting, because Oleg Rumyantsev was talking about parliamentary commission investigators that have actually died in the Russian case. Just compare once again—not even to the United States, or Britain, or other countries—but to Georgia. Georgia is not a perfect example of a full-fledged democracy, but nevertheless Georgia created a parliamentary commission that was able to work incredibly efficiently. It brought all 23 top officials in the country, including the Minister of Defense, the Secretary of the Security Council, the prime minister, and even the president in front of them, and actually questioned them and broadcasted all these sessions live. That is quite a different story from Russia. And, by the way, the head of this commission in the Georgian parliament is a representative not of the majority but of a minority party. He will be in Washington on March 24th, and we will have a special session at the Cato Institute with the head of this commission and the Speaker of the Georgian parliament on what is going on with the Georgian parliament and constitutionalism in this regard.

Coming back to Russia, and considering the Constitution from an economist's point of view, I have a sense that what I thought I purchased is not quite what was delivered. When I purchased this particular interesting device, this

“Constitution,” the advertised features were fantastic. Like a modern iPhone—it is versatile, has great color, nice sound, and excellent features. So I bought this device and I am trying to play with it, and after some time I find that instead of receiving calls it receives no calls, the picture is black-and-white, and there is almost no sound. But they say: “No-no-no, that is exactly what you bought.” I am not very much convinced, so I am trying to fix this device, but instead of responding positively it is giving me an electric shock—in the best case. So I keep trying to get this device to work. I bring it to a service center for repair, but instead they give me instructions on how to use this device. They say, “It is wonderful phone, it is really good.” That is just a description. The device is slightly different from the description.

My question is—what went wrong? Was it the original design that was wrong? Or did the engineers or “founding fathers” of this device make a mistake in the beginning? Or perhaps, in the process some technology was not appropriate? Or was the actual use of this device quite different from what was intended? What actually happened? I would ask: what actually made this Constitution not work? There could be several hypotheses. Perhaps the text itself is incorrect and should be rewritten in some way. There could be several issues, but one of the most crucial is the choice between a presidential system versus a parliamentary system. Another issue would be what conception of a legal system would be more correct to use—giving the authorities rights or limiting powers of authorities—as the basic principle. Or, perhaps even more generally, should it follow the continental law or common law practice?

Another issue that has also already been touched upon in earlier presentations is national cultures, such as the legal culture, civil culture, and political culture. Culture is a very stubborn thing, but as we know, culture is not always the same. It is evolving. We know many examples of cultures that have evolved a great deal. Another issue that has not been mentioned, but I think has a great importance for Russia, is the issue of federalism, including regionalism, nationalities, and ethnicities. It seems to me that in a country with a very clear imperial nature,

democratic institutions, including democratic constitutions, do not fit very well. At least, we do not have very good examples of any empire or remnants of empire that have successfully implemented a democratic system.

So I think that at least these several questions are really of great importance. Without answering them first in some kind of an intellectual debate in theory, we would not be able to move to subsequent stages to adjust or reform in practice, at some point, the Constitution and the political system in the country. Definitely, we will be forced to do it at some point. But when we get a chance to do it, we should be intellectually ready for it. Otherwise we will be in a situation, when Russia will become famous not for producing an iPhone-level modern constitution, but will be famous for producing texts, instructions, and descriptions of what the constitution should look like. Thank you.

#### **OLEG RUMYANTSEV**

Thank you, Andrei. Let me tell you that I am sitting very close to Andrei, and his copy of the Constitution is in quite a bad shape. I guess he is looking at it quite often.

#### **ANDREI ILLARIONOV**

I can explain. This copy of the Constitution was with me during the rally of the opposition, Other Russia, on April 14th, 2007, and suffered with its holder and owner from police actions. However, while this copy survived, other copies of the Constitution were in much worse shape and were left under the boots of the OMON police in the streets of Moscow.

#### **OLEG RUMYANTSEV**

Andrei mentioned some, I would say, provocative ideas. So this is an invitation for questions and answers; perhaps someone from the audience would like to speak. I can only say in reply to Andrei's Georgia case: We are sitting in a country where the doctrine of Vice President Cheney is in full effect, with the unlimited war powers of the president as commander-in-chief and chief law enforcement officer, so we have something in common between these two countries. This is just a short reply. Also, on your issue of "what went wrong," I think that

the birth defect of the Russian Constitution is one of the reasons why it goes in this direction. It was a very difficult birth, it was a very painful birth, and obviously the Constitution bears enormous signs of that defect.

### ***Discussion***

#### **VLADIMIR LAFITSKY**

First and foremost, our goal is not to create more myths: We already have too many myths separating us. Of course, we can joke about what we have or do not have, but I hope to begin a constructive dialogue instead. Although I liked Mr. Pashin's presentation, I disagree with the notion that the courts are tentacles of the former Communist Party. This is not true. We have created a new judiciary. It is very deformed, but it is not a tentacle of the old Communist Party.

In his speech, Professor Trochev asserted that our courts are in constant contact with the executive branch. This is entirely untrue. My field of expertise is the United States, but last year I incorrectly predicted the outcome of presidential elections for the first time since 1980, in part because I had not been to the United States in a long time and was a bit removed from what was happening there. My prediction was incorrect for the same reason as Mr. Trochev's negative assessment of our judicial system: Mr. Trochev is removed from what is happening in Russia today. Our courts are entirely different now. The judicial branch is like a powerful corporation that lives by its own laws and often totally ignores what the supreme authority—in this case the executive branch—expects of it or demands from it.

We have had many problems, of course. Confucius said: "If you have the right people, your governance will flourish. If you do not have the right people, your governance will wither." Unfortunately, this is a huge problem for our courts: we have bad judges who are independent. I take full responsibility for these words, because I have studied this issue extensively and came to a conclusion that our judges are very independent. Unfortunately, they are also independent from the laws of conscience. This is the main problem for our courts, not that they meet with so-and-so and decide

something over a cup of tea or some stronger beverage. That does not happen. So, on this point I categorically disagree.

I also disagree with what Mr. Illarionov said. Perhaps we are reading different constitutions. I, too, have a copy of the Constitution here in my briefcase and I, too, am familiar with it. And although my copy is perhaps not as beat-up as Mr. Illarionov's, I can say that our Constitution is in effect. Yes, it functions with big problems and not nearly as effectively as it should. But it is in effect. The Constitutional Court has not gone into exile, as was said here. No. It so happens that most of the judges are from St. Petersburg, so the Court has gone to the place of residence of most of the judges. That is a different matter, but it is not exile. We can use these eloquent phrases, but we should not create new myths. Thank you.

## QUESTION

Gene Huskey briefly mentioned the corruption of the bureaucracy, but don't you think that one of the major impediments to legal development is not only the corruption in the judiciary, but also the population that is ready to establish corrupt relations with members of the legal community?

## EUGENE HUSKEY

I think there is corruption on a number of levels: there are people in power and there are people at the bottom. I am reminded of a case that happened in Florida where a Russian immigrant came in and wanted to pass the driver's test. Now, instead of getting the book and studying for an hour as this is an easy test to pass in Florida, his first idea was to call up his cousin who might know someone in the Department of Motor Vehicles. This is a classic problem when you have a society that does not believe that rules work, that believes that you have to have personal contact, right? So, is this corruption? It is, in a way, because what they are trying to do is to end-run the system of rules. So I think that yes, corruption's a problem, but at that level of ordinary people and also at the bribe-taking level in the bureaucracy. Other people may have different opinions.

## LEONID VOLKOV

If I may, I would also like to offer an answer to this question. I will give an example. When I was a deputy in the Committee for Human Rights, we had a mission—a constitutional mission—to approve candidates for judges for the City Court of Moscow. Five candidates were submitted to our commission, which was headed by a famous human rights advocate, Mr. Kovalev. We posed questions to these five candidates, knowing that we had to approve at least three of them. All of the five candidates were absolutely incompetent. They were like high school students, ninth grade students, in their morals and in their answers. They were absolutely unqualified for the office.

I asked Kovalev: "What shall we do? I can't vote for these people, they are not fit to be judges. We want to have good judges, it is very important to have a better court system and justice system." In the end, we were compelled to approve at least two of them for the second tier court.

So you can imagine my thoughts when Professor Solomon spoke about the moral qualification and cultural qualification of the judges, which is really the most important for the Russian reform and for the implementation of the Russian Constitution. In fact, it is really necessary to build an entire cadre that is well-versed in reference to the Constitution. Such a cadre is not very easy to make, because the intellectuals, the real intellectuals and really educated juridical intellectuals, do not want to become judges. For example, one person nominated by Yeltsin to be Procurator General, was really a decent man, but after a few weeks he refused to continue in his office. This is really a problem, and the point I am trying to make is that the international community should do more to encourage cooperation or other forms professional development with professionals in the Russian judicial system. Maybe this will help.

## ANDREI ILLARIONOV

Since I was expected to make some suggestions on this issue, on some of these issues, I will try. At least I will offer some suggestions on where to look for positive experience, which can be studied and applied to the Russian case.

If we look back six years, there was a country which rated much lower on Transparency International's corruption index than Russia. It was Georgia. In the last six years there was no country in the world that has improved as dramatically as Georgia—it actually skyrocketed to top ratings within the Transparency International corruption index. This does not mean that there is no corruption in Georgia, they do have some; but it is incomparable what they have today versus what they had six years ago. This happened within a really short period of time, within five years, with almost the same people, in a country which, frankly speaking, is much worse off economically, politically, and geopolitically than Russia. When we talk about the Georgians, it is quite hard even to understand whether this improvement is true or not, or maybe they are trying to fool us. Still, this is a fact of life: they stopped bribing their traffic police; they stopped bribing several other organizations as well. It is absolutely amazing. Members of the new generation, and I have talked to some of them recently, do not know now how to bribe officials. The old generation still remembers; but they are, too, losing this quality pretty quickly. This is amazing. I think, for all people, for lawyers and those who implement law, etc., this experience is absolutely unique. It definitely should be studied so that we could see what has been done there and what can be implemented in Russia.

### QUESTION

On the question of what went wrong, since this conference is in Washington, perhaps it would not be inappropriate to examine the policy of the United States, which was very influential in Moscow 15 years ago. I was the chief American political analyst at the embassy in Moscow during those months, and certainly Washington's reaction to the proroguing of parliament, and particularly to the abrogation of the Constitutional Court, was one of massive indifference. What Washington wanted was a constitutional system, which would allow the continuation of macro-economic stabilization policy as defined by neo-liberal doctrine. It was indifferent to almost any other potential problem within the constitutional draft, even

though the embassy reported on those problems in some detail.

Then let's not forget that when the Constitution was ratified there was also an election for a new state Duma. In that election, the Russian people decisively rejected Gaidar's party and gave massive support to the Communist Party and to Zhirinovskiy. This coincided with the visit to Moscow by the then-American vice president, and the question then arose: should Russian policy under its new constitutional system adhere to the will of the people or should it maintain the neo-liberal program? The advice given to the Russian government was to do the latter. So, at the first instance when the question of respect of constitutionalism or even rule of law came up, the policy of United States at the time, when it had enormous influence in Moscow, was the wrong one.

### OLEG RUMYANTSEV

Thank you for this comment. I cannot withstand the temptation of a one minute counter-comment. We are now publishing a new volume, the second half of 1993. I write there that on September 14, President Yeltsin held his presidential council, and a member of the council, Mr. Kostikov, has it in his memoirs that the president told his advisors: "Today I got a call from President Clinton. The United States is very worried about the destiny of privatization in Russia. So I recommend now to approve the edict to dissolve the parliament." It was an interesting example of that influence, which you mentioned. And only my friends in the Labor Party of Britain were the only political force that really condemned President Yeltsin for his actions on the 21 of September, 1993.

### VIKTOR KUVALDIN

I did not intend to raise this issue here, but I am very grateful to you for your presentation. During the *coup d'état* of September 1993, I was with President Gorbachev in Italy. As soon as we heard the news that Yeltsin had basically dissolved the parliament and shut down the whole program, we went to Rome to hold a series of meetings. I took part in them. Gorbachev met with the Italian foreign minister, the leaders of both houses of parliament, the prime minister,

the president, and the Pope, all on the same day. His message was: Do not let these unconstitutional actions stand. Sitting in that meeting with the Italian president, I saw that the Italians and the Europeans were wavering. However, we later learned that, under strong pressure from Washington, the Europeans ended up supporting these actions. I think that is a lesson to all of us for the future.

