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TRANSITION TO A NEW MODEL OF ECONOMY AND ITS CONSTITUTIONAL REFLECTIONS

Proceedings of the UniDem Seminar organised in Moscow on 18-19 February 1993 in co-operation with the Supreme Soviet of the Russian Federation, Moscow State University, the Constitutional Court of Russia, the Constitutional Commission, the Ministry of Foreign Affairs and the Parliamentary Centre of the Supreme Soviet of Russia

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OPENING STATEMENTS

Mr Lubenchenko said that the subject of the Seminar was of very high relevance for Russia in this time of profound political and societal change, when the whole economic and legal system had to be recast.

The choice between the basic political options was currently the most pressing priority; economic options would be taken immediately afterwards, in a spirit of continuity.

The speaker welcomed all the participants, in particular the foreign ones, and thanked them for their contribution.

Mr Ispravnikov noted that many people in Russia were not mature enough to fully appreciate the close connection between politics and economy, and the fact that any violation of the constitution also had negative repercussions on the economy.

The draft constitution considered the right to private property as a social right. This was now the subject of discussion within the broader sphere of fundamental rights, an area regarded as high priority in the on-going process of constitutional reforms because it served inter alia the purpose of providing State guarantees for safe private investments.

Mr Maas-Geesteranus said that Russia was now in a delicate period of transition from a planned economy and one party rule to the rule of law and a free economy. In order to be of some assistance, this Seminar had been designed to be at the same time of high scientific value, thanks to the level of its participants, and practical in nature, linked as it was to the exchange of views that took place the day before between the Constitutional Commission of the Russian Federation and the European Commission for Democracy through Law on the draft Constitution of the Russian Federation.

What was important for Russia was important for the whole of Europe. Therefore, the European Commission for Democracy through Law was ready and willing to lend all the assistance it could in the move towards economic and political freedom. The task was difficult and urgent, because the basic values on which the reforms were based were still weak in the country.

Mr Holtz stressed that periods of transition were never easy to live through. Trial and error appeared to be the only way to reach concrete results; in this the Council of Europe could help by contributing the experience of its own member States, many of which had gone through phases of transition in the past.

The Parliamentary Assembly of the Council of Europe had taken the initiative to draw up the European Convention on Human Rights (protecting civil and political rights) and the European Social Charter (protecting social rights), showing that the two aspects must go together. Market oriented economy should always be combined with social justice and protection of the environment.

Mr Vitruk recalled the main features of the UniDem (University for Democracy) programme of the European Commission for Democracy through Law, of which the present Seminar was an integral part.

UniDem Seminars and Conferences are organised by the Commission in co-operation with Universities, in particular in countries of Central and Eastern Europe, on issues of particular concern for the host country.

The choice of the subject matter of the present Seminar proved how much the Commission was attuned to the needs of the countries now undergoing profound political reforms.

Mr Kolokolov considered that developing co-operation between the Russian Federation and the various bodies of the Council of Europe (the European Commission for Democracy through Law and the Parliamentary Assembly in particular) was very important in view of the ultimate goal of Russia's accession to the Organisation.

This was particularly true where market economy was concerned, a matter on which the experience acquired by other States in a similar situation would prove valuable to Russia. What mattered now was to identify certain major parameters on the basis of which a stable society could be set up. Also, investors needed complete, sound legislation which was actually enforced.

Economic legislation would of course have to comply with the Constitution, notably with its provisions on human and social rights. The competence of the federal units and of the local authorities of the State would also have to be respected.

Mr Rumyantsev declared that the present institutional crisis in Russia was due to the fact that the previous attributions of the executive power had been changed, but it had not yet been possible to create a proper system of checks and balances between the powers of the State. Various solutions had been proposed (emergency powers for the President, adoption of a provisional constitution or convening of a constituent assembly) which should all be discarded in favour of a speedy adoption of the Constitution.

The draft constitution which will be submitted to Congress for adoption will reflect the agreement between the President of the Russian Federation and the President of the Supreme Soviet concerning the attribution of the powers of the State. Since Russia is to be a social State, the draft will contain a list of social rights, even though they are not directly applicable, as tasks devolved upon the State.

The distribution of competencies in economic matters between the Federation and the federal units (e.g. on the use of natural resources, intellectual property, single market) will be a major issue. Finally, for the State to have a stable financial system, budget and taxes competencies within the Federation should be clearly defined.

Mr Marchenko paid tribute to the European Commission for Democracy through Law, thanks to which for the first time a Seminar on the constitutional aspects of the transition to a market economy has been organised.

The risk of continuing instability in the country was great; the temptation of extreme "economism" to the detriment of society should be resisted, while a comprehensive policy addressing politics, law and economy should be fostered.

FIRST WORKING SESSION

Chaired by Mr B.L. Kolokolov, Deputy Minister for Foreign Affairs of the Russian Federation

The constitutional basis of the economic order

a. Report by Professor Jorge Miranda, Lisbon University

b. Report by Mr Yevgeniy Danilov, Chief of the Expert Group, Constitutional Commission of the Russian Federation

c. Report by Professor Yuriy Tikhomirov, Deputy Director of the Institute of Legislation and Comparative Law

d. Summary of discussion

a.The constitutional basis of the economic order - Report by Professor Jorge Miranda, Lisbon University

I

1. In every state, in every age and in every place, there is a body of fundamental rules -be they written or unwritten, many or few, simple or complex - about the structure, organisation and activities of the State. There is always a constitution which is the legal expression of the relationship between government and political community or between subjects and the people who wield power.

Every state needs a constitution as a framework for its existence, the foundation and visible sign of its unity, the basis of all legitimacy and lawfulness. How it arises, the questions it regulates and the degree of perfection of the rules it contains and their exact nature vary enormously, as everyone is aware; but, whatever the rules, their necessity is unquestioned.

We will call this a constitution in the institutional sense, as it deals with the state as an institution, something permanent which is independent of the actual circumstances and particular holders of power - because it declares the primacy of the objective or objectified aspects of political relations over the subjective intentions of one or more actual rulers or subjects; because the state cannot survive if it is deprived of rules and guiding principles; because, finally, the institutionalisation of political power is achieved by means of these principles and rules.

While constitution in this sense seems universal, irrespective of its content, legal opinion about it and the very awareness of it must be understood in historical terms. The politicians and lawyers of Antiquity certainly did not consider it in terms comparable with those of the modern state,

whereas the concept of the constitution in the "Basic Laws" of Christian Europe seems much more similar.

In Greece, for example, ARISTOTLE'S study of the constitutions of different city-states does not suggest they laid down guidelines about freedoms; constitutions are inextricably linked to political and social systems. While it is stated that the nomos of each state must be directed to a moral end, the constitution is regarded as an organising system which binds rulers as well as subjects, and one whose object is more to define the identity of the political community than to serve as a basis for those in power.

On the other hand, in the Middle Ages and in the absolute state, the idea of state law, laws superior to the will of princes, is already apparent; and in the last phase of absolutism, even when an attempt is made to defend the virtues of monarchy, the inevitability of "Basic Laws" which kings must respect and which they cannot change is accepted. It is these "Basic Laws" which establish the unity, sovereignty and religion of the state, regulate the form of government and succession to the throne, and rule on the subject of safeguards for institutions and the rights of various sections of society and their representation.

2. "Basic Laws" regulated rulers' activities very little and did not strictly define their relationship with their subjects. They were vague and diffuse, already old and founded on custom, very few of them being written down. They appeared to form a system which could be changed as societies developed.

It is not surprising therefore that Illuminism found them inadequate and unacceptable and sought to transform them, the criticisms of them - contained in the Declaration of 1789 and in the preamble to our 1822 Constitution - having served only to calm those worried by the liberal revolutions and to criticise the excesses of absolutism.

The constitutional system, on the other hand, seeks to regulate everything rulers do and their relationship with their subjects. It claims to make all manifestations of sovereignty subject to the law and to lay down citizens' rights in a basic document. It is the expression of an autonomous will to reshape the legal system.[1] It is consequently easy to understand why there was an historic breach between the Basic Laws of the Kingdom and the constitution although they do not differ in kind (both give the political system a legal form). It is easy to understand why it was not until this period that the concept of constitution began to become clearer in academic terms.

It is therefore important to examine the scope and objectives of constitutional rules rather than their subject matter. While the constitution in the material sense covers everything that was already contained in the constitution in the institutional sense, it is much more vast. It contains the rules which establish the structure of the state and that of the society in relation to the state,

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[1] *Henceforth, the Constitution appears to be the starting-point rather than the result; it is no longer descriptive, but creative; its raison d'être is no longer to be found in its age but in its legal meaning; its mandatory force no longer arises from historical inevitability but from the rule of law it expresses. While the natural Constitution is concerned exclusively with the way power is exercised, the institutional Constitution defines power itself before laying down the conditions under which it is to be exercised (BURDEAU, Traité de Science Politique, IV, 2nd edition, Paris, 1969, pp.23-24, who uses the expression "institutional Constitution" where we would speak of the "material Constitution").*

so that it submits the government to standards as precise and detailed as those which govern all the other institutions or bodies. What we see is the search for means of achieving such an aim, means which are in their turn ends, to which the law must provide other means.

Constitutionalism - which can only be understood in the context of the great philosophical, ideological and social trends of the 18th and 19th centuries - accurately expresses a particular idea of law, the idea of liberal law. The constitution in the material sense was not born simply as the legal organisation of the state but as the organisation of the state in accordance with the principles proclaimed in the great revolutionary documents.

According to the doctrinarians and politicians of liberal constitutionalism, the state is only a constitutional state, a state rationally constituted, if individuals have freedom, security and the right to property and if power is divided among several organs. In the words of article 16 of the 1789 declaration: "Any society which has not guaranteed rights and which has not established the separation of powers has no Constitution".

People are no longer at the mercy of the sovereign; they now have inalienable and inviolable rights vis-à-vis the sovereign. Instead of one single organ, the King, there are now other organs such as an Assembly or Parliament, ministers and independent courts, so that power checks power as MONTESQUIEU recommends that it should. This gives rise to the need for a developed, complex constitution. When power is simply the attribute of the sovereign and the people are not citizens but subjects, it is not really necessary to lay down in detail the rules of power. But when power is broken down into several functions called powers of state it becomes necessary to lay down rules that specify which organs perform which functions, the relationship between the various organs, the system to be observed by those holding power, etc;

The constitution is seen as providing protective machinery and sets out the general character of the protection to be provided. According to constitutionalism, the ultimate aim is the protection thus won for the people, the citizens, the constitution being only a means to that end. The constitutional state is one in which it is the constitution which guarantees the freedom and rights of the citizens and where possibilities for improvement depend on the respect for its provisions, the constitution being the primary safeguard for those rights.

However, liberal constitutionalism still has to find a legitimacy which can be contrasted with the old monarchic legitimacy. This legitimacy can only be democratic, even if all the corollaries of this idea are not found in practice and in the constitutional laws themselves. The constitution is thus the means whereby a people (a nation in the revolutionary sense of the term), organises itself, the act by which a people binds itself and binds its representatives, the ultimate exercise of sovereignty (national or popular, according to one's belief).

Taken to its logical conclusion, this idea amounts to regarding the constitution not simply as the limit to, but also as the basis of, power, and not only the basis of power but also the foundation of the legal system. As it is the constitution which lays down the powers of the state and which governs the establishment of the state's laws, all the state's acts and laws must, to have legitimacy, accord with the constitution; they must be in keeping with the constitution in order to be valid.

However, the idea of the constitution as the origin, from a logical legal point of view, of the organisation of the state, as the basis of the validity of other laws and as a list of rules to which the citizen can appeal direct, did not appear immediately or in the same form on either side of

the Atlantic. The verification a posteriori that academic lawyers can undertake is one thing; the historical process of the establishment or awareness of binding provisions and the corresponding conceptual instruments is quite another.

In the United States, partly because the Constitution of 1787 was the founding document of the Union, it was very soon realised that it was also, for the same reason, the fundamental rule of the whole legal system. What HAMILTON wrote in his famous work "The Federalist" follows from this (as does, in some respects, article VI, n° 2 of the Constitution itself, which describes it as the supreme law of the land). The corollary the Supreme Court drew from 1803 onwards, with regard to the power to check that laws were in keeping with the constitution, also follows from this.

On the other hand, in Europe (where the political and constitutional vicissitudes were far more complex than in the United States) the road leading to the recognition of full primacy of the constitution was much longer for two reasons: 1) given the absolutism which had prevailed up till then, the most immediate preoccupation was the restructuring of political power (particularly of the King's power); 2) it was not until the 20th century that there was the will or the ability to institute judicial supervision of constitutionality.

3. In the 20th century, the material concept of the constitution was to gain ground; it was adopted and used by various political systems and consequently came to have a plurality of subject matter.

The constitution in the material sense, having originally been linked to legal rationalism, contractualism and liberal individualism, became separated from these concepts and came to be inspired by other philosophies and ideologies, the aim being to obviate the risk of its scope being considerably reduced. It became separate and became a relative and then a neutral concept (which does not, however, imply indifference as to values). It is the state's statute, whatever that may be, whatever its constitutional type.

This explains why, in addition to the subject of its provisions, it gives increasing attention to the idea of law or of institutions, to schemes specific to various political systems, to basic principles which every constitutional rule should respect.

There is not, however, a return to the simple institutional constitution as the objective is still to structure the powers of the state in their entirety, its organs and its workings, as well as those aspects of the organisation of society that have political implications. There are no similarities between the non-liberal constitutions of the 20th century and the Basic Laws that preceded liberalism.

As the state is both a community and a power, the material constitution is never merely a political constitution limited to political organisation. It is also a social constitution, laying down the rights and duties of the community vis-à-vis the authorities or society in its political form. The legal rules governing the state are always tantamount to the rules governing political power and society - that is, the individuals and groups of which it consists: a society in a dialectic with power and unified by that same power. And, being the constitution of the state (in itself) and the constitution of the law of the state, the material constitution necessarily deals with both power and the society subject to that power.

Even liberal constitutions - at first sight further from this image - were no less concerned with society, in that they dealt with freedoms and property. And all, or almost all, the constitutions of the 20th century have broadened their scope to become guarantors not only of human rights, the rights of the citizen and the worker, but also of objective principles of society, by permitting or requiring state intervention in the economy, and by refashioning public and private institutions.

In short, the constitutional is to be found wherever one finds the political. Consequently, if the political field broadens (for reasons it is not necessary to go into here), the constitutional field will necessarily broaden too.

4. The variety of possible contents of the constitution makes it not only possible but advisable to classify the contents.

One of the most representative classifications was put forward by KARL LOEWENSTEIN, who adopted the criterion of "the ontological analysis of the extent to which the power process is in keeping, in practice, with the constitutional rules", and is based on the argument that a constitution is what the holders of power make of it in practice, which, in turn, depends to a great extent on the political and social environment in which the constitution has to be applied.

On the basis of this criterion, there are normative, nominal and semantic constitutions. The first are those whose provisions dominate the political process, which adapts and is subordinate to constitutional rules. The second are those in which the provisions are not adapted to the dynamics of the political process; they therefore have no real existence. The last are those whose ontological reality is simply the formalisation of the existing political power situation for the exclusive benefit of the de facto holders of that power. While normative constitutions genuinely limit power and nominal constitutions, although not limiting it, aim to do so, semantic constitutions serve only to establish and make durable the intervention in the community of those who actually dominate it.

It should be mentioned that LOEWENSTEIN'S constitutional taxonomy was developed with an ideal constitution as a starting point and not the interweaving constitution/constitutional reality dialectic; this produces an axiological classification dependent on conformity between the normative constitution and western constitutional democracy. However, it is also true that this classification brings out the various functions of the constitution in relation to the original model of the modern material constitution - the liberal constitution, limiting power and protecting rights. Furthermore it helps to show the different degrees to which the rules and institutions of a given constitution have been translated into practice.

Whatever view is taken of political reality and irrespective of the functions which all constitutions have in one way or another, there are undeniably constitutions which are the (concrete) foundation of the authority of those in power and others which are primarily the instrument they use to act: constitutions which enshrine fundamental rights and freedoms vis-à-vis or against the government and constitutions which instrumentalise them to the government's ends, constitutions with some intrinsic meaning and value and constitutions subject to the political and ideological situation.

5. A common distinction designed to cover a long series or even various series of constitutional contents is that drawn between statutory constitutions and programmatic constitutions.

Statutory or organic constitutions are those which deal with the government, its organs and the political participation of citizens; those which concentrate on the form and system of government without (at least apparently) dealing with the economic and social system. Programmatic or doctrinaire constitutions are those which lay down, in addition to political organisation, state programmes, directives and objectives in the economic, social and cultural fields.

The distinction should be approached with some caution for the following reasons. Firstly, it does not coincide with the distinction between political constitution and social constitution. Second, although the ideological factor is more obvious in programmatic constitutions, it is nonetheless also present in organic constitutions. The decision to opt for one or other form of organisation and the inclusion or otherwise of a right to, or a form of ,state intervention in the economy indicate, in themselves, a certain ideology. Finally, there are no neutral constitutions; what there are are constitutions which, because they aim at one or other form of organisation, are either pluralist or not because they allow or exclude the dynamic co-existence of all groups and ideologies.

In fact, every constitution contains both organic and programmatic elements. The distinction essentially concerns their respective weight, the way they are combined, the degree to which they are realised and the interpretation they are given by case law and academic law. Liberal constitutions, however, tend to be more statutory or organic and Marxist-Leninist constitutions (like the constitutions of many authoritarian régimes of other kinds in Asia and Africa) are more programmatic or doctrinaire, constitutions of social democracies being constitutions which seek a systematic balance between the various elements.

A structural analysis of constitutional rules looks at the question differently. It distinguishes between basic rules, rules governing competence and procedural rules, between prescriptive and programmatic rules and rules which it may or may not be inherently possible to apply. In programmatic constitutions, the programmatic provisions are numerous, but there are also rules about the economy and society, very marked by doctrinal or ideological considerations and having the character of prescriptive provisions.