## QUESTION

Andrei Illarionov touched on the topic of federalism in Russia and spoke of the destructive influence of imperial ambitions on the growth of democracy. As he explained, the vertical consolidation of power over the eight years of Vladimir Putin has happened because of the need to preserve Russia's territorial integrity. Many historians have studied this question throughout Russian history, and they have noted a certain tension in Russia between the growth of individual liberty and the preservation of the territorial integrity of this enormous country. Do you think this problem exists, and if so, how can it be resolved?

## ANDREI ILLARIONOV

This problem does exist, and it is very serious. This problem goes beyond a purely political discussion. It is a fundamental philosophical and legal problem. On the one hand, the legal equality of all citizens of the country is an essential prerequisite for a democratic and liberal state. However, having national or ethnic autonomous entities and regions with special rules clearly contradicts this principle. I think the world has been trying to find a reasonable, democratic solution to this problem but has yet to find this ideal. One solution would be extreme regionalization and federalism, which would fundamentally alter the political and governmental structure of the country. For many in the country's national political elite, or should we say, the ethnic Russian political elite, and for a significant number of the country's ethnic Russian citizens, the very thought of this (which, incidentally, has never been proposed) would be so unacceptable that they could not even think about it. So the country is sliding in the opposite direction. In other words, you

are absolutely right that this is one of Russia's fundamental problems, much more fundamental than all the economic problems and all other issues we normally talk about.

## OLEG RUMYANTSEV

In my opinion, the single greatest and most powerful achievement of the 1993 Constitution is that it preserved and strengthened the constitutional federation. The Russian Federation came close to falling apart in 1991-1992. The Constitution cemented the concept of a federation based on a constitution rather than a treaty. Another major step in this direction occurred after 2001, when the member states of the federation amended their constitutions to make them consistent with the federal Constitution. But unfortunately, the pendulum subsequently swung back the other way, and the attack on the principle of federalism began. Today federalism is becoming more and more of a fiction and that is the problem we need to talk about. Still, the undeniable achievement of the 1993 Constitution is that it saved our constitutional federation. In this sense I totally support the way it has worked out.

## VIKTOR SHEINIS

You know, things happened so inconsistently. The Constitution passed through several stages of development in 1993, and ultimately the conflict ended with a decisive victory for President Yeltsin. As a result, changes were made to the text of the Constitution that made it worse—in particular, the procedure for choosing the members of the Federation Council. In one sense, however, the Constitution became better in the fall than it had been in the summer, because the provision stating that the member republics of the federation are sovereign states was removed. To add to what Mr. Rummyantsev just said, I believe this was a very important step in strengthening the Russian state as such.

## QUESTION

There is a fundamental question that has not yet been answered: was the Constitution of 1993 actually adopted? Unfortunately, this question is often overlooked, but I would like to discuss it.

## **OLEG RUMYANTSEV**

I would be happy to begin answering that question. I will be brief, because I discuss this subject in my introductory article, which talks about the last 6 months of 1993, in our *Anthology on the History of the Drafting and Adoption of the Constitution*. It will be published on March 31.

By all appearances, the Constitution was not adopted, but it was a very complicated situation. As you know, President Yeltsin held the referendum on the Constitution not according to the previous constitution that was still formally in effect, i.e. not until September 21, but until December 25, 1993. Nor did he conduct the vote pursuant to the Law on Referenda. He held the referendum on the basis of his own order of October 15 and its provisions on voting. Moreover, as democrats from Alexander Sobianin's Center and Communists like Elena

Lukianova demonstrated persuasively with their data, only 43 percent voted for the Constitution, not 57 percent. But this is a formalistic legal approach. The Constitution was adopted, because the vast majority of political forces in the country were exhausted, just tired to death of the enervating political battles and confrontations.

The Constitution was essentially adopted as the lesser evil. All the problems with its adoption and its birth trauma were accepted as a lesser evil than having no fundamental law at all. In a sense, it was a social contract that we entered into because we had no choice. It was better than nothing. In other words, in a formal legal sense, it was not adopted. But politically and practically, it was adopted, because we agreed that it was the only alternative to the horrible things that could have happened if we had no constitution at all.

## PANEL III

# Constitutional Guarantees of Social, Economic, and Regional Development

### VLADIMIR MAZAEV

Ladies and gentlemen, thank you for inviting me to this conference.

I would like to share some thoughts and my general impression of the process by which our constitutional model and our economic system are currently evolving in Russia. But first I want to make two comments. During this discussion, very serious issues have been raised regarding the future of the Constitution, how it was adopted, and the institution of the presidency with its excessive power. All of these things affect the economic model and our economic development in one way or another, because no matter how much economists claim they are removed from the Constitution and legal issues, as Mr. Illarionov claimed, there is the concept of the institutional economy, which has been steadily gaining ground in the academic community in recent decades.

This concept implies that while there are purely economic factors (accumulation and redistribution of wealth, etc.), the elements of the institutional economy—a strong judiciary, a transparent and clear government that interacts with the public, and public trust in government—are also extremely important in economic and industrial development. Therefore, you have nothing if you do not have a constitution, a judicial system, and enforcement of the rules of the economic game. That is the first point.

Secondly, on our team of Russian experts and members of the Congress of People's Deputies, I was among those who did not vote for the existing Constitution and did everything possible to oppose the creation of the office of president in Russia and the status of the presidency under the existing Constitution. This, of course, does

not release me from responsibility and the duty to make a scholarly analysis of what is happening today.

One more comment. There is a formal constitution, and there is an actual one. We must always remember this. In its form, the Constitution of 1993 is truly a liberal, democratic constitution. Its provisions meet the standards of the second wave of constitutions. The Constitution is based on the liberal democratic model. This is the result of the rejection of the old Soviet economic model, which did not recognize private property. So in our Constitution, private property is paramount, and the principles of the free market economy are enshrined in the Constitution. This is good. It was a huge breakthrough in changing the economic and social structure. However, its primary intent was the destruction and rejection of the old regime. This Constitution, while it established a positive economic model, also took two steps backward.

First, this Constitution failed to incorporate advancements in constitutional governance made in recent decades by countries in the third and fourth waves; advancements such as paying special attention to the social component, concerning the private sector and its responsibility to society, balancing public and private interests, and giving priority to the public interest in certain areas. These elements establish the right of the government to intervene in the economy for various reasons. Our Constitution does not have this.

Secondly, the Constitution did not incorporate any part of the Soviet model, which, on some occasions, very successfully regulated social and economic processes. We should recognize that, in places, this experience was positive.



This Constitution did not incorporate either of these things. It played its role as the destroyer of the old regime and as the foundation for future changes, but the elements I mentioned were disregarded. Yet experience shows that these elements have a necessary place in the constitutional framework, because if they are absent the gap they leave will be filled by entirely different instruments and approaches.

To summarize, during its first stage, the Constitution of 1993 helped to destroy the old and initiate the new, including the adoption of laws on the market economy, which experts from the United States (from Harvard, Stanford, and elsewhere) helped to draft. They are, in fact, the founding fathers of our market-oriented Constitution, which I do not think they would deny. It is interesting for them to watch how this model is evolving and working now.

Naturally, the first stage of radical changes under the existing constitutional model came with enormous costs and losses. Among these is the illegitimate, or not entirely legitimate, process of privatization, which raised doubts about the legitimacy of existing property ownership in the country in general. We are still feeling the effects of this problem today.

Another problem was the excessive decline of the government's role in the economy. The government abdicated its role in economic regulation. There was no real policy on dismantling the monopolies. Government services became commercialized just as we experienced a spike in poverty and the onset of a demographic crisis. All of this happened during the time when the new, market-oriented constitution was being established and the old constitution was being destroyed.

In the next stage, over the past decade, our country succeeded in creating a constitutional and legal basis for regulating the economy. We looked to the experience of both Europe and the Anglo-Saxon countries, primarily in North America, in formulating laws on banking, the financial sector, civil law, etc. Our economists and think tanks, like the ones present here, now say that this was all made possible by the legal framework of the existing Constitution, which allowed us to achieve

a certain macroeconomic stability—until the recent economic crisis, of course.

I would like to mention two main trends occurring now that are part of the actual implementation of our constitutional model: the significant expansion of the government's role in regulating the economy, and the increasing social orientation of the economic system, which did not exist previously. I believe these two trends are consistent with the ways in which the relationship between the economy and the government is developing in the world economic system. The current economic crisis demonstrates the extent to which the government has a role in the stabilization and recovery of the economy and social institutions.

This is why this period of adjustment in social, economic, and political life has led to a stronger government in our country. How this happened is a different question, and I would mention several aspects of this process of increasing the role of government. The first is the change in the government's treatment of ownership rights. Public property—government property—is becoming more prominent. Formally, the scope of public property is not expanding; it is, in fact, shrinking. But in reality, by increasing its majority share in a company or an organization, the government and its ownership instruments are permeating the entire economy. I believe over 60 percent of the economy, perhaps even more, is now under the control of the government and/or under the influence of government institutions.

Federal property has begun to dominate recently. We have three levels of state property under the Constitution: federal, regional, and municipal. The federal government is currently attempting to consolidate its economic power at all three levels through budgetary controls and appropriation of the best pieces of property at all levels.

The government is also expanding its means and methods of influencing the economy and increasing its role in planning of domestic and international business; and it is centralizing the most important property and largest tax revenues. In doing this it is using direct administrative methods and exploiting the dominant position of government interests in business dis-

putes. According to recent opinion polls, nearly 60 percent of business owners try to avoid resolving disputes in court if the other party is a publicly owned entity or the government has interest in it.

What we clearly have now are quasi-feudal relations between government agencies and businesses. What does this mean? We are not talking about corruption here. Corruption is not required for this relationship to exist. Simply: an investor comes to a region, and he is told bluntly: “You have come with good money and good projects, but you must go and see the top official for the region, otherwise your business will not get off the ground.” The top official welcomes the investor and says, “You are a good guy and you have money, so I am interested in you. But you must do certain things in the social sphere, take on certain construction projects, and address various problems in the region. End of discussion.” This is not corruption; this is a form of non-economic compulsion. If you do not agree, you will not get your land permit, and so on. This is the standard practice today, and it is not all that bad.

Another factor is the insufficient political and legal protection for property rights. This is manifested mainly in the application of the laws. For example, a governor or mayor might give an unofficial order not to issue a deed for a piece of land to the person who has a house or other building on that land within the city limits. Under the law, that person has not only the right to acquire title to the land, but also do it through an expedited process. But the regional or local authorities often try to prevent him from getting it, because they might have problems if they lose control of land in their region or city. This is how the law is applied behind the scenes. If the person goes to court and sues, he may have to go through one, two, or three levels of appeal, but the court will rule in his favor and on the side of the law. So there is this tug of war and this flawed application of the law. Unfortunately, the courts do not always come down on the side of the law.

One other area is economic forecasting and planning, where the government is beginning to take a more active role and expanding its regulatory scope.

To summarize, the processes that are happening at this stage of our development demonstrate yet again that the constitutional framework of a market economy, which was formally enshrined in the Russian Constitution, is being filled in with market-oriented content. Yet this constitutional framework is only the tip of the iceberg. There is also the civil, banking, and financial laws that meet all the formal standards of a market economy.

On the other hand, the increased role of the government, the change in the extent of government involvement in the economy, the convergence of political and economic power, the conversion of business into government and vice versa, and everything Mr. Sheinis said about how Russia’s eternal misfortune is the mixture of political and economic power—this is all true. Corruption as a natural component of government management of the economy, the application of the law in ways that are inconsistent with the rule of law and democracy—we have all this in Russia today.

We often hear that our political system and our political institutions are eclectic. On the one hand, in 2005, then-President Putin said, “We must stop reviewing the legitimacy of privatization in order to ensure the stability of public commerce.” To do this, he proposed an amendment that would shorten the statute of limitations on claims of void transactions from 10 to 3 years. This was done to stabilize commerce. On the other hand, the government uses administrative and police measures to redistribute property and seize the most significant properties in order to protect, as they put it, “the economic sovereignty of the government.”

Such eclecticism is contradictory, but it permeates our political and economic system today. If you read the government’s plan for socio-economic development through the year 2020, you will see that it is a wonderful plan. It says that the principles guiding the future of our country are democracy, the free market, and limited government interference in the economy. On the other hand, our leaders like to say that our domestic capital can compete in the global economy only through the use of government levers. They claim that to uphold economic sovereignty, modernize, and make

the leap to a new innovation economy, we must use the power of the government.