6. Another classification based on the content of constitutions is that which divides them into simple and complex or compromise constitutions. Here, it is not so much the nature of the provisions that is considered but rather the unity or plurality of the material principles or basic principles which served as a basis for the material constitution. Compromise constitutions existed from the constitutional monarchy in the 19th century until Weimar, and most of the post-war Basic Laws are of this type.

Strictly speaking, no constitution is really simple. All contain at least two principles which a priori may or may not be compatible. Whether a constitution is simple or a compromise depends on the circumstances connected to its origins, and implementation and the accompanying vicissitudes. It depends on the absence or presence - not in abstract terms, for lawyers, but in concrete terms, for those involved in political debate and citizens in general - of a conflict between the foundations of legitimacy or between plans for collective organisation that the constitution must resolve on the basis of some agreement, depending on the way political integration is envisaged.

Similarly, no compromise constitution consists of a body of principles set down side by side without any possibility of practical harmonisation by legal interpretation, or dynamic basis for the functioning of institutions. The principles of which every constitution consists are structured in accordance with a certain tendency and, and least as far as the legitimacy of the constitution is concerned, there is always (when the constitution is drafted or when it is tacitly or explicitly amended subsequently) one principle which prevails over all the others. Compromise constitutions allow opposing ideas and tend to co-exist, but they can only survive if the institutions principally concerned accept a certain guiding principle for the political process (be it the principle of monarchy in the constitutions of the German constitutional monarchy or the democratic principle in those of the social democracies).

II

7. A situation similar to that which we have seen in connection with the political constitution exists in the case of the economic constitution. I repeat, every state, by the very fact of its existence, has a constitution. However, it was only at a particular moment in history that the material concept of the constitution took shape and documents called "Constitutions" appeared. In the economic field, every state, before or after constitutionalism, has had an economic constitution in the form of basic principles governing the relationship between the political authorities and the economy. It was only more recently though that the theory of the economic constitution was developed.

Before constitutionalism, the economic constitution of the state contained elements concerning corporate economic organisation and state intervention in industry and foreign trade. The liberal revolutions called this economic set-up into question, with the result that this type of state intervention was not provided for in the formal constitution.

Although the almost total absence of economic rules in liberal constitutions reflects the lack of state intervention in the economy, it certainly does not mean that there were no economic constitutions in the age of liberalism. In liberal constitutions we find provisions which have a direct or indirect effect on the economic order (for example, the sanction of ownership, freedom of trade and industry, the abolition of the old economic systems). Furthermore, the fact that the liberal state did not intervene - did not set out to correct or direct certain economic mechanisms - meant that it accepted the existing economic order.

Consequently, the economic constitution corresponding to the liberal constitution is an economic constitution of free competition, freedom of trade and industry, absolute ownership, free will, the principle of the contract, and no intervention by the state to safeguard workers' rights.

However, the question of the economic constitution as a specific issue attracting the attention of researchers and politicians arises only when there is a radical change of attitude and people begin to declare that the state not only <u>can</u> but <u>must</u> intervene actively in the economy in order to transform it and remodel it; it is only posed when constitutions contain schedules or provisions that can pave the way for this new position of the state and when the courts begin to be confronted with their implementation. It is an issue which arises in various types of constitution in different systems in the 20th century - be they Soviet-type systems, Marxist-Leninist, social democracies or authoritarian régimes.

8. The first constitution (still in force today) to represent such a change was the Mexican constitution of 1917, with its provisions concerning labour, social security and agrarian reform, particularly the long article 27.

But it was the Russian (Soviet) constitution of 1918 which represented a total change of course in comparison with the previous liberal constitutions. I need hardly say why - especially in the town in which we find ourselves. It represents a complete change of course in that it seeks to change economic relations down to the last detail, and in that it is based on an ideology completely opposed to liberalism, as it rejects the market and hands over to the state the ownership of the means of production. With a few minor variations, the same principles are to be found in all socialist constitutions, of which those of Cuba, China, North Korea and Vietnam are still in existence today.

The characteristic of these constitutions is the primacy of the economy, since even the law, in itself, is worth nothing. It is the economic system which governs the legal and political systems. It follows from this that rights and freedoms are subordinate to economic rights and that political organisation is dependent on economic organisation (Chapter II of the "Declaration of the rights of the working and exploited people " illustrates this very clearly).

While liberal constitutions seem to ignore (or pretend to ignore) the economic constitution, the Marxist-Leninist constitutions concentrate the whole constitution (the cultural constitution, the administrative constitution, etc., as well as the political constitution) in the economic constitution, which absorbs all the others. The economic constitution is all because the economy dominates everything.

The Weimar Constitution of 1919, which was the first republican German constitution, and was to become the model for the social democracy, is different. In addition to a quite comprehensive list of rules concerning education, the family and culture, this constitution contains a chapter devoted specifically to economic organisation and begins with the following proclamation: "the economic organisation of the country must be such that the principles of justice are applied, in order to ensure everyone of an existence in keeping with human dignity". It goes on to say, "It is within these limits that the individual's economic freedom must be guaranteed.".

The main themes of the Weimar Constitution were to find their way into many other Basic Laws, to varying degrees and with very different political and constitutional intentions. For example:

the Spanish Constitution of 1931;
the Brazilian Constitutions of 1934, 1946 and, especially, 1988;
the Preamble to the French Constitution of 1946 (maintained in the Constitution of 1958);
the Italian Constitution of 1947;
the Bonn Constitution of 1949;
the Venezuelan Constitution of 1961;
the Portuguese Constitution of 1976;
the Spanish Constitution of 1978;
the Ecuadorian Constitution of 1979;
the Peruvian Constitution of 1979;
the Colombian Constitution of 1988.

None of these constitutions breaks with the market economy, but they all seek to influence the market and impose limits on it and all proclaim the subordination of economic power to democratic political power. None of them abolishes private property, but all subordinate it to the needs of society. None of them calls into question political freedoms in the sense of the separation of powers, pluralism and parliamentary representation; all, however, declare and aim for effective social rights for workers and citizens in general.

9. Perhaps I might describe the more recent experience of my own country, Portugal. I will very briefly describe the present constitution, which dates from 1976.

It is the most extensive and complex of all the Portuguese constitutions and bears the mark of the dense, heterogeneous political process of the period when it was drawn up. It condenses the contributions of parties and social forces in the midst of a struggle finding its inspiration in several international ideologies and reflecting, needless to say, Portugal's constitutional history.

It is at the same time a constitution protective of rights and one preparing for the future development of society. If one remembers the nature of the authoritarian régime which ended in 1974 and the actual or potential differences of approach in 1975, it can be seen that the constitution was greatly concerned with the fundamental rights of citizens and workers and with the separation of powers. Having originated, however, in the midst of a crisis of industrial civilisation and under the influence of various socialist and related tendencies, it strove to infuse new life into, and enrich, democracy and increase real equality, participation, intervention and socialisation, all in pursuit of a great vision that was somewhat utopian.

The 1976 Constitution is a post-revolutionary constitution and a constitution based on compromise. In the economic field this resulted in four different phenomena:

1) the coexistence (either in competition or in conflict) of three types of ownership of the means of production - the public sector, the co-operative sector and the private sector;

2) the distinction between nationalisation and collective appropriation of the means of production;

3) the coordination of market (defined in terms of "balanced competition between businesses") and planning (which is imperative only for the state sector);

4) the simultaneous recognition of private initiative, community ownership and joint worker/management control.

The compromise has, however, been the subject of different interpretations, the most important of which contradict one another completely. The interpretations of those who emphasise the constitution's socialist or collectivist tendencies (either to defend or to criticise them) may be contrasted with the interpretations of those who stress its liberalising tendencies. In particular there is the interpretation which sees socialism as taking precedence over democracy and there is another which, on the contrary, subordinates socialism or economic democracy to political democracy.

The argument which soon prevailed - and which I have always defended - is that political democracy and economic, social and cultural democracy are intimately related, the former, however, being supreme. The courts have always leaned in this direction when they have been

called on to scrutinise laws implementing the Constitution. The three constitutional revisions, which took place in 1982, 1989 and 1992, have confirmed this. They reinforced the role of private and co-operative initiative and, in 1989, as a result of the revision, the provision forbidding the reprivatization of industries nationalised between 1974 and 1976 was abolished. Finally, in 1986, Portugal became a full member of the European Economic Community.

Four important conclusions, which all seem equally applicable, mutatis mutandis, to other countries, can be drawn from the experience of the Portuguese economic constitution:1) the different degree of effectiveness of the programmatic constitutional provisions (as is the case with a great number of the provisions of the economic constitution) as compared to the prescriptive provisions, although the programmatic norms are also legal norms; 2) the disadvantage of ideological proclamations and their limited importance; 3) the necessity of following up the implementation of constitutional provisions in the overall framework of the legal system and of the political and economic processes; 4) a pluralist democratic constitution's potential for adapting to new circumstances without breaking the continuity of these essential elements.

III

10. Finally, I would like to clarify and specify my view of the meaning of the constitution in relation to the great questions of law and the state.

Firstly, as part of the legal system of the state, the constitution both models and is modelled by relationships with society; it is at the same time the result of and a factor in political integration. It reflects the formation, the beliefs, the psychological attitudes, the geography and the economic conditions of a society and, at the same time, gives the society a particular character. It acts as an organising principle, laying down the rights and duties of individuals and groups, governing their behaviour, rationalising their reciprocal positions and can be either a conservative or a transforming influence on community life as a whole.

However, because it is the constitution, the basic law, the law of laws, the constitution is much more than that. It is the immediate expression of basic legal values accepted by the political community or dominating it, the seat of the victorious idea of law in that community, the frame of reference for the government which claims to serve such an idea, the ultimate instrument to which the citizens have recourse to guarantee their security vis-à-vis the government. Rooted in the sovereignty of the state, it becomes a bridge between the internal order and the international order.

The interaction - between transcendent ethical principles on the one hand and structures, the concrete situation, the dynamics of the life of a people, on the other - which affects any positive law, is shown to be very powerful here because of the triple function of the system of constitutional norms - institutionalisation, stabilisation and preparation for the future - and because of its specific influence on the other norms and on all acts of government.

The constitution must constantly be compared with principles and is affected by them to varying degrees. It must always be conceived in relation to the political, economic, social and cultural reality which underlies it and which is constituted not only of facts but also of opinions, ideologies, political attitudes and of a whole civic, constitutional culture, and this culture, in turn, refers back to higher principles (which means that value, constitution and constitutional reality are closely interrelated).

The constitution (or rather, the richer, more complex concept of constitutional system) does not enshrine all values and does not, in itself, constitute the supreme value. Values sweep over it but it is not diluted by them and does not absorb them. Consideration of the most precious human values and the role of any positive system - a role which is, in the final analysis, precarious and transitory - requires a distinction to be made between the various fields concerned. In our complex, divided and conflictual world, it seems impossible to eliminate this distinction, which alone makes it possible to contest the commands of the constitution when the incompatibility is irreducible.

However, the pursuit of values must not be confused with any sort of subjectivism; values are only effective if they are objective and durable. The concept of law on which the material constitution is based necessarily appears as an idea of community, as the way in which a community sees its system and destiny in the light of legal principles.

While any concept of law is inherently based on a sense of justice, it also appears to be situated in time and space and dependent on those parameters; the refraction will be in proportion to the activism and ostentation of the ideology. In the context of ideological antagonism and even competing legitimacies (such as we find in the 19th and 20th centuries), it is sometimes possible for the concept of law which goes into the constitution to include rules and forms of organisation whose distance from a certain ethical principle are obvious to a large part of the community or even, deep down, to the whole community. It is also possible for the very concept of law or the legitimacy used as an argument by those who hold power, although it is recognised and obtains the consent of the community at first, to end up losing support and, in time, to be rejected.

Today, the concept of the constitution has become neutral, one on which different political, economic and social contents have been grafted. This has resulted in different types of constitution. The actual constitution of each people, - the instrument governing its politics - is not and cannot, however be neutral, unbiased and unaffected by judgment, in either the citizen's or the lawyer's eyes.

All that is presented as constitutional is not necessarily deserving of the name (although it is not easy to proclaim the non-conformity of a particular provision, and a refusal to comply with it must always be weighed up carefully in the light of other values and interests), just as not everything decreed by the constitution actually becomes constitutional; the reason for this is that it may be inappropriate, lacking in balance or irreconcilably contradictory to other provisions. The constitution can also change direction as a result of the political interplay resulting from its implementation or taking place parallel to it.

In the final analysis, a constitution does not come to life or remain alive unless the will to make it do so is in harmony (not only intellectually, but especially in emotive and existential terms) with the gist meaning of its principles and norms, i.e. when the will of the constitution (KONRAD HESSE) goes hand in hand with the constitutional feeling (LUCAS VERDU).

11. As far as the economic constitution is concerned, although it is not possible to define this constitution in purely economic terms, it is impossible to construe the meaning of the provisions it contains without constantly comparing them with reality by checking whether, and is so how and to what extent, the latter corresponds to them. This does not mean that the constitution's role is abandoned in the light of reality. It is simply a question - in this area more than in any

other - of trying to build a bridge, to establish a means of communication, to obtain a more flexible view of the relationship between constitution and constitutional reality.

Furthermore, and the point is very important, the economic constitution is always part of the constitution: it is a group of legal provisions and institutions. Consequently, the concept of the economic constitution can be easily distinguished from that of the economic system, economic structure and the economic order in the sociological sense. A distinction must likewise be drawn between the problems of the economic constitution and the economic problems of the constitution, that is, problems of economic judgment, the interpretation and implementation of the provisions of the constitution, and, more generally, its strictly economic meaning.[2]

One of the dangers of modern theories of the economic constitution, the social constitution, the administrative constitution, the cultural constitution, etc. is that they lead to fragmentation of the constitution into as many constitutions as there are fields, with the result that different methods or criteria for interpreting the provisions in each of these fields, or each part of the constitution, may be applied. It may then be completely impossible to find any unity in the system, or it may be concluded that there are insurmountable contradictions which can be resolved only by breaking with the constitution or through the will to interpret of the judge or Court responsible for monitoring constitutionality.

The risk can be avoided if we agree that when analysing the economic constitution we must always take the constitution as a whole as the starting-point and interpret it from a systematic overall viewpoint. The economic constitution, the social constitution, the political constitution, etc. are not islands; they are all part of one and the same continent.

12. The link between the economic constitution and the other parts of the constitution becomes more obvious when, for the purposes of interpreting and implementing them, reference is made to the provisions concerning fundamental rights, in particular those concerning social freedoms and rights, and those which govern the economy.

In the case of a social democracy, possible - and, therefore, necessary - freedom in the present cannot be sacrificed to future objectives, however just they may be. Conditions necessary for freedom must be created but their creation and dissemination are meaningless except in a system of freedom, because freedom (like equality) is indivisible; limiting the civil or political freedom of some (even if they are in a minority) so that others (even if they form the majority) can have new rights will lead to a reduction of freedom for everyone.

The target must be equal freedom for everyone, built upon the correcting of inequalities and not achieved in return for a form of equality without freedom, that is subject to the material and procedural limits of the constitution. Freedom must also be open to the changes brought about by universal suffrage within a pluralist political system.

Despite all the vicissitudes our century has known (or perhaps because of them), we are witnessing the widespread intrusion of elements which have their roots in liberal constitutionalism. The problem of the division and limitation of power does not only concern

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[2] *Cf. JAMES BUCHANAN, Constitutional Design and construction: an economic approach, in Economia, 1979, p. 293 ff.*

pluralist democratic systems: it is also found in other systems and with other types of constitution, either because it is a vital issue concerning the organising structure of the state or, at any rate, because the community comes to compare a political system based on the postulate of separation and limitation with one inspired by a different or opposing principle.

It is not a coincidence that new constitutions and compromise constitutions only seem able to protect individual and institutional rights without collapsing and to shape the community's future without causing upsets when they satisfy three basic conditions; a) the greatest possible rigour in the provisions concerning fundamental human rights and freedoms and the rights and freedoms of citizens, workers and the groups they belong to, the only task left to the law being that of implementing and interpreting them; b) openness, within the limits allowed by their normative force, of the provisions concerning the economy, society and culture, which must be the subject of successive formulations corresponding to manifestations of the political will, organised constitutionally; c) the establishment of legal and political machinery to enforce constitutional provisions.

From this angle, there remains a dialectical conflict between the ideal concept of the (liberal) constitution and all the other contents of the constitution, and between the state governed by the rule of law and other constitutional types of state.

b.The legal dimensions of the economic model in the present Constitution of the Russian Federation and in the new draft Constitution - Y.A Danilov, Constitutional Commission of the Russian Federation

It is, I think, exactly the right moment to be holding a joint seminar on the problem of the transition to the new economic model, and how it is to be reflected in the constitution. The representatives of the Venice Commission, together with our Russian colleagues, have certainly chosen the right topic, and a promising one at that. At the meeting between our leaders, the President of the Commission, Mr. La Pergola and the Deputy Chairman of the Supreme Soviet of the Russian Federation and Deputy Chairman of the Constitutional Commission, N. T. Ryabov, it was pointed out that this seminar topic is about the very essence of the constitutional processes in the Russian Federation, and goes to the heart of much that is now happening there.

Let me recall that the present Constitution of the Russian Federation was adopted almost 15 years ago, on 12 April 1978. This was a coherent and unified document which reflected the realities and values of that time and gave an appropriate place to the economic pillar of the constitutional edifice. How shall we describe this economic structure? What was the prevailing economic model like, and how was it reflected in the Constitution? Along what road have we been travelling?

Above all, the Constitution proclaimed that the country's economic system was to be based on socialist ownership of the means of production. Two categories of socialist ownership were recognised.

The first and basic category was called State ownership. The land with its mineral wealth, water and forests belonged exclusively to the State. The State owned the basic means of production in industry, construction and farming; it owned the means of transport and communications, banks, the property of State-run commercial, public and other enterprises, the municipal housing stock and many other things. It should be emphasised that State property was regarded as the common property of the entire people, and no real attempt was made to divide it among the various parts of the Federation, for instance the autonomous republics.

The second category of socialist ownership defined in the Constitution was ownership by collective farms and other co-operative organisations. Their property was in fact State-owned, although not theoretically within the category of State property. In case anyone doubts this, I will quote a typical example.