I think the current constitutional model functions between these two tendencies. The first is to use market mechanisms effectively and improve the quality of management so that the market will thrive in the global economy. I think it is no accident that President Medvedev is actively involved in dealing with financial and economic flows on an international level. He understands that without this, we cannot modernize and break through to a new quality economy, given our broken economy and weak statehood. But there is another tendency as well. The same President Medvedev is also under pressure from groups arguing that the constitutional framework should be fleshed out with the elements of a mobilization economy. To achieve a breakthrough, they say, the government must curtail the democratic and free-market institutions and rely instead on administrative powers.

Russia again faces a very serious choice, and not because retrograde or undemocratic forces, whoever they are, have taken power. In fact, this is an objective choice: how to achieve a qualitatively new level of modernization and how to make this qualitative jump? The options are well-known. Should we use democratic yet complex market institutions (complex in the sense that regulating the market in a globalizing economy is an enormously complex task)? Or should we follow the simpler, more familiar path of placing everything under the control of the government and focus on the so-called mobilization economy? Thank you.

### JEFFREY KAHN

In the spring of 1995, Oxford University was just beginning to give final examinations to the first students to undertake tutorials in a course titled “Soviet and Post-Soviet State and Law.” Soviet law had been studied for decades at Oxford, but post-Soviet law was new and attracted only a trickle of students. They studied under the extraordinary Professor Bernard Rudden of Brasenose College. At the examination, copies were provided of the then-brand new 1993 Constitution, part I of the Civil

Code, and Professor Butler’s collection of *Basic Legal Documents*.

Oxford examinations take the form of writing several essays from a list of topics. Here is one of the most important of the topics offered: “‘The new Constitution of the Russian Federation has achieved neither separation of powers nor a balance of powers.’ Discuss.” Students would have understood that coded language to ask for descriptive and normative evaluations of both horizontal power structures; that is, between branches of the federal government, and vertical power structures, between federal and regional governments. What would a good answer have looked like in the spring of 1995?

Well, any able student could identify a variety of hortatory and prescriptive provisions in the text of the Constitution, some scattered legislation, and a few judicial opinions. The better students might have concluded that, on its face, the Constitution’s super-presidential system did not seem to separate or balance power particularly well in either a horizontal or a vertical direction. Dangers lurked in ambivalent language and yet-to-be-used levers of power. But, the very best student would have continued. She would have observed that the question asked what had been *achieved*, not what the mere text of the new Constitution had *described*. Her essay would have included an assessment of the effects on federalism and the separation of powers of an emerging party system, a history of regional claims to sovereignty and autonomy, and the *de facto* weakness of federal power in the mid-1990s to demand blood and treasure from regional powers like Mintimer Shaimiyev in Tatarstan, Murtaza Rakhimov in Bashkortostan, or Mikhail Nikolaev in Sakha-Yakutia, not to mention the then ongoing first war in Chechnya.

This student would not have begun her analysis on December 12, 1993, when the Constitution was ratified under dubious conditions, but rather on August 10, 1990, when Boris Yeltsin, then Chairman of the RSFSR Supreme Soviet, addressed political elites in Kazan’ and urged them to “take as much independence as you can hold on to,” words repeated a few days later in Ufa with the more

popular variant, “take all the sovereignty you can swallow.” In that ambiguity between independence and sovereignty was planted seeds of confusion that continue to haunt Russian federalism. Independence and sovereignty, of course, are not the same thing, especially in the context of a federal system. But operating within the defective federal shell of the Soviet Union, the difference went unnoticed for awhile.

This student would have observed how that speech unleashed a torrent of declarations of sovereignty from the regions. These declarations—although of no legal significance—had real repercussions. Some regions paid taxes, delivered conscripts, and enforced federal law while other regions did not, seemingly with impunity. As different regions took different views of what their sovereign status meant, this affected the negotiation of the first Federal Treaty and the 1993 Constitution that ultimately repudiated the more decentralized bargain that that treaty had struck. Some regions felt betrayed by the rejection of a treaty that they felt had established the foundations of a new relationship with Moscow. One region actually sought to secede. And more than half negotiated special bilateral relations with Moscow that established varying degrees of fidelity to the constitutional division of powers and subject-matter jurisdiction. The legal status of these early bilateral treaties was as shaky as that of the declarations of sovereignty that preceded them. Some of them were signed in secret, none of them were ratified by legislatures at any level.

None of this, of course, was immediately obvious or predictable from a facial assessment of constitutional *text*. Federal *structure* could create power, and create limits on power, as important as more easily identified textual commands. History, too, could inform how both textual and structural constitutional claims should be assessed. Such constitutional glosses are common, especially in systems of government as complicated as federal systems.

But that was years ago. What if the same bright Oxford student were to write on the same examination question today? The essay would look very different. She would probably not linger very long with the text of the Constitution before describing a succession of federal statutes,

especially those passed at the start of Vladimir Putin’s first term as president. As you know, these federal laws and presidential decrees ended the bilateral treaty process. One statute ousted regional governors and parliamentary chairmen as *ex officio* members of the upper chamber of the Federal Assembly, the Council of the Federation. By decree, federal districts were created that broadly overlapped existing military districts. Federal overseers, men who were mostly of high military rank, were appointed by President Putin. Another statute gave the federal president powers to dismiss regional executives, regional legislatures and municipal governments. In addition, President Putin acquired the statutory power to appoint regional executives himself (thus ending all direct elections for heads of regional governments throughout the Federation). Other than the federal president, the only remaining executive officials subject to direct, popular election are mayors.

Even more recent legislation has ended direct representation of single-mandate constituencies in the lower chamber, the State Duma. The cumulative result, therefore, is that *every* region of Russia now has a chief executive nominated by the federal president and removable by him, and *no* region of Russia has any direct representative to the Federal Assembly with anything remotely similar to an electoral constituency in that region. That shift from political accountability to the people—whom the Constitution repeatedly describes as the bearers of sovereignty and the single source of power in Russia—has deprived the Russian Federation of one of the core protections in a federal system against over-centralization: the political process. There exists what Associate Justice David Souter of the United States Supreme Court referred to as “the political component of federalism.” In words that referenced the “founding fathers” of the American federal republic, but which sound eerily prescient for a Russia then flush with petro-dollars, he underlined how important this was for a federal system. Politics, he wrote, “should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.”

The student may well have described these measures as part of the swing of a pendulum, a reaction to the extreme weakness of the federal center under Yeltsin and increasing legal confusion caused by his parade of bilateral treaties and agreements. The student would also now have plenty of federal Constitutional Court opinions to evaluate. He or she would have noted the Court's early ambivalence about issuing rulings about federal-regional relations, the inconsistency of its early opinions and their low rate of compliance under Yeltsin, followed by the Court's more aggressive enforcement of President Putin's so-called federal reforms. The student would note that what had been *achieved* was not solely a function of constitutional text, but owed much to political forces and to the unhappy memory of the 1990s. The text of the Constitution was sufficiently vague to permit an extraordinary shift of power between the regions and the federal government without any significant amendment at all. But this shift was accomplished by devaluing structural constraints on that text placed on it by core principles of federalism.

In my book, which was published in 2002, I observed the start of this swing of the pendulum during Putin's first few years in office. I forecast that this malleable constitution, on its own, would no more stop extreme centralization under President Putin than it had stopped the extreme decentralization of federal-regional relations under President Yeltsin. At least part of what was required was the strengthening of federal *and* regional institutions to ensure that federal and regional powers respected the spheres of authority of each, and a strong, independent Constitutional Court that could interpret the Constitution with integrity and fidelity to both the text and the structural principles embedded in that document. The likelihood that even this wish list would suffice, however, was undermined by the failure of federal and regional political elites to come to a consensus about exactly what those structural principles actually were and in what foundational document they were to be found. Vladimir Putin's so-called dictatorship of law had certainly ended the parade of declarations and bilateral treaties launched by Yeltsin's famous call to "take all the sovereignty

you can swallow." But it had not, indeed could not have had the intention of resolving the underlying philosophical differences between federal and regional elites: Was this a federation based on a constitution or a treaty? Was this a federation in which the regions were granted their governing authority by a supremely sovereign Moscow? Or was it Moscow that derived *its* limited powers from regions that had ceded some, but not all, of their sovereignty to the center? In other words, Russia did not adopt a federal system based on an agreed foundation of the most basic principles of federalism.

The inherent attraction of federalism is that, to borrow a phrase from Associate Justice Anthony Kennedy of the United States Supreme Court, federalism "split the atom of sovereignty." That idea unleashes opportunities for spectacular innovation, generates dynamos for economic progress, and establishes overlapping forums for democratic self-government. It creates economies of scale and a whole much greater than the sum of its parts. Federalism creates multiple sources of sovereignty within a single state, endowing or preserving each sovereign entity with spheres of authority that are simultaneously co-ordinate and independent. The regional and federal governments are dependent on one another, and yet each possesses jurisdictions constitutionally protected against intrusion by the other.

This division of sovereignty has another advantage, particularly important for Russia. As Associate Justice Sandra Day O'Connor noted: "Federalism secures to citizens the liberties that derive from the diffusion of sovereign power." Put another way, also in O'Connor's words, "A healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." In the structure of federalism is thus a protection of individual rights that can be more potent than their mere identification in a list. In other words, text alone does not protect liberty, constitutional structures do, too.

Those structures are almost gone in Russia. At the request of the International Academy of Comparative Law, I wrote a report last fall (co-authored with Alexei Trochev and Nikolay Balayan) on the unification of law in the Russian

Federation. I presented our findings in Mexico City four months ago, as part of a larger project that compared the unification of law in 23 federal systems worldwide. The conclusions of both our national report and the general report are startling when considered in Russia's historical perspective. Compared to other federal systems, Russia's legal system is among the most unified in the world. It is almost certainly the most centralized system in the world that still claims to be federal.

The text of the Constitution identifies eighteen subjects over which jurisdiction is allocated to the central government. Fourteen subjects are allocated to the joint authority of the central government and regions. Subjects not specifically allocated are left to the regions. Notwithstanding this division, all of these subject areas are, for all practical purposes, under the control of the central government to the degree that it desires to exercise such control. The default rule in Russia is that that question—what is inherently local in nature—is a question for the central government alone to decide. Therefore, all laws and normative legal acts of the regions in areas of joint jurisdiction must be issued in accordance with the federal law on the issue. The Constitutional Court has upheld the central government's view that in areas of joint authority, the central government takes the leading role in establishing the space left for local law-making, even when that space is a null set. No historical or structural gloss appears to temper this engorgement of power.

Federal law often operates throughout Russia directly, unmediated by regional law. Thus, the law of contracts, torts, property, business organizations, and other aspects of private and commercial law (subjects that other federal systems may leave to the jurisdiction of the component states) are all governed exclusively by federal law. Through a system of codification, the central government regulates all civil law, civil procedure, criminal law, criminal procedure, administrative law and procedure, and the procedure for use in the commercial courts. There are federal codes governing the use of land, air, water, and forests. Federal codes also govern all labor law and family law. There are codes for the citing and construction of towns,

housing, collection of taxes and customs duties, and the regulation of government budgets. Even the form of government *within* the region is not the exclusive prerogative of that region. My colleagues and I were hard pressed to identify meaningful spheres of jurisdiction within the exclusive sovereign power of the subjects of the federation. With the exception of certain limited controls over linguistic and cultural practices, these do not appear to exist. From the point of view of federalism, this is a terrible state of affairs. As then-United States Chief Justice William Rehnquist observed, a federal constitution "requires a distinction between what is truly national and what is truly local."

The current relationship between Moscow and the regions is a relationship that I am no longer certain may be described as federal in any meaningful sense of that word. It lacks now many of the structural features of federalism that I have identified: a division of sovereignty in which each entity is simultaneously co-ordinate and independent; a political component that protects this division between what is truly national and what is truly local; and an understanding that in dividing power both horizontally and vertically there is a structural protection for individual rights that manifests itself as much in regional legal distinctions as in autonomy. Russia today presents an example of what can happen when constitutional text is interpreted in a vacuum, with too little attention to identifying these foundational principles, and little attempt to make structural and historical arguments to interpret constitutional text with fidelity to those principles. Arguments and conclusions drawn from constitutional structure and history are as valid and as important tools of constitutional interpretation as argument from the plain meaning of the text. Indeed, structure and history stabilize a text and prevent the sort of pendulum swings that we have seen in Russia. But these tools—as important to a legislature as to a judiciary—have not been used in Russia. And the longer they go unused, the more difficult their use will become. Let me give you one example.