In the agricultural sector, we had essentially only two kinds of farms: the collective farms (kolkhozes), which legally did not belong to the State, and the Soviet farms (sovkhozes) which were State property. However, both the sovkhozes and the kolkhozes were easily and simply transferred, by mere administrative decision, from one form of ownership to the other. In most cases, the views of the workers on the farm in question were treated as irrelevant, and in fact none of the workers were particularly indignant about this, because since the Stalin days they had been well aware that for them nothing would really change; the producer would be no less alienated from the property than he had been before. For the sake of completeness I should add that there were even campaigns to turn kolkhozes into sovkhozes and the other way round; I am sure many people here can remember them.

Ownership by trade unions and other social organisations was also recognized under the Constitution, and was regarded as socialist ownership. Although in a formal sense they were not State organizations, in fact the trade unions and many other public bodies, together with their property, belonged to the State.

The Constitution neither contemplated nor admitted private ownership of any kind.

Property purchased by individual citizens from their wages was recognised. Under the Constitution, individually-owned property did not extend beyond household articles, items for personal consumption or for household use, a home and savings from wages.

As already explained, land was owned exclusively by the State. It was provided for the use of the collective farms free of charge and without any time limit. As for the people themselves, they could use, but not own, only very small individual plots of land. No land was available to individual citizens for purposes other than running subsidiary smallholdings, carrying on horticulture and market gardening, and building individual housing.

Self-employment was allowed under the Constitution, in so far as it comprised only the personal labour of the citizen concerned and of members of his family. Self-employment could be practised in a number of fields, including agriculture, consumer services and certain others. According to official figures, during those years self-employment accounted for around one per cent of the active population.

The country's economy was run on the basis of extremely detailed economic and social development plans, and by non-market, exclusively command-administrative methods. The State economic apparatus embraced all branches of production, distribution and exchange throughout the national territory. Here it should be noted that the word "distribution" appeared in an earlier and more prominent place in the Constitution than the word "exchange", and only the word "production" took precedence, since the authors of the Constitution understood that before distribution could happen, something must first be produced.

All this was the justification for confirming in the preamble to the Constitution, the public ownership of means of production and for declaring in the same document the aim of building a classless Communist society, perfecting the socialist model of society and transforming it into a communist one.

It was from this point, this historical juncture, that we set off on our journey to build a new economic model and incorporate it into the Constitution.

Admittedly, it was something of a slow start. For eleven long years there were no changes in the Constitution, although changes were already under way in the economy, the State and society, and with regard to the legal status of individuals and citizens. And then, in October 1989, a process began which has continued for over three years, right up to the present time: a breath-taking series of amendments to the Constitution along anti-authoritarian, anti-totalitarian, liberal and humanitarian lines. Around 350 amendments have been made, and the Constitution has been perceptibly brought up to date, but a mass of work remains to be done. What does the present Russian Constitution have to say about the running of the economy?

The chapter about the economic system says that in the Russian Federation, the following forms of ownership are recognised and protected: private ownership, collective ownership, State

ownership, municipal ownership and ownership by public corporations. It is noteworthy that for the first time, private ownership is recognised as constitutional.

In our view, however, there is no point in setting down all forms of ownership in the Constitution. Only a civil code, which this is not, would warrant so much detail. In fact there are serious doubts about some of the forms of ownership included in the list. This is especially true of what is called collective ownership, which we regard as an unjustified attempt to bring a plurality of economic sources of ownership under what is essentially a single legal umbrella. Ownership by public corporations is not a simple matter, especially when it comes to defining a legal regime for the operation of particular types of property, such as firms owned by public corporation. The detailed classification of forms of ownership in the Constitution is in fact made on different grounds. For instance, private property is divided between that held by legal persons and that held by individuals. However, public corporations and municipal property-owners are legal persons, and the State may also fall into this category. As a result, property owned by the State and by municipalities, and property owned by public corporations, can and does fall into the privately-owned category. And the term "municipal ownership" means, both literally and in context, ownership mainly or exclusively by cities. Bearing in mind our traditional use of the terms "local self-government", "local councils of people's deputies" and the like, it would have been better to use the expression "local ownership" instead.

However that may be, this represents a serious step forward, and perhaps a decisive one from the constitutional and legal point of view. The rule in the Russian Constitution that the State creates the conditions for the development of the various forms of ownership and ensures equal protection for all of them is part and parcel of this progressive trend in the economic model, and is to be welcomed.

What is missing, however, is the proclamation of the principle of freedom of economic activity, although there is an indirect recognition of it in the statement that the limits of this freedom are fixed by law.

The present Constitution of the Russian Federation, in line with the federative structure of the country, distinguishes first among the various levels of State ownership. They consist, variously, of ownership by the Russian Federation, by the constituent republics of the Federation, by the territories, provinces, and federal cities (ie Moscow and St Petersburg), by the autonomous provinces and by the autonomous areas. The Constitution distinguishes categories of State-owned property, depending on whether the property is held by the Federation or by the various parts of the Federation. However, there is still a great deal to be done as regards the practical delimitation of State ownership.

The Constitution of Russia proclaims that the land and its mineral wealth, as well as the stretches of water and plant and animal life are the common possession of the peoples who live on the territory concerned. It should be noted that in Russian, the word "possession" is not synonymous with "property". I draw attention to this point because the Russian word "possession" is sometimes wrongly translated into English as "property".

It cannot really be claimed as yet that matters of ownership -whether by the State or by anyone else - of land, mineral resources, plant and animal life are clearly resolved in the Constitution. For instance, although according to the Constitution land may be made available by the State not only for use, but also to be held as an inheritance for life or as property, what is actually being referred to here is not land in general, but plots of land, and the boundaries and dimensions of

these plots are to be fixed by the State, since the context here is that of land for the purposes of agricultural production.

This seems to explain the petition, signed by almost two million people, for an all-Russian referendum on the following question:

"Do you agree that the Constitution of the Russian Federation should uphold the right of private ownership of land, ie the unconditional right of every citizen of the Russian Federation to hold, enjoy and dispose of land?"

This wording, of course, has its shortcomings. The right to private ownership of land is mentioned in the existing Russian Constitution, although in a somewhat hypothetical sense, and accompanied by a number of restrictions which are not perhaps as carefully worded as they might be. The demand of the petitioners for an unconditional right of private ownership of land, without restrictions of any kind, is certainly open to objection, since this right, like any other, is not in fact an absolute right, nor can it be. It is also doubtful, under modern circumstances, whether the classic triad of holding, enjoying and disposing suffices to cover all the owner's legal entitlements. For instance, it is well known that in Russian law a legal person who is given property for commercial use is not the owner of the property, although he may hold, use and dispose of it.

Notwithstanding the various shortcomings of the proposed referendum question, it would be a mistake to ignore, like some minor irritation, such an overwhelming expression of public support for it. This is why the Praesidium of the Supreme Soviet of the Russian Federation has suggested, as a basis for discussion, the following preliminary draft:

"Every citizen of the Russian Federation is entitled to hold and acquire land for private ownership. The enjoyment, use and disposal of land must not run counter to the interests of society".

This form of words appears rather more conciliatory and appropriate, although I must again point out that this too is merely a draft for discussion. For instance, for the drafters it is clear that the expression "to hold" includes all the owner's prerogatives, including the right to dispose of property, in this case in the form of land. According to one view, however, the owner's right to the alienation of property should be framed expressis verbis. One should perhaps go along with this.

We should not ignore one further element in the existing Russian Constitution. This is the provision that the State regulates commercial activity. We should say frankly that a very great deal depends on how far, and above all for what strategic purpose, the State intervenes in economic life and plays its necessary regulatory role. It is reassuring that the right to regulate commercial activity is immediately followed, after a comma, by the duty of the State to secure the growth of the market mechanism and to prevent monopolies.

This, then, is how the economic model is reflected in the present Russian Constitution. It is clear that the system defined in the earlier version of the Constitution has been destroyed. But this need not inspire regret, since the system was one belonging to an undemocratic State, law and society.

On the other hand, however, the present Constitution does not yet contain any new comprehensive set of rules for economic life, merely a few fragments, important though they are.

Is there any objective reason for this, or is it merely a coincidence? We are in no doubt about the answer: the contradictions and discrepancies in the present Constitution have arisen in response to the disjointed and contradictory trends in contemporary economic and political life, and to the mentality and psychology of various groups in our society. When many economic and political forces are pulling in different directions, it is inevitably difficult, though not impossible, to implement economic, political and constitutional reforms. At a time of polarisation in society, there are problems involved in moving ahead with these reforms; the path abounds with protracted delays and potential crises - political, economic and constitutional. At this time of crisis, society and the State must be able to identify the proper direction and locate sufficient resources to make progress along the planned route.

The green shoots of the new economic initiatives have grafted themselves on to the tree of an economic model which has been essentially preserved, but which is losing its vital sap. These shoots will probably take, but the end result is unlikely to be very effective or very productive. Many people are arguing that alongside this tree we should be planting others, of different varieties of economic opportunity, with a view to improving the economic environment.

This is the approach adopted in the draft new Constitution of the Russian Federation, the main provisions of which were approved by the Sixth Congress of People's Deputies of the Russian Federation in April 1992. However, in this draft the proposals for excluding State ownership altogether from the economic model, and for prohibiting all State regulation of commercial life were rejected. To a considerable extent, the social achievements of the Russian people are preserved. The very first article of the draft states that the Russian Federation is a social State. Yet the draft specifically denounces social parasitism.

The draft states that in the Russian Federation, supreme value attaches to human rights and freedoms, including economic, social and cultural rights. Everything in the State and in society must express this basic idea.

The draft defines social protection in the Russian Federation as the achievement of equal and just opportunities for personal development, and the attainment of individual and social well-being. Admittedly, some people would prefer to eliminate the reference to justice, arguing from the ingrained notion that justice means real and continuing equality in the material sphere and in all other respects. What this indicates, among other things, is the importance of studying, analysing and fully incorporating in the Constitution all aspects that have a bearing on the individual as a part of the new economic model, and I regret that I did not argue more strongly in favour of including this problem among the matters for discussion. I continue to believe that it would be extremely appropriate to have a report on this subject at our delegate conference.

The draft of the new Russian Constitution states (article 9):

"(1) The social market economy where there is freedom of economic activity, entrepreneurship and labour, diversity and equality of forms of property, their legal protection, fair competition, and public benefit shall constitute the basis of the economy of the Russian Federation.

(2) The State regulates economic life in the interests of the individual and of society".

The same draft article contains a provision to that effect that economic relationships are based on a social partnership between the individual and the State, the worker and the employer, the producer and the consumer. However, there is as yet no consensus on whether this rule should be kept in the draft.

This, in broad outline, is the economic model that emerges from the draft new Constitution of the Russian Federation. This model forms an integral whole; it is consistent and realistic and offers prospects for the future. This is how the legal foundation and underpinning of the economic structure of the future Russia looks at present. And in our view, now that the basic provisions of the draft have been approved it is time to take the next step and adopt the new Constitution of the Russian Federation as a whole.

Of course, as we are only too well aware, there is no magic wand capable of transforming the country in a twinkling. Trying to have everything at once is a recipe for getting nothing at all. But one way or another, the new Constitution of the Russian Federation, the Constitution of a strong, united and democratic State based on the rule of law, will be adopted. This is what we believe in and what we are working for.

c.The constitutional basis of the drawing up of laws in the economic field - Summary of the report by Professor Y.A. Tikhomirov, Deputy Director of the Institute on Legislation and Comparative Law

1. The process of creating a socially-oriented economy is a central aspect of constitutional regulation. In the present constitution of the Russian Federation and the constitutions of its constituent republics, as well as in the draft versions of the new constitutions, provision is made for a body of laws governing action in the economic field. It is planned to strengthen the legislative powers of the official bodies and subjects of the Federation, consolidate the status of participants in the legislative process and reinforce the system and basis of law-making in the economic field.

2. The powers of State bodies at various levels are being constitutionally redefined. At federal level, efforts are still being made to determine the extent of this reform for the legislative and executive authorities. The "vertical" demarcation of the activities and powers of public bodies is determined by the federal agreement and the Constitution. This serves as a basis for the choice of the form and content of legislation drawn up by federal, republic and other official bodies.

3. The classification of the system and types of legal instrument in the economic field is pre-determined by the constitutional classification of such instruments. The relationship between the "legislative basis" and the various republics' laws is proving difficult. Nor has the relationship between laws, sub-laws, by-laws and agreements been an easy one. As a result, the arbitrary resolution of economic problems is hindering the creation of a new economic mechanism and area not least as regards the harmonisation of national laws.

4. The legislative process is defined in the Constitution as a process of identifying and resolving economic problems as and when they arise. But little emphasis is given to the predictive, analytical and informational functions of the legislative process. The inclusion therein of the right of all subjects to initiate legislation (republics, regions, districts and municipalities) increases the chances of improving the quality of laws and ensuring their effective implementation.

5. Observance of the "constitutional parameters" facilitates the effective regulation of economic processes by the law. Any disregard for these parameters, any confusion of the various levels of law-making, any adoption of forms and any enactment of unconstitutional laws has a negative impact on all economic agents, (state bodies) and on the economic behaviour of individuals. Laws which operate consistently help to optimise economic development.

d.Summary of discussions on "The constitutional basis of the economic order"

Are constitutional provisions needed?

The basic question to be asked is whether the economy should be regulated within the rigid framework of the Constitution, and if so to what extent, or if it would not be better left to ordinary law. The Russian participants considered that the Constitution should contain at least the fundamental provisions protecting the weak against the possible abuses of a free market economy.

On the same line of thought, the Constitution should contain provisions guaranteeing the protection of social rights, even though the Courts would not be in a position to apply them directly. It should be remembered that this was part of the Russian tradition, and that the people would not understand a different approach.

Role of the constituent units of the Federation

According to the envisaged structure, the units would have the power to issue regulations on economy and other related matters, respecting of course the provisions of the federal constitution and any applicable federal rules.

It was considered in fact that only at the local level could the specific circumstances of each region be properly assessed, and the appropriate regulations issued. This would nevertheless call for a considerable effort of harmonisation among the regulations of the various units.

Protection of environment

There was indeed great awareness of the close connection between economic activity and environment; several States of the former Soviet Union have already passed laws in this field.

In Russia it is envisaged to grant court remedies to victims of violations of ecologic standards, including the possibility of requesting the freezing of the assets of polluting enterprises.

SECOND WORKING SESSION

Chaired by Professor Mikhail MARCHENKO, Vice-Rector, Moscow State University

Constitutional aspects of property

a. Report by Professor J. Mencinger, Ljubljana University

b. Report by Professor E.A. Sukhanov, Dean of the Law Faculty of Moscow State University

c. Summary of discussions

a.Property and Constitution - Joze Mencinger, University of Ljubljana, Slovenia

1. INTRODUCTION AND SUMMARY

Lawyers and economists think and argue in different ways; lawyers are trained to distinguish and interpret legal opinions, identify salient facts and apply the law to those facts; economists produce models and use simplifying assumptions to make complex problems manageable while looking for the consequences of the legal "rules of the game". The paper is an attempt by an economist to discuss the consequences of constitutional rules on property rights and of their changes upon economic performance. The paper deals with illusions. First, with the illusion that a socialist society could become efficient. Second, with the illusion that privatization and introduction of market without appropriate legal framework can transfer the former socialist countries into welfare states.

For a socialist society, acquisition of income based on the ownership of the means of production - the essence of capitalist exploitation - was unacceptable; this is why they were owned by "the people", the state, or society. A mere ban on capitalist exploitation however creates allocational inefficiency; for the "exploited" are better off than the "unexploited". Furthermore, an economy in which private ownership of the means of production is permitted is also dynamically more efficient than an economy in which it is banned or restricted.

Privatisation has been considered the cornerstone of transition; every single government of the former socialist countries declared its firm commitment to full scale privatisation. It is assumed that privatisation will improve efficiency in the use of the assets, enable fairness in the distribution of wealth and welfare, and serve in the abolition of the monoparty system. In fact, with increased efficiency being remote and fairness ambiguous, the aim of privatisation often reduces to very transparent political goals - not only to abolish the foundation of a monoparty system but also to strengthen the new political elite.

The constitutional provisions on property differ, though the proclamation of the inviolability of private property, a possibility of fairly compensated expropriation if there is public interest, and a guarantee of inheritance form the substance. As a rule, the constitutional provisions of the "newly born capitalist countries" return to the principles of French revolution, and they are often less restrictive than the contemporary constitutions of older capitalist countries. Special and more restrictive treatment of ownership of land also characterises the constitutions of the former socialist countries.

2. THE PARADOX OF EXPLOITATION

Two basic criteria are used in comparative economics to distinguish among economic systems: ownership of the means of production (private or social), and management of the economy (decentralised or centralised). These two criteria are explicitly or implicitly embodied in the constitutional provisions. Thus, the Declaration of the Rights of Man and of the Citizen, adopted on August 26, 1789, and a constituent part of the French Constitution of September 28, 1946, enumerates the right to property among "natural and imprescriptible rights of man" together with liberty, security and resistance to oppression (Article 2 of the Declaration). According to Article 17 of the Declaration:

The right to property being inviolable and sacred, no one shall be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of a previous just indemnity.

Similarly, Article 4 of the Constitution of the Union of Soviet Socialist Republics of December 5, 1936, which voiced the social preference function of a socialist economic system maintained:

The economic foundation of the USSR is the socialist system of economy and the socialist ownership of the instruments and means of production, firmly established as a result of abolishing the capitalist system of economy, the private ownership of the instruments and means of production, and the exploitation of man by man.

Socialism was thus defined as a system based on socialist ownership of the means of production. It was supposed to do away with the shortcomings of the capitalist economy, above all capitalist exploitation and inefficiency. The foundation of the belief was Marx theory - derived from Ricardo's labour theory of value - of surplus value and capitalist exploitation. Because exploitation is an inherent attribute of private property, one can do away with it only by doing away with private property. This is why means of production are to be owned by the state, or society. It was believed that a socialist economy would also resolve other problems of the capitalist market economy allegedly deriving from "the contradiction between social reproduction and private acquisition", from the dominance of private gains over social gains, and from market uncertainties, defective coordination and other shortcomings.

Yet 70 years of socialism indisputably proved that socialist economies were less efficient than capitalist ones. The concomitant of the "exceptionally rapid" economic developments of socialist countries were shortages, queues, and greyness. Countries describing themselves as socialist could not boast of achievements in other areas either. An exception was perhaps greater economic equality, though even there the abolition of capitalist exploitation led to "equality in poverty". In the 1980s, the wave of reforms and re-evaluations of "revolutionary achievements" engulfed all socialist countries. It was first hoped that they could at least follow the capitalist countries by adopting economic reforms by means of which they more or less "capitalised" socialism. This proved to be impossible. Finally, after 70 years of building a society based on the principle "from each according to his ability, to each according to his work" socialism collapsed verifying that its first critics were right after all, when they tried to prove, even in the 1920s, that a socialist economy cannot be efficient.

There are two types of efficiency - static (allocational, Pareto) efficiency, and dynamic efficiency (X efficiency, efficiency in the use of resources).[3] The root of static or allocational inefficiency of the socialist countries is the ban of capitalist exploitation. To illustrate that we can use a simple example (Mencinger, 1989).

[3] Allocational, static, or Pareto efficiency requires, concerning production, an allocation of inputs such that no greater quantity of one product can be produced by reallocating them without reducing the quantity of another product; or concerning distribution, a distribution of goods such that no-one can gain by redistribution without somebody else losing.

X, or dynamic efficiency, or efficiency in the use of resources requires that the product be produced at minimum cost, that is, without unnecessary losses of resources. The X efficiency of an economy thus increases if the quantity of output grows faster than the quantity of input, and decreases if output grows more slowly.

Let us assume that we have two countries: A and B. In country A private ownership of the means of production is permitted, in country B it is banned. Let's further assume that there are two producers and consumers at the same time: an entrepreneurial and able X and less able Y. Both "behave in a rational, self-interested way" (Veljanovski, 1990, p.34). The former produces two units of output, the latter one; thus giving a national economy output of three units. Two units suffice for survival, one each for X and Y. For the economy to function the state too is needed, which uses half a unit, so that economy can save half a unit.

If X and Y lived in country B, X would "according to his work" get two units, Y just one; half would be taken from X for the state, and he could not use the remaining half of his second unit to buy means of production. To prevent him becoming a capitalist, he would have to consume it.

If X and Y lived in country A, half of the second unit produced by X would again be taken from him, but the remainder he could consume or use to buy a machine. By owning it (means of production) he would become a capitalist and could also employ Y who will then produce more than one unit of product. X will take this additional output from Y as "surplus value" and will thus get more than in country B. But to induce Y to agree at all to "capitalist exploitation", X will have to surrender to Y a share of the "surplus value", and the state too will take part of it from X and will perhaps redistribute it to Y. Anyway, the "exploited" Y will not receive less than he would have done in country B, where he is not exploited or than he would have received in his own country if he had not taken a job with X. Economy A in which X exploits Y is obviously allocationally more efficient than economy B in which Y is not exploited. In the worst case X has more, and Y has no less, and this is sufficient for allocational efficiency. A ban on capitalist exploitation causes allocational inefficiency, for the "exploited" are better off than the "unexploited".

An economy in which private ownership of the means of production is permitted is also in the use of resources more efficient than an economy in which private ownership is banned or restricted. There are diverse reasons for that. Let us however again consider a simple case; the effects of the socialist type restriction - ceiling on land holding, an economically damaging relic of the "primeval fear" in the restoration of capitalist relations in agriculture, upon the efficiency in agriculture.

According to the theory of production a given quantity of output can be produced using various combinations of inputs, which are mutually (technically) more or less substitutable. If in addition we know their prices, then for each volume of output we can determine a combination of inputs that will minimize the costs per unit of production: in this case production is efficient. Increasing the amount of one input (i.e. labour) without altering the quantity of another leads to smaller and smaller increases in output; this is what is known as diminishing marginal returns. If all inputs employed in agricultural production (labour, machinery, land) were completely divisible, the optimum combination of inputs once selected, would be the optimum for all output levels; an output doubled would require doubling the quantities of all inputs. Since inputs are indivisible, they are utilised to differing extents at different levels of output. The level of technical substitutability is also not constant and relative prices of inputs change. Consequently, the optimum combination of inputs also changes. The less they are utilised, the farther production is from the optimum, and the higher is the cost per unit of output.

The theory of production distinguishes between the optimum output level of a given production unit and the optimum size of the unit. By restricting the use of an individual factor (the area of land by land ceiling) we determine the size of the production unit: whilst within such a unit, by

combining unrestricted factors we determine the optimum output level of the given unit. Because the optimum of the given unit is different from the optimum of the optimal unit, all types of restrictions on the use of an individual factor - the number of workers employed, value of machinery, area of land - that prevent the adaptation of economic units to the optimal size and which characterised socialist countries are damaging; they diminish the efficiency in the use of resources. The consequence is that the economy consists of production units which are of the wrong size (too small or too large) and do not adapt to technological changes.

Furthermore, even formal (legal) ownership in agriculture and other activities in which, owing to the nature of the production (specific combination of production factors), the more efficient form of production is that in which labour, ownership and management are directly linked is the most important factor of decision making on work and management. It is precisely ownership that determines the eagerness to work and to manage of the individual who works and manages at the same time.

It would of course be wrong to believe that Soviet theorists in the thirties or theorists in other EE countries after the Second World War believed that collective farms would be more efficient than peasant farms, and socialist enterprises in services more efficient than private craftsmen. Collectivisation and nationalisation of these non-capitalist forms of production were aimed primarily at eliminating social pluralism and potential political competition.

Formally, legal ownership relations that are decisive for efficiency are not decisive for distribution of the social product, for it is possible to ensure, by the legal system and state intervention, that a proportion of the income from capitalist exploitation is redistributed and that greater equality is thereby established. An indirect, ex-post creation of greater equality is the only realistic way to secure economic efficiency with a high degree of equality and general prosperity, instead of equality in poverty. The fundamental problem of the countries that based their development upon Marxism, was the excessive emphasis on the ownership of the means of production as the source of inequality, and a total neglect of ownership as a factor of efficiency.

3. COMMON FEATURES AND PERPLEXITIES OF TRANSITION AND PRIVATISATION

The transition from a socialist to a market economy, an essential counterpart to sweeping political and ideological changes has proved to be a painful process with many setbacks, and social and political tensions emerging from the ensuing redistribution of income, wealth, and power. These consequences could have been expected. The transition started without a clear picture of the actual situation, without a fully worked-out scheme of a new economic system, and without suitable economic and social arrangements in place. Instead, there were illusions that the market mechanisms would transform former communist countries instantly into welfare states. Consequently, all declared an uncompromising faith in capitalist market mechanisms; the firmer, the fewer market institutions they possessed, and every single government declared its firm commitment to full scale privatisation of state or socially owned firms. The first results were "disappointing". Unwarranted expectations didn't materialise; many people have suffered substantial reductions in their standards of living, production has declined, unemployment has increased, and distribution of income has worsened. The enthusiasm of Western countries over political freedoms and economic transition of the former socialist countries also moderated when they realised that the amount of money needed to cope with a nostalgia for communism's cradle-to-grave social benefits exceeded financial resources.

How to restructure the existing ownership design into a design that matches the mechanism of a market economy is by far the most intriguing issue of transition. In principle, most property belonged to "the people"- indivisibly. Formally, privatisation is an orderly and legally sanctioned transfer of this property from "the people" - the state, or other public bodies, to private entities - persons, partnerships and corporations.

When one moves away from a formal definition of privatisation to its substance the problems arise and even the definitions change. No wonder. Dictionary of Economics (Bannock, G. et al, 1985), for example, defines privatisation as "the sale of government-owned equity in nationalised industries or other commercial firms to private investors, with or without the loss of government control in these organisations". After transition in the socialist countries had begun, the definition widened to any form of transfer of wealth from the state or socialist sector to the private sector. According to the common view the substance of "privatisation entails a move toward private property and away from, not only government and common ownership, but also from government regulations that limit individual rights to the use of resources" (S.H. Hanke, ed., 1987, p.24, citation in Brzeski, 1991). According to a more radical view: "Only when the use of assets is no longer subject to the test of a putative public or social purpose, but is guided by ordinary profit and loss calculations, can we speak of privatisation" (Brzeski, 1991, p.18).

Sadowski (1991) distinguishes between two understandings of privatisation: a full elimination of state property by transferring it into private hands, and changing the ownership structure by expanding the share of the private sector against that of the public sector, as to make the former eventually dominant. In the latter case, privatisation of the economy can be achieved by expanding the scope of the private sector by providing the appropriate legal framework, or by reducing the scope of the public sector by the transfer of property to private owners. The latter, i.e. the privatisation in a narrow sense, is of interest here. Concerning this latter sense, Bajt (1992) distinguishes two notions of privatisation based on his distinction between the legal and economic concept of ownership (Bajt, 1953). In the legal sense, "privatisation amounts to restitution of private ownership rights in tangible capital in the form both of denationalisation of the previously nationalised private capital (reprivatisation) and privatisation of the state accumulated capital" (Bajt, 1992, p.8). In the economic sense, privatisation connotes the arrangements by which people are allowed to earn their value products. This relates the real issue of privatisation - to increase efficiency, not so much with the legal sense of ownership but more with the responsibility for proper use and maintenance of capital assets. The responsibility aspect of ownership has been, no doubt, neglected in the literature on privatisation and, even more so, in the technical solutions.

It is commonly assumed that privatisation will improve efficiency in the use of the assets, enable fairness in the distribution of wealth and welfare, and serve in the abolition of the monoparty system.

The efficiency assumption is, rightly so, taken for granted; private property is a necessary (as shown above) though, not a sufficient condition for creating an institutional environment that assures economic efficiency. It emerges from "the incentive superiority of private property rights in guiding efficient economic behaviour" (Urban, 1990, 36). Private property rights provide incentives to save, to invest, to look for new products, to innovate production, to use existing resources in an optimal manner, and to bear risks of the decisions. It however does that only if one can find real owners: "those responsible for the proper use and maintenance of capital assets" (Jackson, M, 1992); they cannot be created by a decree. However, warnings such as "to avoid the adverse effects of privatisation in the process of transition, the existing property rights, particularly those of managers, ought to be strengthened rather than weakened and destroyed as

is unavoidably done by the mass privatisation" (Bajt, 1992, 19) appear but contrary to routines in the conventional theories of transition.

The question is how rapidly an institutional environment that assures economic efficiency can be established and in which way. There are at least three gaps that need to be considered; technological[4], institutional, and behavioural.

The technological gap might relatively easily be overcome, though economic efficiency in the former socialist countries decreased drastically after the political collapse, and it might take years before it returns even to the levels before the collapse. Overcoming the other two gaps rapidly seems much more questionable. The development of market institutions in the West has been a gradual process of interactions between economic development, politics, and institutions of civil society. Politics provided an institutional framework for the market and for regulating economic activities. This regulation is needed if the market is to perform better than it performs in Latin America, where capitalism undoubtedly failed to become an efficient economic system and even more so to provide a reasonable distribution of wealth and welfare.

[4] The technological gap of COMECON countries behind the former West Germany was estimated at between two decades for the former German Democratic Republic, a quarter of a century for Czechoslovakia, more than three decades for Bulgaria, Hungary and the Soviet Union and perhaps between four decades and half a century for Poland and Romania (Vacic (1992).

Formally, market institutions similar to those that exist in developed market economies could be established by decrees. Most politicians in the former socialist countries are more than willing to copy such institutions from the West. It is however unlikely that these institutions would operate as they do in the developed market economies. The performance of market institutions crucially depends on norms and patterns of social behaviour created by the institutions of civil society. According to Hare (1991, p.3) "the successful operation and management of a market-type economy is, to a surprisingly large extent, a confidence trick". Agents taking part in economic transactions, repeated or adapted to changing circumstances, must believe that everyone else behaves according to the principles of the society; rather little can be governed by formal rules and contracts.

For these reasons, privatisation itself is a process rather than a move and its economic, social and political consequences are, except in theoretical models, little understood. The sole transfer of ownership to formally private institutions established by the state, and the giving away of the shares of these institutions to citizens amounts to a two stage "paper privatisation" that neglects the real issue (efficiency), and postpones rather than promotes real privatisation for which "we mostly need active instead of passive owners, strategic partners instead of financial investors, and a coherent group of private investors instead of thousands of small owners" (Simoneti, 1991). The efficiency effects of privatisation though certain, might be therefore delayed and lag many years behind the hardship caused by the breakdown of the old system and transition to a new one.

The validity of the second assumption, i.e. that privatisation will bring fairness into the distribution of wealth and welfare is, at least, dubious. Fairness in the distribution of wealth and welfare is an extremely ambiguous concept as illustrated, for example, by the enormous variations of social protection such as pensions and health care, even among the most developed welfare states. The distribution of wealth and welfare, observed in highly developed countries is, as well, an outcome of interactions between economic efficiency, politics and institutions of civil society (Uisitalo, 1992). It is not assured by privatisation of assets or by private property, as again proved by the countries of Latin America.

With increased efficiency being remote and fairness ambiguous, the aim of privatisation in the former socialist countries often reduces to a very transparent political goal - to abolish a monoparty system. Again, it is true that the dominance of private property rights appears the proper basis for a stable political democracy. However, the new political elites "have given a new political meaning to privatisation; it should increase their political legitimacy and compensate for hardships under communist domination" (Privatisation in Eastern Europe, 1992, 7). The speed of the operation, therefore, understandably, becomes the criterion to evaluate the procedures of ownership "restructuring"; it often serves only to strengthen the new political elites. The specific means employed to bring about the privatisation can only in part be attributed to the faith of the new political elites in the supremacy of the market system; they also are in part intended to eliminate political competition by control of the economy.

This is confirmed by observing how technical approaches to privatisation resemble each other or differ. Voucher schemes in Czechoslovakia and Russia should, for example, enable a large proportion of the equity to be given away to all adult citizens directly and in combination with mutual funds. Hungary followed the example of privatisations in Western countries and emphasised the sale option. Poland stressed creation of institutional owners. Croatia "privatised" by nationalising, while Slovenia introduced a rather strange combination of approaches. The differences and, even more so, the similarities, indicate that genuine variations among countries;

such as the political and social environment, the existing institutional framework, the degree of monetisation of the economy, the industrial structure, incorporation into the world market, and macroeconomic performances have been of minor importance, though they should determine the manners in which macroeconomic stabilisation and supply side restructuring could be combined with privatisation to minimise the economic and social costs of transition.

The technical approaches to privatisation have instead reflected specific distribution of political power in a particular country and were also directly or indirectly influenced by the ideas of randomly chosen western "privatisers". Their privatisation schemes exhibit one common characteristic; they are grandiose administrative operations outclassing the dreams of central planners. Different approaches to the transition in general, a gradual and a radical, are also reflected in the privatisation controversies; the former relying on the step-by-step construction of the institutions of a market economy using the legacies of the past, the latter being a social engineering design by which capitalism is "created" by fiat as communism used to be. Ironically enough, the controversies surrounding privatisation have been inspired by the Marxist beliefs that the ownership of the means of production determines all relations in the society.

4. PROPERTY RIGHTS IN THE "NEWLY BORN CAPITALIST" COUNTRIES

Several areas of law provide the framework for a capitalist market system that is to evolve from transition. Among them are constitutional provisions; they set the general principles that guide the economy and define the role of the public and private sector. The protection and the restrictions on private property in the constitution is but one step in the formation of a "normal" capitalist market system. Equally important and much more time consuming is the drafting of laws and regulations to establish a legal framework for market activities i.e. to lay down the new "rules of the game" (Gray, W.C. and others, 1991) so that the "invisible hand" can replace the administrative controls of central planning. Such a framework includes:

(1) rules to guide the economic behaviour of independent economic units (the codes that define the universe of property rights and regulate the organisation of economic units);

(2) rules for a predictable bargaining framework needed for transactions (codes regulating business transactions, foreign investment etc.);

(3) means to enforce rules and resolve disputes that might arise among private parties and between private parties and government (bankruptcy, competition, etc.).

Only a small subset of these provisions - the constitutional provisions - are of interest here.

Property received rather scanty attention in the constitutions that were adopted in the eighteenth and nineteenth century; private property was taken for granted. Consequently, there were no or very scarce provisions dealing with property and socio-economic issues in general. The Constitution of the United States and the Amendments to the Constitution do not have provisions on property. The same holds true for example for the Constitution of the Kingdom of the Netherlands, adopted on August 24th, 1815. The only provision relating to the protection of private property in the Constitution of Sweden of June 6, 1809 is in Article 16 of The Instrument of Government[5]. The protection of property is included among rights of the people. Such scarce

[5] "The King shall maintain and further justice and truth, prevent and forbid inequity and injustice; he shall not deprive anyone or allow anyone to be deprived of life, honour, personal liberty or well being, without legal trial and sentence; he shall not deprive anyone or permit anyone to be deprived of any real or

dealing with property is contrary to the provisions on property in the Magna Carta of 1215, which deals extensively with land property, inheritance and other issues related to economic activity.

The provisions of the Declaration of the Rights of Man and of the Citizen - the inviolability of private property, a possibility of compensated expropriation if there is a public interest, and a guarantee of inheritance - became the yardstick for most constitutions in the nineteenth century.

The twentieth century and the appearance of socialist countries marked a turn from the previous neglect of the ownership issue[6]. On the constitutional level, the appearance of an interventionist government was reflected in restrictions on the use of property that began to undermine the system of unlimited property rights. The Constitution of Chile passed on September 18, 1925 and belonging to a group of constitutions that began to incorporate also obligations of the owner is a rather characteristic example of this development. According to Article 10:

> The law shall prescribe the manner in which property is to be acquired, used, enjoyed, and disposed of and limitations and obligations thereon which ensure its social function and render it accessible to all. The social function of property includes whatever may be required by the general interests of the State, public benefits and health, a better utilisation of the productive sources and energies in the service of the community, and an increase in the living conditions of the people as a whole.