In December 2005, the Constitutional Court upheld the constitutionality of President Putin's new power to nominate governors for regional

confirmation, thus ending their direct election. Will Pomeranz has written an excellent analysis of this case that you will soon be able to read in *Demokratizatsiya*, but let me briefly note some of the opinion's features and omissions. The Court noted the variety of direct and indirect ways that the Constitution provided for filling federal executive and representative offices: some elected, some *ex officio*, some textually proscribed, others left to be established by statute. "Thus," the Court concluded, "the possibility of different variants of endowing with authority organs and offices of public power, which are not directly named in the Constitution of the Russian Federation as elected," leaves open the possibility of change as to how to fill these positions. The Court concluded that if the text is silent, this alteration is constitutional.

But the Court never mentions provisions of the Constitution that support the broader structural protections of federalism against the drumbeat of a unified executive. For example, the Court concludes that regional executives are "links" in the chain of a "unified system of state power". Thus, regional executives, it says "stand in relations of subordination directly to the President of the Russian Federation" based on the latter's direct, nationwide popular election. But this interpretation would render Article 85 of the Constitution meaningless, since this article limits the President's powers to resolve differences between federal and regional organs of state power to that of "conciliatory procedures." Such a limitation would be strange indeed if regional executives were mere subordinates of the federal president.

This manner of reasoning—deriving permitted avenues of organizing state power from the absence of textual restrictions—is to recast a constitution as a mere code. But the plain meaning of the text, or the absence of any text, is not the only source of constitutional authority. The structure of the Constitution establishes prohibitions as forcefully as the text can. The federal structure and recent history of Russia provide strong arguments against such a reading of the text.

I have already mentioned the political component of federalism and the need for genuine distinctions between what is truly national and

what is truly local. Federalism, although found in many variations in many countries, does have a certain base meaning. There is more to a written constitution than the plain meaning of its text. And yet the Constitutional Court of the Russian Federation has found it relatively easy to subordinate those principles to the principle of the "unity of the system of state power" in Articles 5 and 77 of the Constitution. That phrase would seem to be best understood as limited *by* federal principles rather than as placing a limit *on* federal principles. Read in the context of a *federal* constitution, that language does not necessarily lead one to support the idea of an "executive vertical."

In conclusion, let me say this. You will have noticed that I have flecked my remarks with quotations from justices on the United States Supreme Court. I did this deliberately, perhaps unduly provocatively, but not to suggest that American federalism is a model for anyone to follow. American federalism is probably the worst possible approach for Russia or any other multi-national, multi-ethnic, or multi-lingual country. These justices are not talking about American federalism, they are talking about principles of federalism in the abstract. These principles include: that there be a meaningful distinction between what is truly national and what is truly local; a political component of federalism that creates multiple levels of direct political accountability; that power is sufficiently diffused to protect individual liberty from attack by either local or national powers.

What is more, these justices made these arguments not by looking to the text of an American document, but by looking at the structures that a federal constitution creates. The word "federal", after all, is not to be found anywhere in the text of the U.S. Constitution. Each quotation is from a case decided in the last fifteen years (i.e. during the new era of federalism that it was hoped the Russian Constitution had introduced). The Russian Constitution has been interpreted with insufficient attention to these principles of federalism, principles derived as much from its structure as from its unique recent history as from its text. Instead, the Constitution's text has too often been overprivileged and read in a vacuum to render in-

terpretations that are ahistorical and contrary to the structures of the federal state that it purports to create.

The Oxford exam I mentioned at the start of my remarks included more than one opportunity for the student to discuss Russian federalism. The very next question on that exam provided a quotation from the great Dutch scholar of Soviet and Russian law, Ferdinand Feldbrugge, who rightly concluded: “The Soviet Union was a unitary state which masqueraded as a federation.” The student was asked whether he agreed with this assessment and whether things in Russia were now different. The able student in 1995 might have pointed to the disparity between formal Soviet structures and actual practice to draw conclusions about that entity, but accept the invitation of the question to advance a more optimistic view based on the text of the new Constitution.

There is little reason for optimism about federalism in Russia in the near term unless, like Mikhail Gorbachev in his time, Dmitry Medvedev should surprise us in his. The Constitution has thus far escaped substantial amendment by way of Chapter 9 of the Constitution. And yet, in the short span of fifteen years its federal structure has been almost completely undone. That is a bad sign. Worse than a constitution that is buried under the weight of constant amendment is a constitution that, in the face of systemic institutional change, need not be amended much at all. Thank you.

## ***Discussion***

### **QUESTION**

I have a question regarding Jeff’s very interesting talk. You mentioned a pendulum, and that as it is swinging back there are some indications of something resembling bilateral treaties emerging within Russia. I would like further context for such new politics under the conditions of the current economic crisis.

### **JEFFREY KAHN**

I was going to raise a possibility that when you have a swing of the pendulum that goes so far that it does not match the needs and realities of the society then, in fact, informal practices

will develop that counteract and even to some extent erode the new institutional pattern. This is a hyper-centralized federal system now, but are there also limits to central power?

My sense is that in that huge constitutional area of shared or joint jurisdiction, which is two-thirds or even three-quarters of the activity of the Russian government, the actual allocation of responsibilities and even budget with each region or republic is negotiated. Whether you call it a treaty or not, what the federal law has done is set up procedures and principles in those laws of 2002–2003 after the close-out commission, but not uniform standards or patterns. So you can take an area like education, and different subjects of the federation can have different arrangements with the federal government over who is going to administer different aspects of the educational system and so on, and so forth. I am interested in your perspective on that.

### **QUESTION**

Another area where there may be more decentralization than we think involves the accountability of governors. I remember when I read about new appointments that confirmation by regional legislators is going to be a formality. Well, I don’t think it is. Putting it another way, regional legislatures can complain to the president that they do not like a governor, or what he is doing, or may have a veto on re-appointment. I think in some parts of the country we now have a situation where governors look not only to the president, but also to the local business groups who dominate the regional legislatures and in some cases even compete in elections. I have a feeling there is even a bit of renewed democracy going on, although that may be putting it too strongly.

### **JEFFREY KAHN**

Those are all fine and wonderful procedures, you could say. You could say that they produce a certain decentralization in those negotiations either under the framework of those laws, budgetary negotiations, or in the framework of negotiated bilateral treaties. Again, under a new law, a new federal law, you could say all those things, you could say that this is successful, this is a new model for Russia, you could



say it creates elements of democracy. But I don't think that you could say that it creates a federal system. What is federal about that? Because at the end of the day, if the negotiations sour, that joint power, that joint authority under the Constitution, ultimately is decided by a federal code.

### QUESTION

Isn't that the case in Germany? I am not sure. In the German model, a lot of the main domestic functions are in shared jurisdiction. Now, maybe it is the case that a lot of this is still left to the governments of the Länder [Germany's 16 states] to define, I don't know.

### JEFFREY KAHN

And I don't know either. But I guess I would say there is a cumulative effect going on in two dimensions. The first dimension is, suppose that you would just have that provision alone and nothing else has changed. In other words, we still have directly elected governors. Maybe it would be more difficult for me to say, "It is hard to imagine this is a federal system any more." But this on top of that on top of the third has a cumulative effect, because it is not just one structure of federalism that is weakened while other pillars of support remain. All of them are weakened and you might say, if you were extreme, I suppose, that they are gone.

As to the German case, the second point I make is this: I am not trying to prescribe American federalism on Russia. I realize there is a lot of variance within the family of federal systems. But they all share the common principle that each sovereign entity has exclusive constitutional jurisdiction over some spheres of authority and coordinate spheres of authority elsewhere. The political scientist Morton Grodzins famously described federalism not as a layer cake of municipality, region, and federal government, but as a marble cake.

### QUESTION

How much negotiation can you have between entities, whether they are individuals operating under the law or state units, and still have law as the dominant force? I am thinking about Mr. Mazaev's comments about what happens

when a business comes into a region and they are asked to participate in the social sphere to contribute. This is a negotiation of taxes, effectively, with regional authorities. Regions are now negotiating with the center. To what extent can we have this in a legal system? When does too much negotiation move across that line and erode law itself?

### VLADIMIR MAZAEV

As I already said, this is an element of non-economic compulsion and it is a cost of the administrative system that we have. Everything depends on how burdensome these methods of compulsion are, because the authorities have many different methods. For example, allocating land or even offering financial incentives from the regional budget—this broad range of administrative tools gives the regional official the power to have such conversations with businesspeople. And if the official's demands and desires are not too burdensome, the business will generally agree to cooperate. We call it "a public-private partnership with elements of non-economic compulsion."

Now I would like to say a few words about the economic aspects of federalism. I used to be involved with federalism: in the Supreme Soviet I was responsible for issues involving the national structure. First, I would note that the government's feedback channels are open. In the last few days President Medvedev and the State Duma acted on proposals by the esteemed Speaker to change the way the Federation Council is formed. Now only elected members of regional legislative assemblies can be selected for the Federation Council, so that they will be accountable to the voters.

Secondly, we now have federalism, primarily the economic aspects of federalism, which are described in detail not in the Constitution, but in the laws—for instance, the federal law on the legislative and executive bodies. As you know, the Constitution enumerates the exclusive powers of the Federation, the exclusive powers of member entities of the Federation, and certain joint powers, about which there are always arguments over who does what and how they interact. The law lists issues of joint authority to be exercised by the member entity.

This list is limited. Any change in the powers of the member entities must be reflected in an amendment to the law. The exercise of these powers also involves budget appropriations and allocations of property. The same system operates at the municipal level.

The federal authorities have decided to simplify this process and link it to the budget. This portion of the law is amended most often, because the regions often get together with Moscow to discuss adjustments to their authority and the allocation money that they are given to implement their authority. It is a continuous process of discussion and interaction, which results in periodic amendments to the law. In other words, there is both discussion and cooperation. I have been involved in this process, and I have seen what the regions are most often unhappy about: “You give us these powers, but no money to exercise them, or not enough money.”

For example, Moscow had the authority to maintain ponds and other bodies of water in Moscow. The Federation assumed this power for itself, but delegated the management of these ponds to Moscow. At the same time it gave the city ten times less money to maintain the ponds. In response, Mayor Luzhkov said: “Either give me the full authority and I will find the money to maintain the ponds, or take the authority and do it yourself. The money you propose is barely enough to maintain one pond.” This is why no contracts are being signed for such projects—there is a continuous debate about the financing and the budget.

## **QUESTION**

I would like to address my question, if possible, to the drafters of the Constitution. I would like you to appraise the nature, scope, and influence of the involvement of the Russian Orthodox Church in the drafting, adoption, and implementation of the Constitution and the strengthening of the rule of law in Russia.

## **VLADIMIR MAZAEV**

Who has the courage to answer this question? While my colleagues are getting ready, I would like to mention that in 1990, one of the first laws enacted by the Supreme Soviet of

the RSFSR was the law on freedom of conscience. I was involved in the drafting of this law. The working group on this law included members of parliament who represented all the major churches in Russia. The significance of this was enormous. As for the existing Constitution, Mr. Lafitskiy was directly involved in this issue.

## **VLADIMIR LAFITSKY**

Indeed, I was involved in that, although not as actively as I would have liked. In Russia, we have built what Jefferson called a “wall of separation between the State and the Church.” This Russian wall was much higher than the one in the United States. In the United States, the church has always either been involved [in government affairs], or have received some type of support from the government. This has not happened in Russia. Only recently the church began to take the first steps toward asserting itself, if not in politics, then in public life. This process is happening with great difficulty. It would be premature to give an assessment of it now. Many positive things have been done, but just as many negative things have been done as well. So there can never be an unambiguous answer to your question. With time, perhaps, we will see how positive or negative this role has been, but it is too early to tell.

## **QUESTION**

I would take you back to the questions about federalism. As was described, when the budget arrangements were made between the federal government and regions, was there also attached to that budget specific objectives that were to be achieved that were mandated by the federal government along with the purposes of the fund? If so, I recall some of the description of the dissertation that was attributed to President Putin, which drew from a planning document by two professors at the University of Pittsburg describing a system in the United States during the Nixon administration known as “management by objectives.” Some of this sounds very similar to that system, particularly if there were federal objectives that were to be met with that budget.

## **VLADIMIR MAZAEV**

I will try to answer your question, although I am not an economist and am not involved with the budget. The fact is that this phrase did find its way to Russia. As I said before, all of the money in a region's budget is targeted for a specific purpose and can only be used for that purpose. Primarily it supports programs within the region's authority. The federal government also strictly targets the money that it appropriates for the implementation of federal programs or for the exercise of some or all federal powers. It is the same on the municipal level. This system emerged because in the 1990s regional and local officials spent money very inefficiently and ineffectively. Occasionally, they simply stole it. As a result, strict targeting of funds was imposed. If you look at the statistics of the mayors and regional leaders who have been prosecuted or removed from office, the most common reason is use of funds for other than their intended purpose. Dozens of mayors of large and medium-sized cities have been prosecuted or removed from office for this reason.

Indeed, the key problem in Russia is to what extent funds are being used for other than their intended purpose. We have many enforcement agencies, and the Audit Commission has its own idea of the extent of the problem, as does the enforcement divisions in the Ministry of Finance and the office of the president. This is a problem of harmonization of the oversight standards when it comes to the expenditure of public funds.

## **QUESTION**

I just had one question about federalism versus the central model. I know that there are many kinds of federalisms. Russia seems to be working towards one that will function for them. Yet I wonder what if you told that to the American writers of the U.S. Constitution? They had no model for for a federal government, but they thought one up and created it. I think that was the virtue of their actions. But I wonder whether there might be some way to construct a model using devolved powers. We have seen a nasty conflict in Northern Ireland resolved without federal means. And there sim-

ply is not a unitary government there anymore. So is there another possible model?

## **JEFFREY KAHN**

It is perfectly true that federalism, at least as known in our time, was created by the "founding fathers" of the United States, who drafted a federal constitution, because the word did not mean before they used it what it meant after they used it. That said, the word in the Russian Constitution seems to suggest federalism as known at the time of the creation of that Constitution. There is no indication that they were trying to create something brand new but call it by an old name.

It is also true that there are many different types of arrangements for power, devolution of power, and the United Kingdom is one. I was mildly surprised to discover that the International Academy of Comparative Law considers the United Kingdom a federal system, I did not think it was. I think reasonable minds can differ, but the point of my remark is to suggest that this is going too far. And so it is not to say that the inventions cannot continue, nor is this to say that federalism may be the only model, or centralism is the only model, it is just that I am interpreting this particular document, I am trying to use as many constitutional tools as I can, and I cannot make the round pegs fit into square holes.

## **QUESTION**

I wonder if our speakers might make a closing comment on the relationship of some of the problems we have been talking about with federalism, as it has been the focus of this discussion, and on other areas of law. In particular, I was thinking of Professor Mazaev's comments about the need to go and speak to regional heads or governors or other officials when you want to start a business. Then there is the problem with unfunded mandates. Whether it is a problem with the distribution of moneys or with the level of authority granted to regional or local authorities to collect funds adequate to their tasks, you have got people in positions expected to perform a variety of tasks for which they have no budget. It is not terribly illogical to imagine that they are going to start putting

pressure on businesses coming in to perform some of these tasks for them.

That would be an area of law where one might see the defect of federalism affecting, let's say, private property rights. You have people coming in expecting to be able to open businesses and go through normal legal procedures—to register land use, to do all of these things—and they find themselves being pressured to do things that are not within law because of the effects of these federal arrangements.

Another example in a different area of law might be the kinds of things that happen when courts decide that federal considerations are not sufficient to restrict local or regional elections to those who are citizens or residents of the locality or region, despite the fact that anyone elected from half-way across the country, whatever their federal connections might be, may know little or nothing about the region in question.

Or courts can make decisions that a local or regional government cannot independently purchase goods or services without allowing businesses or people from anywhere in the Russian Federation to compete and receive that contract, even if the money has been collected solely from local sources and the region might prefer to devote it to local sources for regional development purposes. I wonder if anybody thinks that the pressure for correction in some of these other areas of the law might help move federalism issues toward other kinds of resolutions. Or perhaps the reverse—might pressure as result of the Federal Commission's work produce improvements in these other areas of the law?

### **VLADIMIR MAZAEV**

Thank you for the question. I would say that everything you have said is true, and even more so. Many different things have happened in Russia, especially in the mid-1990s. Still, the trend is positive from the point of view of the complexity and the types of problems in the process. In the mid-1990s, I had two friends who were district court judges. At that time financing for the courts from the federal budget

was minimal. The courts did not have funds even for basic supplies like paper and pens. They could not conduct court proceedings.

So here is how one judge dealt with this situation: he made an arrangement with the local police chief who collected money for the court from drivers on a federal highway. Another judge drove around with his driver and collected scrap metal to sell. He sold the metal and donated the money to the court. This was the situation when there was no money in the federal budget. Now the situation is different. It is true that municipalities and member entities of the federation receive insufficient financing to perform their functions. Those that are willing to wheel and deal, as we say, find a way out of the situation, including by extralegal and non-economic means.

I would like to give another example showing that courts do not always come to the defense of the governors. For example, just a few days ago, a very well-known judge, the presiding judge of a court of arbitration in Moscow, was removed from office for conflict of interest. She had received some benefits from the Moscow government, and then heard a case involving Moscow's interests. As you see, the trends are getting more complicated and ambiguous. Thank you.

### **JEFFREY KAHN**

I would just add the obvious point that the frustration you describe of giving people authority and responsibility without mechanisms to achieve the result, or the converse, isn't exclusive to a federal system and the same could easily happen in a centralized system, and the effect of judicial decisions that would create those perverse incentives would certainly be destabilizing to a federal system, but also to a centralized system. The problem that I see is that when changes are made to the meaning of federalism in a constitutional system by just regular statutory law, it is very hard to see how change would percolate up in a reverse fashion and undo that law.

## PANEL IV

# Globalization and the Role of International Law

### **OLEG RUMYANTSEV**

Let us turn to the question of the Russian Orthodox Church and its role in the drafting of the Constitution. Let me tell you that this has been a challenge. During early 1990s, at a time when radical democratic thinking was overwhelming in the Russian parliament, the Russian Orthodox Church was an institution that was also in a stage of emancipation from the previous times. I personally have established very close and fruitful relations with Patriarch Alexei himself and with Kirill, who is the current Patriarch, and we had a very interesting exchange of opinions. These blue volumes, which I highly recommend to you to have in your library—this is a bit of an advertisement here, I am very sorry; those who are from institutes and universities, please, write to the Russian Foundation for Constitutional Reforms ([rfcr@rfcr.ru](mailto:rfcr@rfcr.ru)) and order this set of ten volumes. These volumes contain this correspondence with the Patriarch.

I am very proud of Section 3 of the draft of our constitution, which was called “Civil Society.” Unfortunately, people like [former St. Petersburg Mayor Anatoly] Sobchak were fruitful in fighting our Section 3. It had all the necessary limits on state intervention into the civil society institutions and, on the other hand, it had all the necessary constitutional guarantees for the development of civil society institutions. It was extremely important in our case, but, unfortunately, those who thought that the [draft] constitution was too long, too detailed, and that civil society is a philosophic category succeeded in crossing out that section.

However, there are Articles 62 and 65 on religious organizations, and it is interesting that the Russian Orthodox Church was very inter-

ested in the protection of property rights of the religious organizations, which would be guaranteed by law. That was important, and I discussed it several times with Metropolitan Kirill. But the Constitutional Commission decided that we should include this into our Section 3. On the contrary, the government cannot transfer to the religious organizations any of its government functions. It is very clear in the current situation that the Russian Orthodox Church is trying to get some of the state functions.

I will not cite all of this, but please remember Articles 62 and 65, which are devoted specifically to the rights of the religious organizations. And today, the current Constitution’s Article 28 is a very shallow, very weak article, unfortunately. This is a result of the “short constitution” concept.

Our next panel is on “Globalization and the Role of International Law in the Development of the Russian Constitution.” I think it promises to be a very important, a very interesting session, and our first speaker is William Butler, John Edward Fowler Distinguished Professor of Law, Dickerson School of Law, Penn State University. The theme is Russian Law and the International Legal System.

### **WILLIAM BUTLER**

Thank you, Chairman. When Will Pomeranz first approached me about this conference, he said I would be on the last panel. “We will save the best for last,” he declared, and I notice he has now moved himself down to last position.

I would actually reverse the name of this panel slightly, at least for the purposes of my presentation. Rather than speak about globalization and the role of international law in developing the Russian Constitution, to my

mind the question is rather: the role of the 1993 Russian Constitution in the development of globalization and international law. I have in mind, of course, Article 15, particularly Article 15(4) of the document. To remind you, as I am sure not all of you recollect what it provides: “Generally recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of the legal system.” That is the novelty in the provision. The second sentence came straight out of Soviet law: “If other rules have been established by international treaty of the Russian Federation than provided for by a law, the rules of the international treaty shall apply.” This last phrase is, in effect, a primacy clause for treaties.

I personally regard Article 15 and particularly these passages of 15(4) as the most transformative provisions of the 1993 Russian Constitution. If I had to choose a single article that I considered the most important in the Russian Constitution, I would select Article 15.

To be sure, the fathers of the Russian Constitution did not make an omission, which the fathers of the U.S. Constitution did: they included human rights the first time around. They did not have to resort to ten subsequent amendments in order to take account of them.

But a number of issues have been raised by Article 15(4). They are interesting issues. They will not be resolved by the stroke of a pen. They will need to be addressed in the jurisprudence of the courts and the administrative practice of the presidency, of the government, of all of the associated ministries, and of the parliament itself, in my view. At least, I shall make this argument this afternoon.

There is a question in Russian law of the hierarchy of treaties in their relationship with legislation and as to themselves. You may recall that the 1978 USSR law on treaties introduced a classification into legislation which had long been identified in doctrinal writings in the USSR and abroad: namely, the distinctions among inter-state treaties, intergovernmental treaties, and interdepartmental treaties. That classification has been carried over into Russian legislation and, I can confirm to you, the legislation on treaties of every single member of the

CIS. I know of no other countries in the world which have codified that distinction in the way that the CIS jurisdictions have done.

It is an obvious distinction to make; there are constitutional reasons, logical reasons, why one should draw such distinctions. International law, however, does not draw those distinctions. Any treaty, oral or written, entered into by the state, by a state official within his competence, is binding upon the state as whole. Therefore international law is indifferent as to at what level a state chooses to engage its international legal responsibility vis-à-vis other states.

Many, perhaps most, Russian jurists, especially those of a constitutional persuasion, recognize the hierarchy of sources of law. This is the first occasion that I have spoken to a group of Russian constitutional lawyers on this matter, and they may hold views on this that differ dramatically from my own. There have been proposals to enact a Federal Law on the Normative Legal Act, or on the hierarchy of normative legal acts, or on the sources of legislation bearing various titles. I am told by Professor Boshno at the Russian State Civil Service Academy that there is renewed interest in a draft that was originally discussed in the mid-1990s and then tabled after first reading. A number of CIS jurisdictions have enacted such laws, but not all. If I recall correctly, each of these laws that I have examined made no mention of treaties as part of the hierarchy, which is a rather serious omission even if they do not have a constitutional provision exactly like Article 15 of the 1993 Russian Constitution.

Therefore, the question always is and will always be: where exactly does a treaty fit into preexisting legislation on a subject or, for that matter, subsequent federal or regional legislation on a subject? Should it matter, does it matter, and if so, to whom? At what level has the treaty been concluded on the Russian side?

From personal experience I can attest to a number of examples over the years of what I would call positive experience and negative experience. I have seen internal regulations from the Ministry of Finance, which in the late 1990s denied the binding force upon it of double-taxation treaties entered into by either

the former Soviet Union or by the Russian Federation. The reasoning was absurd, but they were telling clients, interested foreign parties, who claimed protection under the treaty that as far as they were concerned these treaties did not apply. On the other hand, I have seen other situations where the Ministry accepted that the relevant treaty applied, and I would simply say that there seems to have been a certain inconsistency in application.

I return to Article 15(4) for a moment: “generally recognized principles and norms of international law”—those are not treaties? They might be found in treaties, evidence of them may be found in treaties, but we are talking about customary international law at a minimum and possibly, in the view of many Russian international lawyers, something more, something higher than mere customary norms of international law: norms of international law that have achieved the stature of general principles. These would be regarded as more fundamental in nature than mere treaty rules. Treaty rules are simply rules that are agreed between states, perhaps between two states, perhaps between many states, perhaps between all states, although there are very few treaties that reach that level of universality. But the United Nations Charter is close to universality, and the 1949 Geneva Conventions on the laws of war are close to achieving the 193 or 194 ratifications or accessions that would be required.

When you marry the first sentence of Article 15 of the Russian Constitution to the second, it says, “if other rules have been established by an international treaty of the Russian Federation;” it does not say, “if other rules have been established by generally recognized principles and norms of international law.” So, is that a limitation on what has precedence, or is the fact that generally recognized principles and norms of international law have a higher stature in the international legal system evidence that *a fortiori* they take precedence over any inconsistent norm of domestic law? This continues to be debated in Russia, as indeed it should.