Furthermore,

> Whenever the interest of the national community so demands, the law may reserve to the State exclusive domain over natural resources, production goods, or others, declared to be of preeminent importance to the economic, social or cultural life of the country. It shall seek, likewise, a suitable distribution of property and the establishment of family homestead.

The Constitution also includes exemption from the provision of just compensation by stating that the "the amount and terms of payment (in compensation) shall be equitably determined by taking into consideration the interest of the community" and has specific provisions for expropriation of rural property and additional protection of small rural property holdings. The Constitution of Columbia, passed earlier on August 4, 1886 as amended to 1960 also recognised the priority of public interest over private; it also challenged the right to just compensation by providing that "the lawmaker, for reason of equity, may specify cases in which there shall be no occasion for indemnification, upon the favourable vote of the absolute majority of the members of both houses" (Article 10).

This trend continued after the Second World War. The Constitution of the Italian Republic, approved by the Constituent Assembly on December 22, 1947 also belongs to the group of

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personal property without due trial and judgement in accordance with the provisions of the Swedish law and statutes".

[6] In economic theory the role of ownership in economic organisation and performance was particularly stressed by the Austrian economic school, and the essence of the so-called socialist controversy in 1920s and 1930s was about the economic consequences of different kinds of ownership.

constitutions with rather extensive treatment of property in Title 3: Economic Relations of Part 1: Rights and Duties of the Citizens. According to Article 42 the law "specifies the modes of acquisition and enjoyment thereof, as well as its limits, in order to assure its social function and to render it accessible to all". Furthermore (Article 43) "the law may, by means of expropriation and against indemnification, originally reserve or transfer to public agencies or to groups of workers or of consumers certain enterprises or categories of enterprises which relate to essential public services or to sources of energy or to monopolistic conditions and which are of preeminent general interest in character". Similarly (Article 44) "In order to achieve the rational exploitation of the soil and to establish equitable social relations, the law imposes obligations and controls upon private land, limits its area according to regions and agricultural zones, promotes and imposes land reclamation, the transformation of the latifondo and the formation of new productive units. The law assists small and medium property". Restrictions are also included in The Constitution of the French Republic adopted by the National Constituent Assembly on September 28, 1946. Though it accepted provisions of the 1789 Constitution, it states in the Preamble that "All property and all enterprises that now have or subsequently shall have the character of national public service or a monopoly in fact must become the property of the community."

Less restrictive and simpler are property arrangements in some modern constitutions though they do include social functions. Such is, for example, the Basic Law of the Federal Republic of Germany of May 8, 1949 that states that "Property imposes duties. Its use should also serve the public weal" (Article 14/2). The Spanish Constitution from December 27, 1978, regulates property in a single Article 33:

> Private property and the right of inheritance are recognised.
>
> The content of these rights shall be determined by the social function which they fulfil, in accordance with the law.
>
> No-one can be deprived of his property, except on justified grounds of public utility or social interest with proper compensation in accordance with the provisions of the law.

The new constitutions of the former socialist countries, although with different words, are marked by: a radical departure from their socialist predecessors, a replacement of the socialist phraseology with the phraseology of classical constitutions, an elimination of the socialist property classification, and a return to classical provisions: the inviolability of property, expropriation for public interests with equitable compensation, and guaranteed inheritance.
These provisions are enhanced by some restrictions and obligations of the owners similar to those in the constitutions characteristic of the interventionist state. In short, the new constitutions provide reasonable protection of private property and have provisions for protection of land and natural resources.

There are some specificities. The Constitution of Romania, adopted on November 21, 1991 guarantees private property rights and equal protection of all property regardless of owner, and forbids uncompensated expropriations (Article 41). An accompanying provision however weakens protection by stating that "the contents and limitations of this right might be established by law" (Article 42). The Constitution of the Republic of Slovenia that was influenced by the Italian constitution retains a chapter on Economic and Social Relations and stresses the economic importance of ownership (Article 67). The Constitution of Kyrgyzstan enumerates the right to have property among other individual rights and freedoms in Article 17 and in Article

20. The Constitution of Lithuania follows the same lines by including inviolability of property among individual rights (Article 23). By the amendments to The Constitution of the Republic of Poland on December 29, 1989 the socialist classification of ownership was abolished by abrogating Articles 11-19 (Chapter 2). The constitution thus lacked general provisions on protection of private ownership and was left with a single rule that property may be confiscated only in cases specified by law (Article 87). Rather extensive on ownership is the Constitution of Slovak Republic. It proclaims ownership as binding. "It may not be used to impair rights of others, or to antagonise general interests protected by Law. The enforcement of ownership rights may not impair human health, nature, cultural inheritance or the environment more than the Law permits (Article 20/3). The Constitution of Turkmenistan retains the division of property and speaks explicitly of the ownership of the means of production. The Constitution of Hungary defines the Hungarian economy as a market economy in which private and public property are equally protected (Article 9/1).

Special protection of land is another characteristic of these constitutions. The Constitution of Bulgaria, adopted on July 12, 1991, for example, declares land to be "a basic part of the national wealth that will receive special protection from the state and society. Arable land can only be used for agricultural purposes and its conversion to nonagricultural uses can be made only on an exceptional basis and as strictly regulated by law (Article 21/1). Article 71 of the Constitution of the Republic Slovenia also calls for special protection of land, including protection of agricultural land. There are similar arrangements in the constitutions of Estonia (Article 6), Kyrgyzstan (Article 4). There are provisions that enable the land holding limits to be established in Constitution of Ukraine (Article 68) and in the Constitution of the Russian Federation (Article 58). In some countries, constitutions forbid the ownership of land by foreigners; Bulgaria (Article 22), Romania (Article 42), Slovenia (Article 68), Lithuania (Article 47) belong to this group.

APPENDIX TO CHAPTER 4

AN OVERVIEW OF PROPERTY PROVISIONS IN THE CONSTITUTIONS OF SOME FORMER SOCIALIST COUNTRIES

Estonia
December 13, 1991:

Article 33: Property rights shall be guaranteed. Restrictions of such rights shall be regulated by law.

Expropriation of property without the consent of the owner may occur only to serve public interests and for equitable compensation in accordance with procedures established by law. In cases of dispute, the right to appeal to the courts shall be guaranteed.

The responsibility to guarantee inheritance rights and copyright shall rest with the State.

Article 6: Land and all other natural resources in Estonia shall be under State protection. Economical use of natural resources shall be guaranteed by Law.

Kyrgyzstan
October 16, 1992

Article 4

In the Republic Kyrgyzstan, land, its minerals, waters, forests, fauna and flora - all natural resources shall be the property of the People of the Republic Kyrgyzstan.

Land and its minerals may become private property, property of regional and other self-governing units, it may be leased in concession to foreign physical persons and legal entities since the owner and lease holders shall guarantee the conservation of this national property and shall use it taking into account the interest and traditions of the People of Kyrgyzstan

Article 20

1. Private property shall be acknowledged and guaranteed in the Republic Kyrgyzstan as an integral right of an individual, natural source of his well being, commercial and creative activity, guaranty of his economic and personal independence.

2. Property shall be inviolable. No person may be deprived of his property. Deprivation of property against the will of the owner shall be allowed only by the sentence of a court in exceptional circumstances envisaged directly by Law.

Lithuania
October 13, 1992

Article 23

Property shall be inviolable.

The rights of ownership shall be protected by law.

Property may only be seized for the needs of the society according to the procedure established by law and must be adequately compensated for.

Chapter 4

National Economy and Labour

Article 46

Lithuania's economy shall be based on the right to private ownership, freedom of individual economic activity and initiative.

Article 47

Land, internal waters, forests, and parks may only belong to the citizens and the State of the Republic of Lithuania by the right of ownership. provision for diplomatic posts exception for government property over significant natural resources

Poland
May 1, 1990

Chapter 1: Foundations of the Political and Economic System

Article 6

The Republic of Poland shall guarantee freedom of economic activities without regard on the form of ownership, restrictions of this freedom may result only by the law.

Article 7

The Republic of Poland shall protect the ownership and the right of inheritance and guarantee the complete protection of personal property. Expropriation shall be allowed only for a public purpose and upon a just compensation.

Slovak Republic
September 3, 1992

Article 4

The mineral wealth, underground waters, natural medicinal resources and surface water is owned by the Slovak republic

Article 20

Everyone has the right to own property. Ownership rights of all owners are equal in the face of Law and are protected. Inheritance is guaranteed.

The law specifies which other property in addition to property specified by Article 4 of this Constitution, necessary to protect the needs of the society

Ownership is binding. It may not be used to impair rights of others, or to antagonize general interests protected by Law. The enforcement of ownership rights may not impair human health, nature, cultural inheritance or the environment more than the Law permits.

Dispossession or an enforced limitation of ownership rights is permitted only if absolutely unavoidable and in the public interest, and this in accordance with the Law and for reasonable compensation

Turkmenistan
October 16, 1992

Article 9

Property shall be inviolable. Turkmenistan shall confirm the right of private ownership of means of production, land, and other material and intellectual assets. These may likewise belong to associations of citizens and the state. Objects that are the exclusive property of the state shall be established by law. The state shall guarantee equal protection and equal conditions for the development of all types and forms of property. The confiscation of property shall not be permitted, with the exception of property acquired through means prohibited by law. The forced alienation of property with compensation shall be permitted only in cases prescribed by law.

Ukraine
June 10, 1992

1 General Principles of the Constitutional System

Article 6/3
The state recognizes the variety of forms of ownership and shall create equal legal conditions for their protection.

Chapter 4: Economic, Social, Ecological and Cultural Rights

Article 36

Every person has the right to private property, that is the right to own, use and manage his or her property and other values both singly and jointly with others.

No one may be arbitrarily deprived of his or her property.

The exercise of the right of ownership must not contradict the interest of society as a whole and the rights of individual natural persons and legal entities.

Inviolability of property and the right of inheritance shall be guaranteed by law and secured by judicial protection.
Every person has the right to protect his or her property by all lawful means.

Chapter 8. Ownership

Article 66

In Ukraine ownership shall be public and private. Public property includes state and communal (municipal) property. All other property shall be private property. The state shall support the social function of ownership.

Article 67

Mineral wealth, waters, coastal areas, air space, forests, animals, and natural resources... shall be subject only to public ownership.

Article 68

Land may be owned publicly and privately. The right of private property to land shall be acquired on grounds and within limits established by the law.

The law shall impose certain duties on the landowner, set maximum limits on private ownership of land and encourage efforts aimed at maintaining the quality and fertility of soils.

Article 69

Ownership, in accordance with the laws, may include property designed for production and any other purposes, and also the results of production and intellectual effort.

Article 70

In Ukraine, in accordance with the laws, there may be objects subject to the right of ownership of foreign nationals and legal entities, joint ventures and also by other states and international organizations.

Article 71

Equal legal protection shall be guaranteed to all owners. The owner must compensate for material and moral losses caused to persons or legal entities in the exercise of his or her right of ownership.

Article 72

Property may be forcibly appropriated only for the social necessity and with prior and full reimbursement of its market value, and only in such cases and in accordance with such orders as are established by law.

<u>Russian Federation</u>

November 13, 1992

Chapter IV. Economic, Social and Cultural Right and Freedoms

Article 34

In the Russian Federation, economic liberty of every person shall be realized in the right of property, the right to free entrepreneurship and the right to free labour.

Article 35

(1) Every person shall have the right to be a property owner.
The right of inheritance shall be guaranteed.

Chapter VII. Property, Labour, Entrepreneurship

Article 57

(1) Property in all its forms - private, state and other - shall be recognized and guaranteed. The use of the right of property shall not contradict public weal.

(2) All property owners shall enjoy legal protection.

(3) Property shall be inviolable. No one may be arbitrarily deprived of his or her property.

Compulsory alienation of objects of property shall be allowed when there is evidence of proved public necessity with compensation of damage in cases provided by the federal law. Confiscation shall be carried out by a judicial decision. Nationalization shall not be allowed.

Article 58

(1) The land, its subsoil, waters, the animal and plant world, and other natural objects shall be in state, private and other ownership and shall be in common possession of the people living on the respective territory, of the entire people of the Russian Federation and may not be used to the detriment of their interests. All natural objects shall be subject to protection and rational use.

(2) The land and other natural resources shall not be concentrated in the hands of an owner or holder over and above the limit prescribed by the law.

(3) The implementation of the rights to land shall not be prejudicial to its fertility and the environment.

It shall be forbidden to change the purposeful designation of agricultural lands to keep them unused or use them beyond the proper purpose.

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b.Property and free enterprise : legislative problems - Summary of the report by Professor E.A. Sukhanov, Dean of the Law Faculty, Moscow State University

1. The transition to a market economy has resulted in the emergence of a host of proprietors and entrepreneurs with equal rights and ended the predominance of state ownership and state enterprise in the economy. However, the juridical regulation of this process is highly incomplete and contradictory, owing to the use of such economic concepts as "forms of ownership" and "private ownership" as well as individual acquisition etc. Politico-economic and ideological dogma has exerted a powerful influence (the emergence of concepts with no legal substance such as "collective ownership"). Unfortunately, all this has been reflected even in the Russian Constitution.

2. Civil law takes a more clear-cut approach (law on property, 1991 Principles of civil legislation, draft new Civil Code). Instead of different "forms of ownership", it provides for a single right of ownership; private ownership is treated as the antithesis of state (public) ownership. Most importantly, it embodies a variety of legal ways of handling the economic aspects of ownership; in particular, it enlarges the category of property rights over and beyond the right of ownership (managing other people's property, servitudes etc.). Regulating these multiple aspects is not, therefore, a question of enacting individual laws in the light of the Constitution but vice versa; in the same way, the Constitution stands to benefit from clear-cut, fully developed legal structures.

3. Similarly, the regulation of free enterprise originated in a number of individual legal instruments (Law on private enterprise and businesses, Principles of civil legislation), and only afterwards was action taken at constitutional level. Unfortunately, this legislation also suffers from marked shortcomings. One example is provision for "joint-ownership" by the partners of a joint-stock company in respect of the company's assets, based on an interpretation of joint-ownership as a type of "collective property". This also has negative consequences for the legal regulation of the privatisation of state and municipal property.

The report deals with unjustified attempts at the direct borrowing of concepts specific to English and American law, particularly with regard to trusts. On the other hand, the contractual administration of other people's property can be treated differently in European, including Russian, law; it can be regulated by means of intrinsic concepts and principles.

4. The question of land ownership is approached on the basis of the above. Here, different types of land must be governed by different legal arrangements, but there are various legal forms for expressing these aspects which cannot simply be equated with property law in its traditional sense but encompass a system of other property (and even contractual) rights. Clearly enshrining them in legislation will help to eliminate sources of misunderstanding inherent in the Constitution, such as the "collective/joint ownership" of land.

5. Thus, a developed commercial system needs developed legislation based on well-designed legal principles, the general application of previous (including foreign) experience of legislative development and the rejection of politico-economic dogma and ideological systems. The development of constitutional law in this field can and must be based on the progress of civil law.

c.Summary of discussions on "Property and Constitution"

The provisions on property in the draft Constitution of the Federation of Russia

It was pointed out that two chapters of the Constitution contain provisions on property, the chapter on fundamental rights (Article 35) and the chapter on civil society (Articles 57 and 58). Western Constitutions usually deal with property in the chapter on fundamental rights, distribution among two different chapters may lead to contradictions.

With respect to Article 57, paragraph 1 first sentence, participants in the discussion agreed with the report by Professor Sukhanov that there was no need to speak about various forms of property and that it was preferable to move away from hazy notions like "collective property". With respect to the second sentence of Article 57, paragraph 1 ("the use of the right of property shall not contradict public weal") it was pointed out that this sentence follows Western models and that it will be up to the legislature and to the courts to define the notion of public weal.

Article 58, paragraph 1 of the draft Constitution did not seem very clear, at least in the English translation.

Which rules should be put into the Constitution?

Russian participants wondered whether the constitution should set out goals for economic activity and define the respective areas of State regulation and the free market.

Western participants insisted that the most important function of the constitution in the economic field is to provide for a clear, rule of law oriented framework. State intervention had to be based on the principle of legality and any arbitrariness had to be excluded. In democracy the population would then see to it that objectives of social and environmental policy would be pursued by the politicians.

It seemed very difficult to set out now, during a period of transition, detailed rules. The ordinary legislator might be better able to take into account changes in the situation and in particular one should not underestimate the important function of the courts. Case law would play an extremely important role and it might be better able to reflect new developments than statutory law. The competence, integrity and impartiality of the judges is therefore one of the most important issues.

It was however acknowledged that it might be necessary to put safeguards into the Constitution against a backlash to the old regime. Russian participants pointed out that entrepreneurs still had a bad image within the population and that they needed encouragement and a clear legal framework. The population did not yet accept that the freedom of economic activity was a reflection of the freedom to develop one's personality.

THIRD WORKING SESSION

Chaired by Mr Godert W. MAAS GEESTERANUS, Member of the European Commission for Democracy through Law for the Netherlands

The freedom of economic activity

a. Report by Professor J. TROMM, TMC Asser Institute, The Hague

b. Report by Professor B.I. Puginskiy, Moscow State University

c. Summary of discussions

a.Freedom of economic activity - constitutional guarantees and limitations - Professor J. TROMM, TMC Asser Institute

1. INTRODUCTION

(a) The nature of constitutional standards

At first sight, the most striking aspect of my brief - freedom of economic activity; constitutional guarantees and limitations - is that it touches upon two vastly different classes of conditions in respect of the organisation of the State or the State community. The concept of "Freedom" - however qualified or restricted - "of economic activity" would seem particularly to relate to the dynamics of industrial and commercial activities in an open or free market society. The concept of "constitutional guarantees and limitations" is relevant to conditions of a far more static nature: the fundamental standards governing the organisation of the State, the distribution and attribution of State powers and the conditions of responsibility and answerability by which to balance such powers and to monitor and control their execution, - the fundamental standards to be heeded by institutions of the State, including those of the lower legislative and administrative authorities within the State, in the exercise of their powers in relation to the individual members of society (the most notable category being that of citizens rights and, in a somewhat different setting: human rights), - and the fundamental standards regarding the procedures and remedies to be followed in organising the distribution and attribution of State powers and safeguarding the legal position of the individual members of the community. A constitution is not the kind of legal instrument through which substantively to deal with the dynamics of market forces. It lacks, by its very nature, the flexibility required for legislative or administrative regulation of market conditions.

(b) Constitutional revision and conditions for free market activities

In providing fundamental standards for the distribution and attribution of State powers (and responsibilities), a constitution deals of necessity with the hierarchical relations between the various State institutions. According to the Netherlands constitution, the custodian placed at the top of the State hierarchy, is the legislature, that is : Government and Parliament. Acts introduced by the legislature shall not be checked by any constitutional standards in adjudication. There is no mechanism for constitutional revision of Acts formally adopted by the State legislature. The common courts are not supposed to enter upon such revision; there is no constitutional court to act as the ultimate custodian of the fundamental rules comprised in the constitution. Parliament, as composed periodically by the electorate, is the State institution which is to act as the ultimate constitutional custodian, and essentially so in the legislative process and in monitoring the acts of the executive.

Conditions as contained in the constitution that has been drafted for the Russian Federation are different. A mechanism for constitutional revision is included; a constitutional court is part of the organisation of the State institutions. Dependent, of course, on the powers attributed to the constitutional court and on the checking powers of the Judiciary in general, it may be submitted that here the ultimate custodian of the basic, constitutional standards is the judicial institution which is deemed to guard the rules and values embodied in the constitution. To the extent to which this is indeed the case, the constitutional court may be deemed as being charged with powers which are bound to have an impact on the dynamics of society wherever the constitution

itself contains substantive - sc. other than purely institutional or procedural -standards by which to condition the dynamic, and as such politically relevant, processes in society. Since the scope of the jurisdiction attributed to a constitutional court is to a large extent defined by the scope of the standards contained in the constitution, every extension of that scope beyond purely and fundamentally organisational and procedural matters, risks involving the constitutional court in matters concerning the regulation of the dynamic processes and consequently in issues of a politically relevant nature. Where a constitutional court enjoys such wide jurisdiction, the appointment of constitutional judges tends to be a politically sensitive act in the management of the State, - an act that is difficult to isolate from the policy-making or, indeed, the political dealings of any government or parliamentary majority in place.

There is, so it seems, every reason for the draughtsmen of a constitution to exercise restraint when it comes to formulating constitutional conditions regarding economic activities. They should rather restrict, where possible, the scope of the constitution to institutional and procedural domains.

(c) Limitations

From what has been submitted in the foregoing paragraphs, one may conclude, that a constitution, if broadly kept within its proper institutional and procedural limits, is not really the instrument to provide standards by which directly and effectively to sustain a free market economy.

The success of a free market mechanism does not at all exclusively depend on the availability of favourable legal conditions. Obviously, State authorities, including the legislature, may well assist in promoting the proper entrepreneurial climate through establishing and maintaining such favourable conditions as financial and social stability, equal market opportunities - not least vis-à-vis State managed partners in the market - an even-handed fiscal policy which is likely not to deter but rather to attract (foreign) investment, legislation providing remedies against unfair competition, - to name just a few of the areas where the legislature and the administration could take their share in promoting conditions favourable to a free market economy, areas, to be sure, where the constitution should not in principle be viewed as the proper legal instrument in which to lodge the necessary standards. If in this connection one should wish to name a type of preferential legislation which could under circumstances be suitable for the purpose of enhancing market conditions, particularly on the international level, the obvious reference to make would be to international conventions or treaties. Like sections of domestic statutory law, parts of the law embedded in international conventions is designed to steer market activities. Moreover, international conventions tend to be constitutionally accorded a special, preferential status.

This is inter alia true of both the Constitution of the Kingdom of the Netherlands (Article 94) and the Constitution drafted for the Russian Federation (Article 3, para.4).

In all this the role that could be claimed for the constitution is a modest one. Necessarily so. For the various reasons indicated above, a constitution makes an awkward legislative vehicle for carrying whatever kind of steering policies in matters concerning the operation of a (free) market.

The role that constitutions can adequately play and that they are, indeed, essentially meant to play, is that of establishing the fundamental rules on the architecture and the operation of the State: rules, therefore, of a largely institutional and procedural nature.

It is proposed that with all this in mind we shall now turn to the constitution drafted for the Russian Federation and discuss what guarantees and limitations affecting economic activities are or might be contained in that fundamental legal instrument.

2. Constitutional guarantees and limitations in general.

Let us start off by supposing, that as a prospective participant - whether Russian or foreign -in the Russian economy, one would wish to obtain a clear view of the various rules of Russian law that would affect market conditions. Admittedly, for private persons, whether they be physical or legal, who plan to engage in economic activities, the constitution of a country is not the primary legal source to consult. Let us assume, however, that apart from scrutinising the more common legal and non-legal conditions prevailing in the market one would wish to enter, it is deemed desirable to gather information about precisely those constitutional conditions which might serve to place the complicated pattern of commercial and administrative (including fiscal) rules in the proper perspective.

What constitutional guarantees would one look for when devising the economic or entrepreneurial strategy that would allow the party concerned to benefit from the opportunities offered, and what constitutional limitations should one take into account when calculating one's risks ?

Stability and predictability are of primary concern. On the constitutional level that concern should direct one's attention towards the following items:

(a) "Legislative integrity" as regards the formation of rules affecting market activities, particularly rules of civil or commercial law and civil or commercial procedure.

The not so common notion of "legislative integrity" might best be explained by reference to a provision of the Dutch Constitution which makes legislation in all matters concerning civil (and commercial) law a prerogative of the State legislature: King and Parliament. The provision is particularly important for what it excludes: neither the lower legislative bodies (provincial, municipal etc. legislatures), nor indeed the administration are entitled to introduce binding rules of a general legislative character in the fields of - inter alia - civil and commercial law, - unless, of course, so empowered by the State legislature itself. It is not uncommon for the legislature to empower the administration to issue regulations by which to enforce standards comprised in a Basic or Skeleton Act. If so, the administration will still act under parliamentary scrutiny and, in case the regulations are aimed at introducing rules of a general character - orders in council - they still require parliamentary approval.

Article 9 of the Draft Constitution, entitled "Diversity of forms of economic activity" is one of the Constitutional provisions which have direct relevance to the economic activities within the State. In its second paragraph, it contains a rule which, at first sight, might seem to be a bit ambiguous. It reads: "The State shall regulate economic life in the interest of man and society". It is presumed that this rule should be read in conjunction with Article 3 which provides for "The supremacy of the Law". Yet, one could imagine a clearer expression of the supremacy of the

legislature at this point. The notion of "State" as included in Article 9 would seem to leave some room for the assumption that in fact the Administration is supposed to be constitutionally charged with the regulatory powers in matters regarding the economy. After all, the provision of Article 6 quite generally distributes the State powers between the legislature, the judiciary and the administration, without clearly stating the supremacy of the legislature, as apparently laid down in Article 3, or referring to that latter provision. The problem may just be one of a linguistic nature. It is not uncommon to refer to the administration or executive by the notion of "State". Entrusting the executive with the constitutional power to regulate the economy would seem a rather imprudent policy to adopt. The constitutionally established subordinate position of the administration in the field of legislation, is of particular significance whenever the administration participates in some way or another in the market along with individual parties.

Within a legal system which builds on the principle of equality of all legal subjects before the law (and, consequently, the Courts of Law), the law that conditions market relations should be the same for all subjects and should not allow for the State (the administration or the executive) or a State-controlled enterprise to legislate or regulate itself into a privileged position. In a healthy market where competition is a predominant force, State enterprises should only participate on a par with whatever other (individual) enterprises may be active in that same market. The State is not supposed to act iure imperii where actually it engages iure gestionis upon market activities.

Article 9 of the Draft Constitution would seem to go some way towards establishing constitutional equality on the market, although the notion of "social partnership" (Article 9, para 3) does not necessarily exclude State immunities or privileges in cases where the State joins in economic activities through State owned or State controlled corporations. A constitutional rule of this nature would not in general seem to be absolutely necessary. In view of the ambiguity of Article 9, para (2), there might, however, be a cause for clarification. (Comp. in this connection also Article 34, Ch.IV - Economic, Social and Cultural Rights and Freedoms) The same might well be true of the position of foreign State corporations. In the former Soviet Union, the doctrine of absolute immunity used to be solidly established. The chances of that doctrine being upheld and being allowed to reflect itself in (the approach to) domestic legislation - not necessarily in constitutional law - might not necessarily be too remote.

A further truly constitutional condition one would expect to be upheld when it comes to legislation affecting market conditions, is that of "publication": for statutes to obtain force of law, they have to be officially published so as to make them fully accessible to the general public. Here we touch upon a most fundamental and, indeed, constitutional principle which quite generally applies to all acts of a generally binding character, performed by State organs, whether charged with legislative or administrative powers: what is done for the public shall be done in public. That same basic rule is reflected by the rule that, in principle, adjudication shall be open to public scrutiny.

The "publication requirement" by which the Legislature is bound, is firmly established both in the Constitution of the Netherlands (Articles 88 and 89; see also Article 95 on publication of Treaties and decisions issued by organisations recognised under international law), and in the Draft Constitution of the Russian Federation (Article 3, para (3)).

The constitutional provisions according to which adjudication shall be performed in public (allowing for exceptions to be defined by the Legislature) are included in Article 121 of the

Netherlands Constitution (which also contains the requirement of motivation, and Article 110, para (1) of the Draft Constitution of the Russian Federation.

Closely connected with the requirement of publication, is the requirement of motivation or explanation. In the Netherlands, it is customary for the Explanatory Memoranda to be published along with the statutes concerned. Moreover, the Government sees to the publication of the advisory opinions and the reports of the discussions in Parliament (see in this connection Article 110 of the Dutch Constitution).

There are, of course, quite a few non-constitutional conditions that the legislature should keep in mind when going about its work: consistency, clearly intelligible phrasing of legal notions etc. Here again, Parliament has a major monitoring role to play. It forms an integral part of the legislative power within the State structure. The very constitutional rule that only the State legislature may introduce legislation in matters of civil (and commercial) law, constitutes a guarantee that the measure of consistency and transparency in legislation, upheld by the State legislature, shall not be affected by the administration or by lower State corporations vested with some regulatory powers. At the same time, legislative flexibility is maintained: only institutional and procedural conditions are laid down in the Constitution; the legislative power by which substantively to steer market conditions is in principle concentrated in the State legislature.

Reference may here be made to Article 107 of the Netherlands' Constitution, which states that civil law (including commercial law) and criminal law, as well as the law on civil and criminal procedure shall be codified or enacted in separate statutes by the State legislature (Government and Parliament). The same goes for the law concerning the administration (administrative law) (Article 107, para 2).

Here again one may submit that in dealing with the powers of legislation, the Draft Constitution of the Russian Federation does not seem unambiguously to place such legislative powers with the only State institution in which democratic representation is solidly secured: the State legislature (to the exclusion, particularly, of the State institution which, in terms of democracy, may well be deemed the most unruly horse: the executive).

Since the exclusive powers of legislation discussed here form a vital element in the State structure and a vital condition for the balance of State powers to be properly maintained, the power to create and establish substantive law and the power to establish the rules by which the judicial administration of the law shall be conducted, should be vested in one and the same State organ.

The actors on the market stage may either be physical or legal persons. Enterprises, organised in some corporate form, will commonly constitute entities in which labour, management and capital are combined in an integrated form. Keen legislation on the conditions by which such entities may be established and may participate in the economy as separate corporate organisations, is, as has been discussed earlier, exclusively a matter for the State legislature. Where necessary, control over the legally sound formation of corporate entities will commonly be left to administrative authorities. Even though key issues of great significance are involved in the establishment of legal persons and in their participation in the market - separate, corporate liability, representation of collective interests, and a - at least initially - sound financial basis - the Constitution should not be made the legal instrument in which any of the standards by which to steer corporate activities in the market are lodged. For reasons discussed earlier, the State legislature alone should be entitled to legislate in this area, to the exclusion of lower legislative

bodies within the State and of the administration, whose duties to act should be keenly delimited by the legislature. Apart from the fact that the administration is not really in a position to maintain consistency in legislation, it will frequently be so closely involved or interested in market activities, that by introducing market standards of a general nature, it could easily tip the balance and so affect the essential condition of equality between all players on the market stage.

(b) Access to Justice.

The Constitution of the Netherlands contains the provision that access to justice shall be guaranteed to every legal subject who wishes to seek judicial intervention on the part of the official (and strictly independent) judiciary: nobody shall be involuntarily barred from access to the courts of law. The rule is included in the Chapter on civil rights (Ch.1, Article 17). A similar rule is contained in the Draft Constitution for the Russian Federation: Article 109, para (1) in conjunction with Article 45.

In the Dutch provision, the notion of "involuntarily" offers an opening for parties to rely, by mutual agreement, on other means of conflict resolution and so leaves room for parties to contract for conflicts that may arise or may have arisen between them, to be submitted to conciliation or arbitration.

For a free market to function properly, stability and predictability are essential conditions. The judicial mechanism that should be freely accessible in case the balance in market relations - between individual participants (irrespective of whether they are State controlled or of a purely private nature) or between participants and intervening State organs (in particular the executive) - is disturbed, constitutes an essential element in the maintenance of stability and predictability. The institutional and procedural conditions by which that mechanism shall be established and shall be allowed to operate independently should be guaranteed by standards contained in the Constitution. That is where the basic conditions of conflict resolution in private and administrative matters are to be laid down. Enacting and introducing the rules on the actual administration of justice in private and administrative matters are a matter for the State legislature. In the Netherlands one would find such largely procedural rules in such codified instruments of legislation as the Code of civil procedure, the Act on the organisation of the judiciary, and in various Acts dealing with the judicial solution of conflicts between individual parties and administrative authorities.

In view of all this, one might well list a number of essential conditions for access to an independent judiciary to be guaranteed to all those who wish to participate in the market:

(1) Whereas the appointment of members of the judiciary is a matter for the administration (acting under Parliamentary scrutiny, to be sure), dismissal of judges should not be left to that same Administration. In the Netherlands, where the judiciary is almost entirely composed of professional judges, judges are appointed for life (i.e. till they have reached 70). A similar rule is included in de Draft Constitution for the Russian Federation: Article 107, para (1).

The administration does not have the power to dismiss judges of its own accord. There is, however, disciplinary control within the organisation of the judiciary, which serves to counterbalance the limited powers of the employing State.

(2) The judiciary is independent, even in establishing its own judicial jurisdiction. Although judges are required to adjudicate, being fundamentally denied the right to refuse administrating justice, they may independently decide on whether or not to "receive" a case

submitted to them: dismissal of a case on grounds of "non-receivability" (to use a literal translation of the French notion, adopted on the French inspired Dutch system of civil procedure) is a decision which is exclusively for the judge to take.

(3) For individual parties (including corporate entities) to get access to a court of law, that party being granted "standing" is a condition to be weighed up and decided by the court involved. The question whether "standing" shall be granted to a foreign corporation (a problem of - at least partial - recognition), or to an entity which does not fully comply with the legal conditions to be met for an entity to be accorded "legal personality", is a question for the court to deal with, independently, to be sure, from whatever stand the administration may wish to take in this matter.

(4) Access to the courts may be conditioned by such requirements as proper representation (a condition which, in the individualistic system of civil procedure prevailing in the Netherlands where the ius agendi is so tightly bound up with the individual rights and interests at stake, may give rise to intricate problems in the field of group-, or class-actions). Moreover, access to the courts (however keenly established in the Constitution) may be hampered where the parties concerned lack the financial means to put up with a "cautio" or, quite generally, with the possibly high cost of proceedings. In order to alleviate such negative and, indeed, discriminatory consequences of procedural expenses, the legislature has introduced a statutory scheme for granting financial assistance (legal aid) to those individuals who, due to the lack or inadequacy of financial means, would be barred from exercising their (constitutionally established) right to seek court intervention. Here again, we touch upon a piece of legislation which is clearly intended to support individual parties in their exercising a constitutionally established right - a piece of legislation which is guaranteed in the Draft Constitution for the Russian Federation: Article 44. (Comp. Article 18 of the Dutch Constitution).

In principle, the process of adjudication by the courts of the common judiciary is a potentially two-tier process: allowing for the odd exception, the right to lodge appeal against a decision rendered by a first instance court is considered a fundamental condition in matters of adjudication. Here again we come across a fundamental condition which is not spelled out in the constitution, but which is generally acknowledged as of primary significance. Where the right to appeal is legally upheld, the authoritative position of the individual judges who, to a considerable extent, escape otherwise normal democratic scrutiny, would seem to be better balanced. In arbitration, where parties will usually be allowed some say in the composition of the court, the requirement that appeal may be lodged against a judicial decision rendered by the arbitratral tribunal is not nowadays deemed essential.

Equal market conditions require uniformity in legislation irrespective of the place where market activities are deployed. That requirement of legislative uniformity is reflected in the organisation of the judiciary and in procedural law. In the Netherlands, the single court, placed at the top of the pyramidal structure of the judiciary, is the Hoge Raad der Nederlanden, a cassation court, originally modelled on the French Cour de Cassation.

Appeal to the cassation court is largely restricted to cases where there is uncertainty or dissatisfaction about the interpretation or application of legal standards - other than contained in the Constitution - by the lower courts, or where decisions of the lower courts are supposedly ill-motivated. The cassation court will not enter upon questions of fact.

Uniformity in the administration of justice and, consequently, in the interpretation and formation of the law, is a primary objective. However, there is no system of "binding precedent".