Given the predisposition of our discussions in this forum so far, where there has been a heavy emphasis not really on the Constitution, but on judicial practice under the Constitution,

it is the judicial practice of all Russian courts of relevance—the Constitutional Court of the Russian Federation, the *arbitrazh* courts, and the courts of ordinary jurisdiction—that is of special interest, because these courts frequently cite *international acts*, as they are often called. These include treaties, sometimes general principles of international law, and, fairly uncommonly, resolutions of the United Nations General Assembly and other kinds of “soft law”, as we international lawyers call them. These are international acts that do not have the formal status of treaties, but are something less.

Nonetheless, acts of “soft law” often reflect the consensus of states about the existence or content of a particular rule. The 1948 Universal Declaration of Human Rights is not a treaty; it is a declaration of the United Nations General Assembly. Unless we accept, as most of us do, that it has now have been incorporated into customary international law and that its provisions are tantamount to the general principles of international law, as a document in and of itself it is not binding.

Nonetheless, a number of Russian courts have cited the Universal Declaration in passing, and they have cited the 1966 international human rights covenants, which are proper treaties. There is a vast repertoire of Russian judicial material of this nature—some published, some emanating from Russian colleagues who have been into the archives of courts at the regional and central levels who have found these cases and drawn our attention to them. Indeed, I would say to Professor Rumyantsev that if his Foundation were looking for another project, a very good one would be to publish all Russian court decisions since 1992 that made any reference to international law whatsoever—a Digest of Russian Cases on International Law. There is an American collection that could serve as an example.

But Russian experience becomes more interesting by reason of Article 15, and as such it has perhaps a larger impact in the international community than would otherwise necessarily be the case. Some explanation is required. Russian international lawyers would criticize Russian judges for citing in individual cases, for example, “soft law” documents. The criticism

would be that they are mistaken, that they do not understand the difference between a treaty, which is binding, and a United Nations General Assembly resolution, for example, which is not. This criticism is fair, assuming that the court understands the relevant document in that sense. But the fact that the “soft law” documents are cited actually has an impact on the international law, because that amounts to a form of state practice, a form of affirmation of the content of the document. In the international legal system that has meaning and significance, even if it qualifies as what we common law lawyers would call *obiter dicta* in the Russian judicial decision itself.

I do not exclude the possibility that if we had access to all relevant judicial materials from the Russian court system that relate to international law, we would say that many references to international legal material were incidental and not central to the holding of the court. But I do not think that matters from the international legal point of view. From the international legal point of view, unless the court took issue with the document, in which case it becomes even more interesting, then it amounts to a form of affirmation of *opinio juris*, as we call it in the international legal system.

The third element I would draw to your attention actually resides in Article 15(3) of the Constitution, although I believe it relates both in law and in practice to Article 15(4). This is the requirement that normative acts be published in order to be applied and enforced. The Russian courts have been zealous in requiring evidence of publication of the treaties before they will take judicial notice of their existence, relevance, or application. There are a number of decisions where they have refused to apply a treaty in force, because the parties could not produce an official text of the treaty, as they are required to do.

One outcome has been, if you follow the *Bulletin of International Treaties*, which is an official source in Russia published monthly by the President’s Office and Ministry of Foreign Affairs, is the publication of treaties that were ratified several years ago, even decades ago, including treaties with the United States and with the United Kingdom. In each instance

it is the first official publication of these treaties in Russia. They have pulled these treaties out of the archives and made them publically available, probably in most cases because the courts are being so insistent. So far as the courts are concerned, the treaty does not exist unless and until it is officially published. That is absolutely correct, of course. This practice is a salutary enforcement of the provisions of the United Nations Charter, which encourages, but does not so vigorously require, the publication of treaties.

The fourth example is one which arises out of issues that Article 15 seems to represent in the minds of some Russian colleagues, particularly those who are specialists in international law. One reason that it is sometimes argued in doctrine that only treaties that are ratified formally by the Federal Assembly should take precedence over Russian laws is, of course, that ratification itself takes the form of a federal law. In their view, to argue otherwise would mean that both the government and a ministry could conclude treaties inconsistent with federal law without requiring any review by parliament whatsoever. Parliament need not even have knowledge of the existence of such treaties.

One difficulty that arose in U.S.-Russian negotiations several years back related to American assistance to Russia in dismantling nuclear missiles on nuclear submarines. Much of this work was to be done at American expense and with the use of American contractors. No American contractor will undertake such a project without indemnities from his government in the event of a little technical episode of some kind or other. The government of the United States routinely gives indemnities of this kind if the project work is performed on U.S. territory. In Russia, however, the Civil Code provides that liability attaches to any source of increased danger, and the nuclear industry is by definition such a source of increased danger. So the suggestion was that the United States Department of Defense and the Russian Ministry of Defense conclude a little inter-departmental treaty which would abrogate that provision of the Civil Code. Then it was suggested to them that such an interdepartmental treaty might not be such a good idea: this would be circumvention



of an imperative provision of Russian law, one that is absolutely central to the Russian understanding of obligations arising out of the causing of harm.

I do not know how they ultimately solved this dilemma of two legal traditions. There was a serious impasse for a long time. This was not a disagreement, but rather a question of how to solve a serious difference of approach between two legal traditions on questions of liability, both of them having entirely plausible and defensible positions in approaching liability, but coming at the question from opposite directions and being unable to reconcile their positions.

My answer to Russian colleagues who would be concerned about inter-departmental treaties or inter-governmental treaties constituting a circumvention of the Constitution or other legislation is: handle them internally. Require that there be a satisfactory level of internal review of any inter-departmental treaty or inter-governmental treaty, whether it is committees of Federal Assembly, or the presidency itself, or the government, and deal with it at that stage—but then accept the treaties at whatever level they are negotiated and concluded as falling under Article 15(4).

### **OLEG RUMYANTSEV**

Thank you very much, Professor Butler. It was a pleasure for us, members of the Constitutional Drafting Commission to hear how you praised Article 15(4). The whole Article 15 about the legal system of the Russian Federation is taken directly from the Constitutional Commission's draft, and Article 15(4) is one of the legal guarantees for the rule of law in the Russian Federation. That is why I appreciate it. Thank you for your nice talk.

Next speaker is Viktor Kuvaldin, Head of Department of Political and Social Sciences, Moscow School of Economics, Moscow State University. Professor Kuvaldin is a long-time partner in the Gorbachev Foundation, so, please, Professor Kuvaldin.

### **VIKTOR KUVALDIN**

Andrei Illarionov said that he happened to be at this interesting discussion almost by chance. The same is true of me. I am not and could

not have been one of the founding fathers of the Russian Constitution because, as President Gorbachev said, I was always part of his team. At that time there were very serious differences of opinion between Gorbachev's team and the Russian parliament and the drafters of the Constitution—so much so that we ultimately ended up on opposite sides of the political barricades. For this reason, I am even more grateful to Oleg Rumyantsev for inviting me to take part in this discussion, because he knows that I have had a point of view that is very different from his or his fellow framers of the Constitution.

Secondly, I am not an expert on constitutional law. I am not even a lawyer. My field is world politics, which is rather far removed from the issues being discussed here. But I think there is a connection. The process of adopting a constitution is an act of birth. It is the birth of a new political system. So it seems to me, as others have said here, including Oleg Rumyantsev, who said it quite forcefully, that we need a comprehensive, multidisciplinary approach to the analysis of these processes.

What are the elements of this approach? First, we need experts in constitutional law. Second, perhaps less obviously, it would be very helpful to hear from political scientists, especially those who specialize in comparative politics and the comparative analysis of the development and operation of political systems. Third is the field most near and dear to me: we need experts on globalization, people who work in the new field known as Global Studies.

Why do we need this third component of the analysis? Globalization is a process that increasingly interacts with many other fields, including law. I would refer you to the pioneering work of Anne-Marie Slaughter, who will soon become the director of Policy Planning at the U.S. State Department. She talks about the very intensive process of interaction that involves not only businesspeople or politicians, but also lawyers in a wide range of practice areas. This includes lawyers who work for government agencies, lawyers for nongovernmental organizations, and lawyers in private practice. Naturally, this interweaving, diverse sharing of experience among various countries has a major

impact on the constitutional processes in each individual country.

How does Russia fit into this general picture? I think that two characteristics of Russia have left a strong mark on its constitutional process. In my view, culturally, Russia is a European country. But politically, it is a country that has been displaced on the Eurasian geopolitical stage. I would remind you of the simple fact that two-thirds of our country is located not in Europe, but in Asia. This has very important implications for the way our political system works. Secondly, Russia is European in its culture, but in terms of its political culture, I would describe it (in school grading terms) as “Europe minus.”

This “minus”—that is, the things we lack—is very important. We did not experience the Renaissance, nor did we experience the Reformation. Our constitutionalism did not emerge gradually. We did not go through these periods in which a great many important political advances, such as universal suffrage, for example, became slowly ingrained in the culture. This places us among the countries that Fareed Zakaria described ten years ago as illiberal democracies. These are countries that have created democratic institutions but lack the strong foundation of what might be called constitutional liberalism.

We are certainly not unique in this sense. Fifty one countries signed the Charter of the United Nations in 1945. Today, the United Nations has about 200 members. Many of the states that have entered the world stage over that period of time are in this category of illiberal democracy.

However, there are significant differences. The countries that came out of the Anglo-Saxon legal tradition, for example, are in a much better position. The classic example is India. It is a large, diverse country with a very complicated history. But it has the right to call itself the world’s largest democracy, despite all the complexities of the Indian state. There may be even more persuasive examples. I do not mean countries like Malaysia, for instance, but rather Pakistan. This is a country where democracy seems even weaker and the foundations shakier. Nevertheless, we know Pakistan as a country with functional democratic institutions.

The last and, perhaps, most interesting issue is the evolution of our Constitution and how we should assess its current status. Some of the speakers here, including some of the framers of our Constitution, say that it was born in very difficult circumstances, that it suffered “a birth defect,” and that eventually it resulted in the political battle that led to bloody conflict in 1993. I agree with this analysis, but I believe the roots of it go deeper. I think this birth defect did not begin in 1993, but earlier. Its roots are in 1990 and 1991, when considerations of political expediency regularly prevailed over respect for the law among members of the Russian parliament, including those who were working on the constitution.

I would remind everyone here that President Gorbachev was removed from power in a *coup d’état*. This could be seen as two *coups d’états*: one in August by the putschists, and the counter-coup by so-called democrats in response to it—including its second phase, the Belovezhskaya Accords [signed on December 8, 1991, which officially dissolved the Soviet Union]. This could be seen as a single creeping *coup d’état* over the fall of 1991. I can say this based on my personal experience, because I was in the Kremlin at that time, as a member of Gorbachev’s team. I think these events left a very strong mark.

It has been said here with an understandable sense of pride that the adoption of the Constitution of 1993 prevented the collapse of the Russian state. However, I would remind you that these same “founding fathers” of the Russian Constitution did not raise their voice when another country called the Soviet Union was being destroyed. The Soviet Union, too, was a Russian state, but packaged in a peculiar historical form. This history of political expediency regularly prevailing over respect for the law has, unfortunately, left a powerful mark on the Russian Constitution and the Russian political process. Speaking here about the circumstances in which the Constitution was adopted, Oleg Rummyantsev drew a very important and thought-provoking distinction between the formal act of adoption and the essential adoption of the Constitution. I am happy to discuss this distinction, but I am not prepared to accept it in full.

Unfortunately, we now know almost certainly that the Constitution did not formally receive the required majority of the votes. This is a very serious problem, a time bomb ticking under the Russian statehood, because a thing that seems merely formal can subsequently take on huge political significance.

Finally, I would like to give my assessment of the current situation in Russia. The opinion has been expressed here that we have all but returned to Soviet times or, in the best case, to the early years of *perestroika*. I do not agree with this. I do not think Russia has gone through all of these difficult, terrible years in vain. I do not think we have returned either to the Soviet past or to the beginning of *perestroika*.

Why? Of course, we have not had much success in building democratic institutions. Many of the democratic gains that were achieved during the *perestroika* of the Gorbachev period have been lost. They began to crumble not in 1993 or 1996, but as far back as 1990. But at the same time, and I think this is fundamentally important, a generation has grown up in our country that is used to living in freedom. This is commonplace in America, of course, and it has become commonplace in Europe. But for Russia this is an unusual situation. We have lived through Khrushchev's thaw, which was not freedom. The only period that is comparable to what happened after 1991 is the 12-year period in tsarist Russia, from 1905 to 1917, when Russia had a dualistic regime. This, however, lasted only 12 years, not nearly 20 as we have had now; not to mention that we must also subtract from that tsarist period at least three years of World War I.