(5) Although, technically, court proceedings - here, we may restrict ourselves to proceedings of a contentious nature - will commonly be instituted for the purpose of obtaining a title for execution, in actual practice, court intervention and particularly the various decisions - interim and final - which will in all likelihood result, are often just handled by the parties as incidents in the process of - temporarily faltering - negotiations. As seen in this perspective, and taking into account that procedural delays should not invariably bar the protection of vital interests, the fact that, under some circumstances, a court decision may provide such a title even though appeal may still be, or has indeed been lodged, would seem to be quite acceptable. It is important to note, that once it does come to execution, whether on the basis of a provisional, or of a final decision, the constitutional requirement that every individual party is entitled to judicial protection, is still operative. Whereas the levying and the conduct of execution are a matter for the administrative execution authorities, intervention by the judicial execution authorities (under Dutch law: the President of a first instance court) may still be sought so as to secure judicial protection of individual rights and interests during the execution stage. That complicated but meticulously balanced mechanism is not provided for in the Constitution. However, the basic standards by which the mechanism has been shaped and balanced, are of a truly constitutional nature. Needless to say, that for the proper functioning of market relations, opportunities for parties to secure their rights and interests through executory measures, possibly of a provisional character, are of vital importance. Procedural means through which to secure or conserve rights in anticipation of a final judicial decision (such as various forms of seizure, and all kinds of injunctive measures, possibly backed up by a threat of fine) may well serve to enhance the conditions for participation in a - necessarily risky - free market, particularly so if such means are equally available to all actors and may be resorted to in relation to all partners in the market, including the State-owned or State-controlled enterprises.

(6) All exercise of State powers shall be open to the scrutiny of the public. That goes for the exercise of legislative and administrative, as well as for the exercise of judicial powers. Obviously, the main institution which can effectively guarantee that the exercise of State powers - including such powers as are exercised by the representatives of the public in Parliament - is effectively monitored, is the Press, provided it is truly independent and truly free. (Comp. Article 7 of the Dutch Constitution; reference may also be made to Article 22 (in conjunction with Article 73) of the Draft Constitution for the Russian Federation in this connection). However nicely the entrepreneurial climate may have been conditioned in legislation and however beautifully the powers of administration are being formally checked and the powers of the judiciary have been designed in constitutional and statutory form, day by day information on how the State duties are being discharged is an indispensable condition for maintaining the sense of stability and predictability, on which a really free market thrives. The constitutional rule supporting this condition is that of the freedom of opinion or of the press, - a civil right which is firmly established in the opening Chapter of the Netherlands' Constitution.

(c) Non-discrimination.

Discriminatory rules directed against non-domestic actors on the domestic market-stage, including such protectionist rules as may be introduced with a view to safeguarding the domestic market interests, should not be included in the Constitution.

If, under some circumstances, the Government of a State wishes to protect its domestic economy through legislative or administrative means, it should not be bound by any constitutional standards. Flexibility - to the extent allowed under existing treaty-obligations - would seem to be a primary condition. Elaborating on this theme would carry us well beyond the limits of our brief. Let us, therefore, restrict ourselves to discussing a curious instance of "positive discrimination", contained in the Draft Constitution for the Russian Federation.

I am referring to the final provision of Section 3 (Civil Society), Chapter VII (Property, Labour, Entrepreneurship), Article 61, para (3), which reads:

Provision shall be made for the business-activity of foreign legal and also natural persons who are not citizens of the Russian Federation on the terms and conditions and in the order prescribed by the law. Foreign investments may not be nationalised and shall be protected by the law. (stress applied by the author.)

One would be inclined to submit, that a provision of this nature and wording does not really belong in a constitutional instrument:

(1) It may well be the case that, historically, the notion of "nationalisation" has some rather uninviting connotations, but constitutionally to exclude an economic policy which would comprise nationalisation of whatever kind or purpose, would seem to be unrealistic and imprudent. Nationalisation - of domestic or foreign assets - is not necessarily the wrong policy to pursue, not even in societies marked by the liberal tendencies of a free market economy (to avoid the notion of "capitalism").

Governments may be in a position to consider nationalisation for a variety of quite commendable reasons, such as environmental protection, health care, or such grounds as are listed in the Russian Privatisation Law of June 5th, 1992 and associated legislation (State programme of Privatisation, June 11th, 1992; Decrees of January 29th, 1992 and July 1st, 1992 on transformation of State Enterprises etc. and of June 14th, 1992 on sale of real estate etc.), where exception is made for special objects and enterprises. In this connection, may I just quote the wording of the clause on "objects and enterprises not to be privatised":

Objects and enterprises not allowed to be privatised encompassing in practice enterprises, agencies and objects the nature and scope of which are of a public character, such as public financial institutions, health service, historical and cultural heritage, social security organisations, port structures and facilities, motor roads for general use, enterprises involved in nuclear activities and spacecraft, pipeline facilities, public works, gas facilities, mineral water and forest resources, including also television and broadcasting facilities.

It would really be hard to name any country in the world which could cope with the investments needed to keep all those services and enterprises going without to some extent relying on (foreign) private investment of some kind or another.

(2) There is an additional reason for being sceptical about the non-nationalisation clause included in the Draft Constitution:

"Nationalisation" is not a legally well defined notion. One could manage to explain it to some degree, but it is really hard to define it as keenly as its position in the constitutional setting would actually require. How does it compare to "socialisation" or even to expropriation which,

as seen in terms of property law, would seem to be an essential feature of any form of nationalisation. Even if one assumes that the Constitutional Court would be prepared to qualify the notion of nationalisation in Article 61 of the Draft Constitution so as to include any form of expropriation, there would still be no absolute guarantee against State interference with (foreign) property rights. What about bankruptcy proceedings of the kind conducted in the famous Barcelona Traction case, submitted to the International Court of Justice in the sixties?

(3) In my opinion, no instruments of economic, environmental, health etc- policy, including such instruments as are aimed at expropriation, should be constitutionally excluded from being handled by the legislative authorities. What the Constitution should guarantee in this field is that expropriation of whatever denomination should only be carried out with due respect for the interests of the private citizens (foreign and domestic) involved. That is exactly the philosophy behind the expropriation rule contained in the Dutch Constitution (Article 14, included in the Chapter on civil rights!), the first paragraph of which reads:

Expropriation can only be exercised in the public interest and under the condition of the restitution of damages (allowing for the odd exception) established in advance, by statute or in accordance with conditions established by statute (Act of "King and Parliament"),- etc.

3. Final observations

To conclude this necessarily broad discussion of some aspects of the Draft Constitution for the Russian Federation in the light of market conditions, attention may be drawn to just one more field of legislation which is of major importance in matters of economy and market activities: currency and fiscal legislation. To what extent should a constitution comprise institutional or procedural standards by which to regulate conditions in that field?

In as far as the Draft Constitution for the Russian Federation is concerned, the provision of Article 76, para. 1(g) would seem to contain the central rule (see also Article 85, para (i)): the State Legislature is charged with providing the law in this field.

In the Dutch Constitution, currency and fiscal regulation are a matter for the supreme legislature, as well: Articles 104-106 make legislation in this area a prerogative of the State legislature.

b.The development of contract law during the transition towards market economy - Professor B.I. Puginskiy, Moscow State University

The transition to a market-regulated economy presupposes significant and large-scale changes in the application of the system of contracts.

With the rejection of the planned-administrative regulation of economic life, the bulk of the organisation of property relations is being transferred to contracts, which are currently ensuring the establishment of entities (enterprises and entrepreneurs) on a horizontal level. We are witnessing the gradual creation of the institutions of a wholesale market (commodity exchanges, wholesale fairs, a system of contract-based purchase) where contracts are serving as a means of achieving a balance within the national economy. Above all, forces of competition are emerging in the sphere of contractual relations, leading the economy towards a reduction in production costs, an increase in productivity, the exploitation of scientific and technological innovations and prompt reaction to consumer demand.

Contracts are defining the main parameters for transactions between economic agents (volume and range of goods and services, qualitative indicators, delivery dates, dispatch and payment procedure), and contractual conditions are beginning to have an ever increasing effect on production and circulation.

If contracts are to become the cornerstone of economic regulation, the present situation will have to be constitutionally reinforced, just as the planned character of the socialist economy was proclaimed in the past. This means that state and municipal bodies will have to pay attention to the development and strengthening of contractual links and that society will be directed towards using their potential for the organisation of economic activity.

The embodiment of provisions on the role of contracts in constitutional law would create a basis for the further development of civil and commercial legislation. At present a serious problem is still raised by the sheer number (over 3.1 thousand) of legislative texts governing the circulation of goods, not to mention a mass of administrative regulations and instructions. This legislation is in an unsystematic, chaotic state and is full of gaps and contradictions. These shortcomings are preventing full use being made of the potential offered by contract law in the creation of a market.

The strengthening of links with the world community depends on intensive efforts to bring Russian legislation more fully into line with the generally accepted rules and practice governing contractual relations. International and inter-state agreements are acquiring priority over national legislation, hence the necessity of actively reviewing the norms of contract law with a view to their harmonisation and reconciliation with Western civil and commercial law.

If these problems are to be solved, there will have to be permanent co-operation between Western and Russian academic lawyers in the form of seminars and technical exchanges as well as joint programmes for the drawing up of key legislative texts such as a code of commercial law, transport regulations, laws on financial settlements, bankruptcy and so on.

c.Summary of discussions on "The freedom of economic activity"

Basic principles on economic activity which should be contained in the Constitution

It was pointed out that the constitution could not provide a blueprint of the desired economic order but that some basic principles should be set out within it:

- the right to private property;
- freedom of contract;
- freedom of association, including the freedom to form corporations and other companies;
- freedom of movement;
- free access to the courts and right to an open court trial;
- the equality of all legal subjects within a market economy;
- the territory of the state as a single economic space.

The rules on state regulation

The main rules on state regulation of the economy are contained in Article 9 of the draft Constitution. Participants welcomed its paragraphs 1 and 3 which make clear that the desired economic model is neither a completely free market along laisser-faire principles nor a centrally planned economy but a social market economy in which the competitive forces are the engines of growth but are harnessed by a legal framework. Paragraph 2 of Article 9 ("the State shall regulate economic life in the interest of man and society") might open the door too much for state intervention and might be abused. Since paragraphs 1 and 3 seem sufficient, it might be deleted. At least the principle of legality as the basis of state intervention should be added.

Paragraph 2 of Article 8 did attribute too great a role to the state. In this area one should not overlook the important role to be played by the free collective bargaining of trade unions and employers.

Another very important point is the limiting of the discretion and of the norm setting role of the administration. Administrative bodies should only be able to set norms if and to the extent expressly authorised by law. Article 98, paragraph 4 of the draft Constitution did not seem sufficient in this respect.

FOURTH WORKING SESSION

Chaired by Mr Alexandre DJEROV, Chairman of the Legislative Committee of the National Assembly of Bulgaria, Member of the European Commission for Democracy through Law

The role of the Constitutional Court

a. Report by Professor Otto Luchterhandt, Hamburg University

b. Report by Mr Nikolay Vitruk, Vice-President of the Constitutional Court of the Russian Federation, Associate Member of the European Commission for Democracy through Law

c. Summary of discussions

a.The role of the Federal Constitutional Court in economic matters - Prof. Otto Luchterhandt, University of Hamburg

PART I

One of the juridical peculiarities of the socialist states of eastern and southeastern Europe is that their constitutions were not only supposed to regulate the "State" (i.e. state-run organisations, basic rights), but also "society"; however, this was only of very relative significance owing to the centralised control exercised by the Communist Party. From the outset the economy, defined by socialist ownership of the means of production and central state planning, constituted a natural part of the constitutional order, a part to which all communist states dedicated a separate chapter in their fundamental principles. Those states indebted to the liberal-democratic constitutional tradition, on the one hand, have generally limited themselves to including aspects of the economic system within the framework of their guarantees of basic rights, as in the guarantee of private ownership, as well as in the duty to use property in a socially responsible way. Recently in the West, though, the tendency to incorporate economic and social systems into the state constitution (cf. the cases of Spain and Portugal) has been increasing.

After the decline of socialist leadership, the states of eastern and southeastern Europe are now at the point of drawing up new constitutions. Amongst other things they are currently faced with the issue of whether or not to adopt legal requirements concerning the future economic system, and, in the event of this happening, to what extent these should be adopted. Two different paths have been taken:

The first is the decision to adopt a particular economic system,
the second the limitation to certain regulations concerning economic matters.

Hungary falls into the first category. Article 9 of its constitution (in the version of 19.6.1990) declares:

"The Hungarian economy is a market economy, in which public ownership and private ownership are of equal status and enjoy the same protection. The Republic of Hungary recognises and promotes the right to engage in business and of freedom of trade."

Romania took the second path in its constitution of 21.1.1991. Bulgaria took a middle road; its constitution of 12.7.1991 contains numerous regulations concerning the economy which grant the State the authority to intervene to a very considerable degree. This equally applies to the situation in which the constitutional law of the Russian Federation finds itself. The new Russian constitution will presumably go the way of the Hungarian law. Article 9 of the draft constitution at any rate declares:

"The social market economy, where there is freedom of economic activity, entrepreneurship and labour, diversity and equality of forms of property, their legal protection, fair competition and public benefit, shall constitute the basis of the economy of the Russian Federation. The State shall regulate economic life in the interest of men and society. Economic relations shall be built on social partnership between man and the State, the worker and the employer, the producer and the consumer."

PART II

After the Second World War the free part of Germany chose to take the first path. The Basic Law (Grundgesetz) of 1949 does not explicitly mention any affiliation to a particular economic system. However, it has long been the custom in the Federal Republic of Germany to talk of an "economic constitution", despite the fact that the term does not occur in the Basic Law. In fact, ever since the 1950s it has been argued that the Basic Law does -at least indirectly- guarantee a market economy system, or at the very least is biased towards a market economy.

The Federal Constitutional Court had to adopt a standpoint on this matter at a very early point in time, the reason being a complaint of unconstitutionality made against the Law on Investment Aid passed in 1952. The law obliged the whole economic sector of the Federal Republic to raise a thousand million Deutschmarks for a fund to aid coal-mining, steel production and power production. At that time the Court rejected the claim made by the opponents of the law that the Basic Law was biased towards a "social market economy"; on the contrary, it found that the Basic Law was not biased towards any particular economic system. In the Court's view, the Government and legislature may follow any economic policy they find proper, with one reservation: they may not overstep the limits laid down in the constitution. As the Court said,

"The current economic and social system is, indeed, a system permitted by the Basic Law, but it is by no means the only one. It is based on a decision on economic and social policy for which the legislature bears responsibility, and may be substituted or overturned by another decision. For this reason it is irrelevant from the point of view of constitutional law whether or not the Law on Investment Aid is in accordance with the existing economic and social system, and whether or not the means of controlling the economy conforms with the market." (BVerfGE 4, 7/15/18).

The regulations laid down in the Basic Law are consequently the sole criteria by which the constitutionality or unconstitutionality of state intervention in economic matters can be judged.

The supporters of the theory that a social or liberal economy - at any rate a market economy -is in accordance with the nature of the Basic Law make particular reference to the following basic rights:

1) Article 2, Paragraph 1 of the Basic Law, which guarantees the free development of personality. From an economic viewpoint the article protects the rights of freedom of contract, freedom of consumption and freedom of enterprise.

2) Art. 12 Para. 1, which guarantees the freedom to choose and practise a profession. This also encompasses freedom of trade, i.e., the right to freely establish a commercial enterprise according to conditions set down in the law, as well as the right to work as an entrepreneur, i.e. the right to found and manage a business.

3) Art. 14, Para. 1, which guarantees private ownership of both land and means of production. One particular part of the ownership guarantee concerns the capital assets of a business set up and run by someone. The protection offered by Art. 14, Para. 1 here extends to business-owned land, a business's rooms, machines, inventory, goods, supplies and claims by the enterprise with respect to other commercial partners. Moreover, the intangible assets of the business, such as its good name and the relations it has established with other businesses and with its regular customers, are also protected.

4) Art. 9, Para. 1, i.e. the right of freedom of association, in other words the freedom to associate with other enterprises for economic purposes. An example is the establishment and maintenance (or dissolution) of a cooperative or a share-holding company.

5) The freedom of coalition set down in Art. 9, Para. 3. This guarantees citizens the right to organise themselves in unions with the aim of preserving or improving working and economic conditions. The trade unions and employers' associations are such examples. The Constitution gives citizens the right to determine conditions of pay and employment independently, i.e. without state intervention, via pay negotiations. This is a case of empowering citizens to determine social and economic conditions.

The five basic rights listed above clearly secure citizens a significant degree of creative influence in shaping economic life. The Basic Law, however, also contains a number of rules that provide the state legislature with the authority to intervene in economic life in a far-reaching way, and to reduce the economic freedom of the individual correspondingly. Four legal institutions need to be mentioned in connection with this:

1) The Basic Law expressly declares its commitment to the "welfare state" (Art. 20, Para. 1; Art. 28, Para. 1). (Incidentally, Art. 1 of the Romanian constitution and Art. 1 of the draft constitution of the Russian Federation have also adopted this declaration). In the view of the Federal Constitutional Court, the principle of the welfare state gives Parliament and the Government the authority to continuously determine the form of both society and the economy by means of social welfare, though to an equal degree also by means of redistribution, direction and planning.

2) Like the current constitution of the Russian Federation, the Basic Law lists in catalogue form those areas in which the Federal Government is permitted to take precedence over the federal states in enacting laws. The lists encompass the whole of commercial law. The fact that certain matters relating to commercial law are specifically mentioned in the Basic Law is interpreted by the Federal Constitutional Court as an indirect acknowledgement that the State is entitled, for example, to regulate the economic sectors listed in Art. 75, No. 11 of the Basic Law, namely mining, industry, craft trades, the supply of power, commerce, banking, the stock exchange and private insurance. Other sectors mentioned are forestry and agriculture, the fishing industry (Art. 74, No. 17) and the health sector (cf. Art. 74, No 19). The legislature can limit citizens' freedom to develop economic enterprises. The legal preconditions that make this possible were created by means of the Basic Law, for it is precisely the freedom to choose one's profession and the guarantee of property ownership in which the legislature is largely unauthorised to exercise its influence. Art. 14, Para. 2 of the Basic Law declares in this connection: "Property imposes duties. Its use should also serve the public weal."

The legislature has largely put this social commitment of private ownership in concrete terms, to the benefit of the public. Furthermore, the possibility was created of expropriating private owners for the common good (Art. 14, Para. 3).