I think it is fundamentally important that a generation has now grown up and come of age, including my students at two of the finest universities in our country, Moscow State University and the Moscow State Institute of International Relations, for whom the Soviet experience, if it has any relevance to them at all, is nothing but history. They did not internalize it, and it did not leave its mark on them. They are different. There is now a certain segment of our society—various estimates put it at 25–30 percent—that is ready and willing to modernize the country. Not in the classical Russian

way, when it is done from above with great sacrifices and blood, but modernization in the normal way, from below, in the interest of the public. Thank you.

### **OLEG RUMYANTSEV**

Thank you, Viktor, for that excellent presentation. It is no accident that Viktor is one of the speakers here, and I would like our American colleagues to note how well-balanced the Russian delegation is at this conference. We have people with very similar views who, at one point or another in this historical process, ended up on opposite sides. But we are still presenting the full range of opinions of Russian constitutionalists here. Some may call themselves economists, political scientists, or experts in comparative politics or global studies. The important thing is that we are presenting this interdisciplinary, comprehensive analysis of the events in the Russian Federation, and that is a very good thing. Thanks again for your excellent presentation.

Our next speaker is Vladimir Lafitsky, who served as an expert adviser to the Constitutional Commission from 1991 to 1993, and is now the deputy director of the State—the *state*, mind you—Institute of Comparative Legislation in the Government of the Russian Federation. He was directly involved in the drafting of the constitution. Mr. Lafitsky, please.

### **VLADIMIR LAFITSKY**

Thank you. It is a great honor for me to speak here, especially because my teacher, August Mishin, also spoke here. We heard about him at the beginning of this conference. I was his student, and I dedicated one of my books to him. So it is particularly nice that my teacher is being remembered here. Thank you for that.

The topic of my presentation is the way in which the process of globalization affects constitutional regimes. But before I get to that, I need to make a comment. There is something I would call “a worldwide legal environment.” To paraphrase the well-known statement by the Apostle Paul, there is no Judaic law, no Hellenic law, no American law, or Russian law, and so forth. There is a common legal environment that operates and evolves according

to its own laws, which are intrinsic for everyone at all times. These ideas were formulated back in the 18th century. The outstanding but now forgotten Italian scholar Vico Giambattista wrote about this. He analyzed what he called the “era of poetic development” in human history and noted that the first laws were in poetic form. I even published a book in 2003 entitled *The Poetry of Law: Vignettes in Lawmaking from Antiquity to the Present Day*. This is a common theme in the development of law.

If you look at the laws of various nations, you will see a great deal in common. Unfortunately, we do not study these fundamentals, because our law, the law of the modern world, is very diverse. It is very difficult to make comparisons now, because the law is developing under the influence of other forces and factors. The most powerful factor is religion. We know that there is Christian law, which is common to American law, Russian law, and Anglo-Saxon law in general. This is Christian law based on the laws of the New Testament. There is also Islamic law, Hindu law, and so forth.

Another very powerful factor that influences the development of law is national character and language. Here is one example: In many modern languages, the word *law* has a close semantic relationship with concepts like *justice* and *truth*. This link exists in the Russian language—we have *pravo* [law], *spravedlivost* [justice], and *pravda* [truth]—just as English words like *holiness* and *justice* have a common etymology. But the Russian word *pravo* also shares its root with *pravitel* [ruler] and *pravitelstvo* [government]. So in the Russian mind, this odd picture emerges, in which the law appears to come primarily from the will of the government, and justice, too, is what comes from the government. These are deep-seated patterns that form in everyone’s consciousness.

I could continue on this topic, but this is a good transition point to a discussion of the impact of globalization. Globalization is supposed to level out the differences between modern legal systems. The most important and well-known mechanism for doing this is through international treaties. The U.S. Constitution established the classical formula for incorporating international treaties into the legal sys-

tem. International treaties to which the United States is a party are the supreme law of the land. The constitutions of other countries did not adopt this approach until the 20th century. As Professor Butler described so eloquently, this approach has now acquired new borders and new colors. Many constitutions, not only the Russian Constitution, proclaim the priority of international law over domestic law. That is the first mechanism.

The second mechanism is the influence of more developed and powerful countries. This influence may take various forms, including force. We recall how the revolutionary army of France spread its constitution to many Western European countries at the point of a bayonet. American forces imposed constitutions in Japan after the World War II and recently in Afghanistan and Iraq. There is a difference here, of course. As Talleyrand said, “You can rely on a bayonet, but you can’t sit on it for very long.” So it is difficult to say whether those constitutions will endure, because a constitutional regime cannot be built on bayonets.

Japan is a somewhat different case. We must give credit to the wise co-authors who helped to draft the Japanese Constitution. They took into account the traditional values of Japanese society. They preserved the existing form of government, which is why the constitutional regime in Japan has had such longevity and stability. Still, the primary way in which a country can influence the constitutions of other countries is not by force, but by providing a good example.

Economically powerful countries like the United States have had a powerful impact on the constitutional development of the entire world. Our good friend, the late Professor Albert Blaustein of the University of Pennsylvania, said that the U.S. Constitution is America’s most important export. This is true. A great many countries have adopted the model of the U.S. Constitution, many of them rather uncritically. Unfortunately, our Constitution did not follow the American formula closely enough. And although some of the other post-Soviet states have borrowed certain constitutional provisions of the Russian Constitution, our Constitution has not had such a big impact on its neighboring countries.

The third main way in which globalization influences the constitutional process is through the various intergovernmental or supranational associations. There are many of them now. Unfortunately, the ones Russia has aligned itself with have not been very successful. For example, the Commonwealth of Independent States is a very weak and amorphous entity. Also, the Russian Federation is not playing the role in that organization that it should, for various historical, economic, and political reasons. We have not yet succeeded in creating a new community of nations.

This is partially the fault of our lawyers. For example, the Yalta Agreement on the Creation of a Common Economic Space takes up only three pages. Compare that to the agreement creating the Common Market in Western Europe or the agreement between the United States and Canada creating a common economic space, which takes up several hundred pages. This is the correct approach to dealing with issues of integration and the impact of globalization on political reality.

Thank you.

### **OLEG RUMYANTSEV**

Now it is real pleasure to introduce a man who has taken on the challenge to be our partner in this conference. It has been a challenge. I can tell you that William Pomeranz was one of the U.S. scholars who took part in our international research devoted to the 15th anniversary of the Russian Constitution, which Alexander Lebedev here described as a white paper.

I am very proud to tell you that 15 years after drafting the Constitution we were awarded by President Medvedev a *pochetnaia gramota* [Certificate of Honor] of the President of Russian Federation. It is a new award for our input in the drafting of the Russian Constitution. And when we were at the award ceremony in Kremlin, Mr. Sheinis came to the rostrum and told Mr. Naryshkin, the Head of the Presidential Administration: “This is our international report on the problems of the implementation of the Russian Constitution. I hope that you and the administration will study this and will comply.” So this was a real action by an independent constitutionalist. And William Pomeranz was

part of it. So now I am proud to announce that he is here to speak to us.

### **WILLIAM POMERANZ**

Thank you very much, Oleg. Several of the speakers have already addressed the importance of Article 15(4) of the Russian Constitution. This provision states that generally recognized principles and norms of international law and international treaties of the Russian Federation shall constitute an integral part of its legal system. Since we are holding this conference in Washington, D.C., I think I can begin by assuring you that there is really no equivalent provision in the U.S. Constitution. Indeed, when Justice Anthony Kennedy mentioned foreign law in one of his opinions, he endured significant criticism for even referring to non-U.S. legislation. The Supreme Court remains sharply divided on this issue, with several justices insisting that outside of specific treaties, foreign law should play no role in U.S. constitutional interpretation.

As Professor Butler has so eloquently demonstrated, Russia has taken a very different approach. It has opened itself up to international law to an unprecedented degree. Yet, at the same time, significant tension exists between Russia and international law. I intend to highlight this clash and further examine the impact of international law on Russia by focusing on one specific issue: *nadzor* (supervisory review).

Now, I must admit, there is probably some rule that the last speaker on the last panel cannot talk about civil procedure. Nevertheless, I am going to try and skim the surface and talk about supervisory review in the most general terms, primarily to draw attention to the tension over *nadzor* between Europe and Russia. Supervisory review generally serves as a supplementary appeal to civil and criminal judgments that have already technically entered into legal force. In practical terms, this means that Russian law allows for an extra round of appeals that can go through multiple stages, and drag out the proceedings considerably. As a result, *nadzor* leads to uncertainty within the Russian legal system, most notably by raising questions about the finality of judgments (*res judicata*) under Russian law.

Supervisory review traces its origins back to tsarist Russia, but it truly flourished after the 1917 revolution. During the Soviet period, it was the procuracy that retained broad discretion as to when to file supervisory review petitions. According to the 1964 RSFSR Civil Procedure Code, prosecutors (and certain high-ranking judges) received broad authority to protest a final judgment that technically had already entered into legal force. These protests, in fact, could be filed years after the final judgment had been rendered and without consulting the actual parties to the dispute.

Since the collapse of the Soviet Union, the principles and norms of international law have had a profound effect on the institution of supervisory review. This influence has occurred primarily through individual decisions issued by the European Court of Human Rights. The European Court initially confronted the issue of supervisory review when it addressed the *nadzor* procedures in post-socialist Romania and Ukraine. In those cases, the European Court found that these supervisory review procedures violated Article 6 of the Convention of Human Rights and the right to a fair trial. In 2003, the European Court examined Russia's civil supervisory review process and also found these provisions in violation of Article 6. In rejecting *nadzor*, the European Court emphasized the importance of *res judicata*, stating that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a re-hearing and a fresh determination of the case. However, while rejecting those cases where civil supervisory review was just an appeal in disguise, the European Court carved out a special exception for Russia, allowing for supervisory review if it was made necessary by circumstances of a substantial and compelling character.

Other institutions, most notably the Council of Europe's Committee of Ministers, also have called for fundamental changes to the *nadzor* process. In response, Russia introduced substantial modifications to civil supervisory review in 2002 and 2007, while criminal supervisory review underwent a major overhaul in 2001. Most notably, Russia opened up the process of civil and criminal supervisory review

to the actual parties to the proceedings. As a result, *nadzor* ceased to be the exclusive reserve of the procuracy and judiciary. In addition, the deadline for submitting civil supervisory review requests has been limited to 6 months after a final decision. The Russian Civil Procedure Code further now requires the exhaustion of the means of appeal prior to the submission of a supervisory request.

All of these fundamental changes would not have occurred without the persistent prodding of the European Court and the Council of Ministers. It further must be noted that the Russian Constitutional Court has listened to Europe and issued its own call to reform the supervisory review process. The 2007 amendments to the Russian Civil Procedure Code are, to a large degree, a response to the Constitutional Court's insistence that *nadzor* satisfy established international legal standards. And, as Professor Butler mentioned, the Russian Constitutional Court now regularly refers to European Court cases in addressing *nadzor* and other important issues.

Yet despite supporting these critical changes, the Constitutional Court remains unwilling to take the final step and declare supervisory review unconstitutional. This failure has resulted in significant tension between Europe and Russia. Both the Russian Constitutional Court and the Russian government now insist that in light of the major changes to the *nadzor* process, a decision should not be considered final as long as the supervisory review proceedings remain ongoing, since all internal appeals would not have been exhausted as required under Article 46(3) of the Russian Constitution.

This assertion directly contradicts previous rulings by the European Court of Human Rights. Since 1999, the European Court has ruled that supervision under the previous RSFSR Civil Procedure Code was not a local remedy that requires exhaustion. This determination essentially means that Russian citizens may file appeals to the European court within six months of a cassation decision without necessarily exhausting all appeals within the Russian legal system. As a result of this abbreviated appeals process, the European Court has been inundated by appeals by Russian

citizens. For example, in 2007, Russia filed more than one-quarter of all appeals to the European Court.

In conclusion, the issue of supervisory review highlights some of the points that Professor Butler and other speakers previously made, namely that international and European law currently exerts significant influence on Russian law. At the same time, the Russian Constitution's openness to international law has also resulted in significant tensions. The Russian press regularly accuses the European Court of Human Rights of lacking objectivity and directly interfering in the Russian judicial system. Meanwhile, EU officials cite the multiple failures of the Russian legal system as the main reason for the overflow of Russian cases to Strasbourg. At the root of this legal—and increasingly political—dispute is the institution of supervisory review. How the EU and Russia ultimately address this crucial procedural issue will have profound implications for the future influence of international law on the Russia Federation.

#### **OLEG RUMYANTSEV**

Thank you, Will. Thank you very much. And we should thank Will Pomeranz and the Kennan Institute for being our hosts for this excellent conference. It is now quarter past midnight in Russia, but there is still one young man who is our discussant on this fourth panel, and we would like to ask for five minutes for Stanislav Stanskikh, a representative of a younger generation of Russian constitutionalists. He is deputy editor-in-chief of the *Journal of Constitutional Justice*, which is edited and published in the constitutional court.

#### **STANISLAV STANSKIKH**

Thank you, Oleg. It is very nice to be here. And it is nice that after 15 years, this conference has renewed the contacts and scholarly exchanges between American and Russian constitutionalists. Today I want to respond to some of the statements made by previous speakers. First, I would like to make one remark. In Russia it is very rare for a newspaper to sell out. You can always find any newspaper you want. But in January of this year, one Russian newspaper could not be found for sale anywhere. It was the edition in which *Rossiyskaia gazeta* officially

published the text of the Constitution with the new amendments. It was a national bestseller. Even in the early morning, it was nowhere to be found for sale. I would like to present a copy of this official edition to the Kennan Institute.

I would like to second what Professor Lafitsky said regarding the creation of myths about our constitutional history and practice. For example, Professor Sheinis said that the Venice Commission of the Council of Europe approved the first and second chapters of the draft constitution of the Russian Federation. But for some reason he did not mention that the Venice Commission also approved the other chapters of the draft and did not identify in the final draft any significant or radical imbalance in the distribution of powers, the federal structure, or anything else. Arguing in support of his conclusion, he said that every country is different, and that applies to all aspects, including local government, the federal structure, and so forth. Experts from other countries performed a comprehensive legal analysis of the draft constitution, and the results show that the provisions of our Constitution are not copied from anyone else's constitution. The framers of the Constitution took a very thoughtful approach to all the suggestions they received from foreign consultants. Many of these suggestions were made by American scholars, of course.

In his speech, Professor Illarionov said that they removed the Constitution Day from the list of government holidays in Russia. This is not quite right. Constitution Day is an official holiday in Russia, but it is a work day now, while previously, it was a day off. I mention this because there are facts that should not be confused.

Secondly, Professor Illarionov also said from this podium that everything is so bad in Russia and freedom is so limited that the poor Russian constitutionalists had to come to America, land of the free, to celebrate the 15th anniversary of their beloved Constitution. Supposedly they were not allowed to do this in unfree Russia. This is not true either. As Oleg will confirm, he has organized or taken part in many conferences and roundtables. We have worked together to organize events celebrating the 15th anniversary of the Constitution, both in the State Duma and at other institutions. Many

of these events were open to the public, and everyone was welcome. No one attempted to restrict anything, except of course the official conference that was held in the Kremlin. The atmosphere there was rather...official.

I would like to say a few words about this panel, the fourth panel during which we have discussed the processes of globalization. There is a trend in the world now toward interpenetration of legal systems and legal cultures. These systems are becoming more similar and incorporating international standards and norms to a greater extent. But one problem is that it is sometimes very difficult to determine which international standards a nation's legal system must adopt. One good way in which international norms are incorporated into the Russian legal system is through the constitutional enforcement bodies, primarily the Constitutional Court, whose actions in this sense can be divided into three stages.

The first stage was the period until 1996, before Russia joined the Council of Europe, when for all practical purposes international norms, standards, and principles were not applied. Certainly the courts of general jurisdiction and the Constitutional Court did not apply them. After Russia joined the Council of Europe and ratified the European Convention on Human Rights, the Constitutional Court began to apply the provisions of that Convention and to cite the legal opinions of the European Court and other mandatory standards. This stage lasted until about the year 2000.

The third stage began around 2000 and continues today. This is a progressive stage, in which the Constitutional Court is applying not only the mandatory standards but also the recommended norms of the Council of Europe, the Venice Commission, the Congress of Local and Regional Authorities of the Council of Europe, and other organizations. This practice has continued to expand. It has moved deep into the country, and the recommended standards are now being applied, for example, by the Constitutional Court of Tatarstan. This is a very progressive trend, and this experience is very useful for other countries.

What do Russia and America have to offer each other now? One thing we could borrow

from the United States is the idea of a museum of the constitution. This would make a great contribution to the effort to raise the level of legal culture among the public, because students could visit the museum, as they do here in Washington. This would promote awareness about the Constitution. Of course, we should also spend more time teaching about the Constitution in the schools. For our part, we could offer the experience of our Central Election Commission, because until recently the United States did not have a federal election commission. So come and visit us, we will teach you how to count votes.

Since I represent the scholarly journal of the Constitutional Court of the Russian Federation—the *Journal of Constitutional Justice*—I should probably say a few words about the assessments of the work of the Constitutional Court that have been made by Alexei Trochev and Professor Illarionov. Mikhail Gorbachev was right when he said that we cannot do in 200 days what took centuries elsewhere. The Russian Constitutional Court is only seventeen years old, and it has done a great deal in that time. The fact that the official text of the Constitution was sold out before noon and has become a collector's item indicates that the public in all parts of the Russian Federation is interested in the Constitution.

The same can be said of the Constitutional Court. Some of its decisions, particularly those that involve the functioning of government agencies and local governments, are frequently called into question. But the majority of the decisions is effective and truly helps the average citizen. We should not forget this.

There is an impression that other high courts in Russia, like the Supreme Court and the Supreme *Arbitrazh* Court, are for various reasons not fully reconciled to the existence of the Constitutional Court. This is particularly true of the Supreme *Arbitrazh* Court and the entire system of commercial justice, which in several cases has simply ignored the Constitutional Court. The Constitutional Court enters an order, and they ignore it. The Constitutional Court comes to them again and issues a ruling clarifying the order, and they ignore that too. Then the Constitutional Court issues a ruling



clarifying the ruling clarifying the order. All these rulings are issued, but the courts ignore them. This is what Professor Lafitsky was talking about when he said that the judicial system is highly corporate. Thank you.

### **VIKTOR SHEINIS**

I have decided to hold you up for two or three more minutes, because the issue that Viktor Kuvardin touched upon is very important. I respect his point of view, which he expressed clearly, without mentioning me by name but referencing what I said earlier, that “it is not true that Russia has regressed to the time before *perestroika* or to the early days of *perestroika*.” I said it had regressed in the political sense. This is an important qualification. Unfortunately, Russian political institutions have ceased to be independent. This includes the vast majority of political parties, including opposition parties. Unfortunately, this is the way it is.

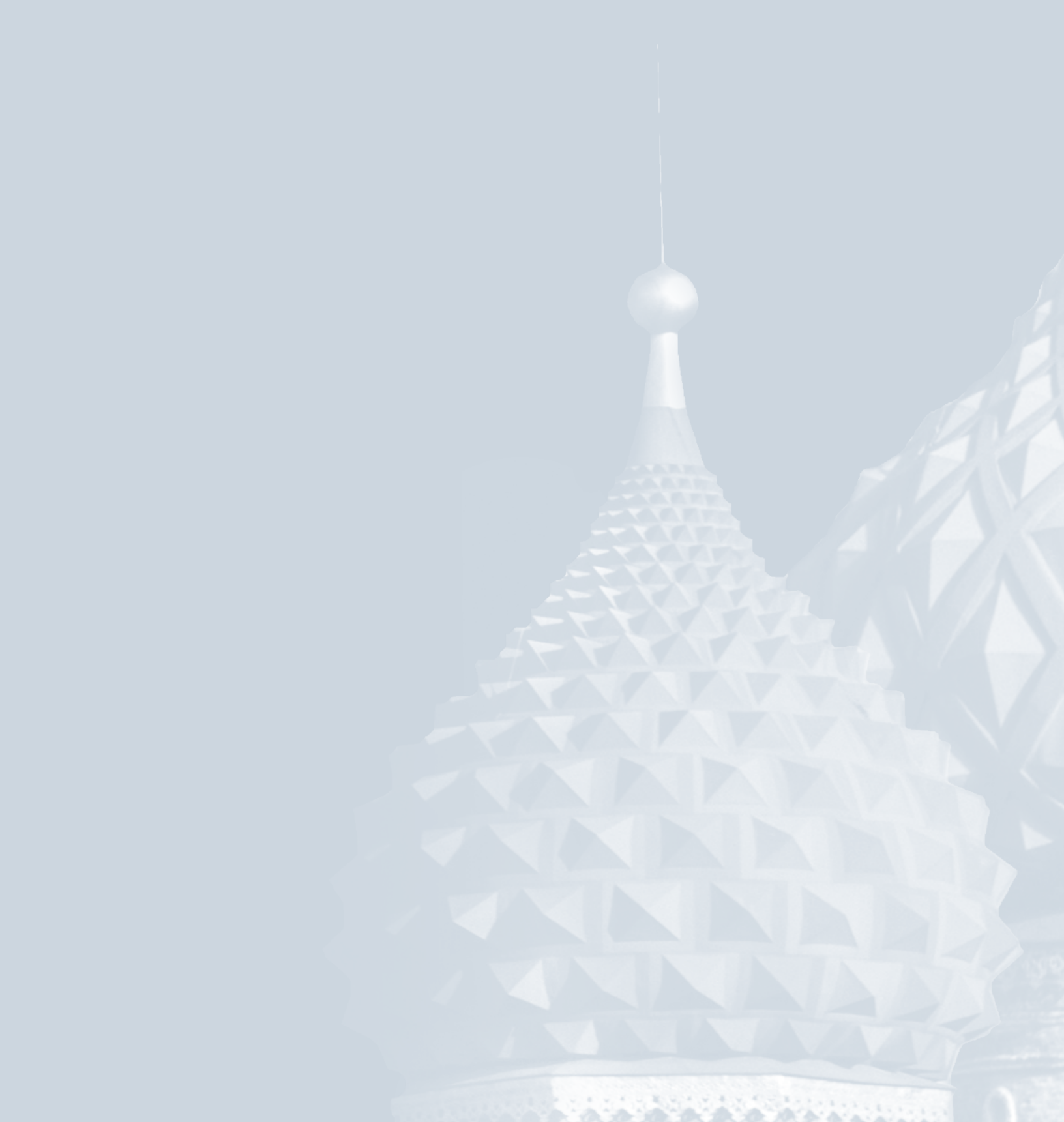
Some say that there are newspapers like *Novaia gazeta* or *Nezavisimaia gazeta* or several others, which can publish things that no newspaper could have published in Soviet times. This is true. But we know that they exist largely because the authorities have decided that these independent newspapers are needed for one reason or another. At any time, if the authorities so desired, these newspapers could be shut down just like the excellent NTV television network once was. I cannot imagine, for instance, the *New York Times* or the *International Herald Tribune* being closed down because the U.S. president suddenly felt that they were unsuitable. Except for certain private matters, our political system largely mimics the Soviet system and is moving in that direction. We see this in the political structure as well. For example, the presidency is analogous to the office of general secretary, the Security Council is similar to the Politburo, and the parliament is no more independent than the Supreme Soviet. There are many more examples.

Viktor Kuvardin said one other very interesting thing I would like to note. My friends and like-minded people often say this to me: “A whole new generation has grown up!” In the words of our great historian Nathan Eidelman:

“A generation has grown up that has not been beaten down.” They are different. This is true. But let us not exaggerate the quality of this young generation. I also work with students in prestigious universities, and I should say that, unfortunately, my students at Leningrad University in the 1970s were much more uninhibited; at least in private conversations, when they said what they really thought. They were much more politicized. I should not generalize, all students are different, but the current generation of students is focused mainly on personal success. This is a sign of the times, and there are good things about it. But in general these are not very publicly spirited people.

Finally, we should not exaggerate the idea that this generation is not beaten down. For example, just recently the Higher School of Economics received a letter from a police official saying that certain students had been observed participating in an unsanctioned demonstration. From the point of view of the Constitution, this is an absolutely nonsensical term: the Constitution grants the right of assembly and demonstration with no requirement of official sanction. But this police officer recommended that the administration of the Higher School of Economics review the actions of these students. As far as I know, he received a worthy reply from the Higher School of Economics. They told him, in the Russian vernacular, something along the lines of “Go to hell.” This happened at the Higher School of Economics, an outstanding institution of liberal education. I do not know which other universities got similar letters, because students from the School of Economics were not the only ones who participated in the demonstration. But it is quite possible that the administrators of the other universities, as a minimum, decided to not make public this outrageous letter from a police official.

Everything that Viktor Kuvardin said about the new generation being different from us is quite right, but as long as this political system is in place, it all hinges on tenterhooks, and we should not be overly optimistic. I would be very happy, though, if future events proved him right and me wrong. Thank you.



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