However, the strongest argument made by the Federal Constitutional Court to support its theory that the Basic Law can be freely interpreted with respect to economic policy was -and still is- based on Art. 15, which authorises "socialisation". This declares that

"Land, natural resources and means of production may for the purpose of socialisation be transferred to public ownership or other forms of publicly controlled economy, by a law which shall provide for the nature and extent of the compensation."

The legislature has never made use of this empowerment, nor is it seriously likely to do so in the future. The provision is nonetheless of significance, as the conclusion to be drawn from it is that the state, in accordance with the process of socialisation, is authorised to implement an economic system that differs fundamentally from the social market economy. Art. 15 keeps this possibility open with respect to constitutional law.

Thus, one can see that the Federal Constitutional Court in principle grants the Government and the parliamentary legislature considerable room for manoeuvre in matters of economic policy.

PART III

Within the broad framework of economic policy, the role of the Federal Constitutional Court has up until now effectively been limited to examining complaints of unconstitutionality filed by entrepreneurs, trade unions, those engaged in trade and other private individuals. The Court investigates the extent to which measures taken by the State to the detriment of the economy are consistent with basic rights and other constitutional regulations. The judicature quite clearly lays particular emphasis on those sections of the Basic Law giving citizens protection, namely the freedom to choose one's profession (Art. 12, Para. 1) and the guarantee of private ownership (Art. 14, Para. 1). Essentially, discussion centres around two issues, namely (a) whether the measures taken by the State to intervene in economic life are in accordance with the formal requirements of the constitutional state principle, and (b) whether the basic rights of those engaged in economic activity that are concerned are not too seriously affected. Limitations on basic rights related to economy can, of course, be justified by social or other motives of public interest and consequently appear to be legitimate. All the same, they can materially violate the Basic Law in two ways. Firstly, the basic right may be limited only as far as it is necessary in order to achieve the effect intended by the state measure. This is set down in what is known as "the principle of proportionality". Secondly, the measure to be taken by the State must not violate the essential control of a basic right (Art. 19, Para. 2).

The principle of proportionality is the most important measure to have been used by the Federal Constitutional Court for a long time in its examination of the constitutionality of state intervention in economic life. This is illustrated in the next section using a few typical and important examples.

PART IV

In the first part of this section I would like to draw the reader's attention to several fundamental judgements passed by the Federal Constitutional Court concerning the freedom to choose one's profession.

1) The so-called "chemist's shop judgement" passed in 1958 (BVerfGE 7, 377 ff.) after a complaint of unconstitutionality was made is of great significance. The party making the complaint, a qualified chemist, wished to open a chemist's shop in a small town in Bavaria.

According to the Bavarian Chemist's Law he needed a licence from the State in order to do this. This could only be issued once the State had been assured that the chemist's shop would not run at a loss or affect the profits of those chemists' shops that already existed in the town. The authorities refused to issue the licence on the grounds that the one chemist's shop present in the town was sufficient for its 6,000 inhabitants.It was said that there was no room for a second chemist's shop in the town, as a chemist's shop could only run at a profit by serving 7,000 people. The Federal Constitutional Court judged that the regulations concerning admission to the profession set down in the Bavarian Chemist's Law were incompatible with the freedom to choose ones' profession, declaring that the refusal of the authorities to issue the license affected the freedom of the chemist to choose his profession. It was found that the choice of a profession could be made more difficult by subjectively or objectively preventing access to this profession. One means of subjectively preventing access, it was said, was the professional qualification, the acquisition of which is testified by certificates. In the case mentioned, the chemist possessed the necessary licence to practise and therefore fulfilled the subjective requirement demanded by the law. However, because of an objective hurdle he lost his case. According to the section of the Chemist's Law relating to the inhabitants of the location where a chemist may practise, there was no need to open a further chemist's shop. The appellant had no influence over this factor.

The Federal Constitutional Court came to the conclusion that the choice of profession is central to the basic right of freedom of profession. For this reason it must enjoy the highest protection. Intervention by means of objective hurdles could only be justified where public interest was shown to be at danger. Though the Court believes that maintenance of the public health service would lie in the public interest, in the case of the chemist it rejected the idea that the health of the population of the town would be seriously endangered as a result of a further licence being issued. The controversial regulation in the Bavarian Chemist's Law offered established chemists de facto protection against potential competition; the decision of the court effectively ensured the freedom from competition in the chemist's trade. The judgement also had considerable consequences in other sections of economic life.

2) In 1961 the Federal Constitutional Court decided on the constitutionality of a subjective requirement for admission in connection with the Handicrafts Law (BVerfGE 13, 97 ff.).

Article 1 of the German Handicrafts Regulations Act allows only those people to open a private craftsman's business who have passed a Mastercraftsman's Examination held by a public examination board and whose names are listed in the Craftsman's Register. In the lawsuit mentioned above the question was whether the necessity to provide evidence of this qualification violated the right to choose one's profession. The Federal Constitutional Court did not accept this; initially it found that a subjective hurdle existed that prevented the realisation of the freedom to choose one's profession; the citizen, however, could, in principle, overcome this restriction on admission to the profession by his or her own personal efforts. A subjective hurdle could, however, only be justified by a significant common interest. The legislature has standardised the Mastercraftsman's Examination, the Federal Constitutional Court said, in order to guarantee the traditionally high standard of work in the craftsman's profession and maintain the economic efficiency of medium-sized businesses. Furthermore, the Mastercraftsman's Examination was intended to safeguard the next generation of craftsmen for the whole of trade and industry. The Federal Constitutional Court has acknowledged these economic policy objectives set by the legislature as "important community values" and subsequently declared the subjective restriction on admission to the craftsman's profession to be constitutional.

In one case in 1965, however, the Federal Constitutional Court lifted a subjective regulation on qualifications set down in the Retail Law, declaring it a violation of the right of freedom to choose one's profession. The law in question only allowed the management of a retail business by those people who were able to show evidence that they had "the necessary technical knowledge" (BVerfGE 19, 330 ff.). The decision of the Federal Constitutional Court on the matter was that special knowledge of the goods sold was not necessary in the retail trade, as fabrication and workmanship were not of central importance to the trade, in contrast to the craftsman's profession. Few qualifications are necessary in order to buy and sell goods, the Federal Constitutional Court said.

3) Most of the cases concerning the compatibility with the basic right of freedom of profession examined by the Federal Constitutional Court were and are not concerned with regulations on the choice of one's profession. They are, rather, concerned with regulations regarding the exercise of one's profession. This is therefore a matter of how a profession is carried out; in the opinion of the Court it is not a matter of the internal regulation of the freedom to choose one's profession, but rather a matter of external perception. The state legislature's regulations are justified whenever "reasonable consideration of the public interest" speaks in their favour.

The following case is of interest here. In 1965 a special federal act was passed that required privately owned petroleum companies amongst others to stock-pile a certain amount of their oil (BVerfGE 30, 292 ff.). The regulation was intended to provide the Federal Republic of Germany with enough oil reserves to be self-sufficient for a short period of time in the event of the flow of supplies being interrupted. This would then prevent the collapse of the Republic's infrastructure. The obligation to build up oil reserves was an economic burden for the enterprises, but the Federal Constitutional Court found that the legal measure was a regulation of the right to exercise one's profession and that its objective was a reasonable one made in the interest of the public. The act, it said, did not impose an unreasonable burden on the oil companies. For this reason the Court rejected any claim that the State was obliged to reimburse the oil companies for the storage.

A further typical regulation of the right to exercise one's profession is the Shop Hours Act, which obliges retail businesses to cease trading at a given time in the evening (BVerfGE 13, 237 ff.). In the eyes of the Federal Constitutional Court the Shop Hours Act is justified on the grounds that it guarantees employees leisure time, thus protecting their interest, and also ensures equal conditions of competition between businesses.

PART V

In this section several fundamental cases concerning the guarantee of public ownership are discussed. The theory of the guarantee of ownership in constitutional law is one of the most difficult issues in the Federal Constitutional Court's administration of justice in economic matters. Three issues have always been at the centre of this:

1) To what extent is property ownership protected? Which rights and legal interests are covered by its guarantee?

2) What is meant by the duties of the owner to society? To what extent is a property-owner under obligation to the community? How great is his or her responsibility to the community? Are a property-owner's duties to the community already incorporated in the content of the

ownership or do they merely constitute the external restrictions which the legislature places on the owner for economic, social or environmental reasons?

3) What relationship exists between the duty of an owner to the community and expropriation? Does the overstraining of duties constitute an "expropriation" for which the owner can demand compensation, or is the excessive imposing of duties a violation of the guarantee of ownership which merely justifies the owner's demand to be released from his or her duty?

Obviously, the answers to these questions of Constitutional Law are of great consequence for enterprises, indeed for the economic system as a whole.

Though disputed in the juridical literature, the answers provided by the Federal Constitutional Court on the issues were clear:

1) The Court's definition of the extent of the protection offered by property ownership was, in principle, a very broad one. The decisive criterion in the issue of whether or not an asset counts as property in a constitutional sense is whether or not it can at least partly be attributed to citizens' personal efforts. For this reason the Federal Constitutional Court said that the right to national insurance was protected under the right of property ownership.

Those engaged in trade cannot, however, rely on the fact that local conditions that are to their advantage will remain constant. This is exemplified in the hypothetical case of the owner of a petrol station situated on a busy road. If the city council were to alter its traffic planning policy and move private traffic to other roads, with the result that turnover decreased at the petrol station, the owner of the petrol station would soon be threatened with bankruptcy. This does not mean, however, that the State intervened in his or her business. The likelihood of someone doing business at the petrol station would, indeed, have been greatly reduced, yet in the opinion of the Federal Constitutional Court "business potential" would not fall under the protection of the ownership law as it is unrelated to the citizen's personal efforts to manage the business.

2) In the interpretation of the Federal Constitutional court, the social obligations associated with private ownership are a constituent part of the notion of private ownership via rights and duties. The court came to this conclusion particularly on the grounds of Art. 14 of the Basic Law, which states that the use of property should also serve the public good, in other words society or rather community needs. The rights and duties of the owner are thus indivisible.

3) The Federal Constitutional Court makes a fundamental and clear differentiation between the social obligation of property ownership and expropriation on the grounds that social duties are integrated in the guarantee of ownership. The reason for this is that "expropriation" amounts to the withdrawal of ownership and the transfer of rights to another legal entity, in most cases the State, in return for compensation.

The following examples illustrate the consequences of the Federal Constitutional Court's notion of property ownership or rather its interpretation of Art. 14 of the Basic Law.

1) A federal bill was passed in 1976 that considerably extended the employees' right of co-determination in enterprises with more than 2,000 staff (such as joint-stock companies and limited companies). This was achieved by enlarging the number of employees' representatives on the supervisory board to more than half of the total number of members. Work and capital

were to enjoy "equal representation". The shareholders of the affected enterprises filed a complaint of unconstitutionality in the Federal Constitutional Court, which they justified by claiming that the act was unconstitutional because they, the shareholders, could no longer make decisions alone on what business should be undertaken. The Federal Constitutional Court, however, rejected the complaint, concluding, that the legislature had not violated the constitution (BVerfGE 50, 290 ff.).

The Court initially confirmed that shares in a joint stock company selling share certificates are protected as property by Art. 14 of the Basic Law. The right in question is a right of property relating to company law, i.e. the shareholder can only exercise influence over the way in which the company is controlled via his or her right of membership.

The Federal Constitutional Court found that the act of co-determination passed in 1976 did not violate the shareholders' rights in favour of the employees. It justified its decision on the grounds that according to the law the owners of the capital (the shareholders) actually did form a majority compared with the labour representatives. This was explained as follows:

1) A managerial staff representative, who in fact stands on the side of the capital holders, has to be included amongst the workers' representatives.

2) The chairman of the supervisory board is elected by the owners of the company's capital in a second round of elections should the two sides, capital and labour, not come to a consensus of opinion in the first round.

3) In the event of a tied vote the chairman of the board of directors, who as a result of his or her position is more on the side of the capital holders than that of the labour representatives, possesses the right to use a casting vote.

The improvement of the employees' rights by almost bringing them on a par with the owners of the enterprises has been justified by the Federal Constitutional Court as the social obligation attached to property ownership set out in the Basic Law. In connection with this, the Court has established the following general rule concerning the intensity with which the state legislature may emphasise the responsibility of the private owner to the community (BVerfGE 1/32):

"The postulate laid down in the Constitution of a use of private property in the public interest includes the requirement to consider the needs of those fellow citizens who were obliged to make use of the property in question. The extent of the obligation imposed on the owner by the constitution and to be realised by the legislature depends on whether or not and to what degree the property is of social relevance and has a social function. The more the individual is dependent on the use of property not belonging to him/her, the greater is the degree to which the legislature may intervene. This room for manoeuvre is reduced whenever this is not the case or is only the case to a small degree. Art. 14, Para. 2 of the Basic Law thus does <u>not</u> justify an excessive limitation of powers relating to civil law when this limitation is not appropriate to the needs of the community."

The "social relevance" and "social function" of private property are obviously very considerable in the case of a large concern in which ownership -in the form of a joint-stock company- is largely anonymous and where production is based on a wide reaching division of labour. This explains why the legislature was consequently able to greatly reduce the powers exercised by shareholders.

Conversely, the Federal Constitutional Court has also emphasised that human rights lie at the centre of the right to private property (BVerfGE 50, 290/339):

"From a historical and contemporary perspective, the guarantee of property as an elementary basic right is to be seen in the narrow context of personal freedom. Within the framework of basic rights, the guarantee of property ownership is intended to secure the bearer of the basic right room for manoeuvre in matters concerning the law on wealth distribution. As a consequence of this the guarantee of property ownership seeks to make it possible for the bearer to structure his/her life autonomously."

The conclusion to be drawn from this is that the social obligation of a small craftsman's business or of a self-employed trader working alone is far smaller than that of an economic enterprise with a large number of employees. The smaller the business, the narrower and more immediate is the connection with the personal freedom of the owner of the business to determine the activities in his or her life.

2) The possession of land is of great significance for the economy. The Federal Constitutional Court has had to comment on the question of the extent to which social obligations exist in the case of land ownership in a large number of judgments. It formulated the following fundamental thoughts at an early stage of its life (BVerfGE 21, 73/82 f.):

"The fact that land is irreproducible and indispensable prohibits its use by the inestimable interplay of free forces and the discretion of the individual; a just legal system and social order demand that the interests of the community with respect to land are considered much more carefully than in the case of other forms of wealth."

The consequences of adopting such an approach became particularly clear in the following case, laid before the Bundesgerichtshof, i.e. the Supreme Court of the Federal Republic of Germany (BVerfGE 58, 300).

The plaintiff was the owner of a large area of land from which he wished to extract gravel. The gravel was to be found near the groundwater. According to the Domestic Water Act of the Federal Republic he needed to obtain a licence from the State to be able to make use of this groundwater. The Act does not, however, allow the owner of land to claim compensation if the authorities refuse to issue a licence. In practice, this amounts to a prohibition of the use of groundwater. The State, though, is able to make exceptions for landowners in certain cases.

The Federal Constitutional Court decided in this case that the ownership of land does not automatically include the right to use groundwater. It is the state legislature, it said, that deals with the full treatment of the regulation of the law on groundwater. The Court did not feel that an expropriation that justified the payment of compensation had taken place, but rather that the expropriation was a result of the principle that the social duty inherent in property was more important than the interest of the landowner.

3) Furthermore, the Federal Constitutional Court decided that laws imposing taxes on citizens and economic entities are not to be compared with the standard of the guarantee of property. The Court explained its point of view by stating that the taxes do not burden any particular property, but rather the entire capital of the citizen. The capital as such would not, however, be covered by the guarantee of property ownership. Only when taxes have a

"confiscatory", "strangling" effect is the position of the landowner affected, and, indeed, damaged. To this day this has not happened, and it is very unlikely to happen in the future. The stance taken by the Federal Constitutional court favouring taxation in this manner is largely rejected in the literature on constitutional law.

4) Over the last few decades the State has imposed levies on sectors of the economy with increasing frequency. These levies are not meant as real taxes, but are used by the legislature to pursue certain economic and social ends.

The "Equalisation Levies", as they are known, are also part of these. They are applied to a particular group of businesses or within commercial associations and have the purposes of evenly distributing costs, evening out returns, altering market conditions to suit manufacturers and consumers or balancing out any other disproportions within the sector.

In the following case from 1990 the Federal Constitutional Court had to decide again on the constitutionality of such an equalisation levy (BVerfGE 82, 159 ff.):

By way of law, the Federal Government had set up a central fund the finances of which were intended to increase the turnover of goods produced by German agriculture, the food industry and forestry. The general political aim of the act was to strengthen these sectors of the German economy on the EEC's common market.

The fund is financed by contributions collected from the businesses in these sectors. As an example, the flour mills had to pay approximately 1 DM per 1,000 kg of milled bread flour into the fund. The Federal Constitutional Court found that such a special levy is not a "tax" in the sense used in the Basic Law, for taxes are only levies paid by the citizen to the State without him or her receiving anything particular in return. The special characteristic of the Equalisation Levy, however, is that the capital accumulated in the fund flows back to the businesses in the form of financial aid.

The Federal Constitutional Court declared the special levy for the fund to be constitutional in principle and listed four criteria relating to its usage:

1) The Special Levy may not be used to finance general state responsibilities.

2) The Levy may only be imposed on those groups of economic entities that clearly have common interests and stand out from others as a result of their common characteristics, i.e. those that show a certain degree of homogeneity.

3) The purpose of the Levy must be of special technical relevance for this group, i.e. it must be attributable to the groups's particular sphere of economic responsibility.

4) The finances of the Fund must be used to the benefit of the group, i.e. they must not be used by economic entities that are not entitled to them.

A further form of special levy is the Control Levy. The following case was brought before the Federal Constitutional Court (BVerfGE 57, 139 ff.):

Federal Law obliges all private and public employers with more than 16 staff to set aside 6% of its workplaces for the severely disabled. For each of these workplaces not filled in this manner,

the employer had to pay 100 DM into an equalisation fund. The fund was used to finance national measures to integrate the severely handicapped into working life.

The Federal Constitutional Court declared this equalisation levy to be in accordance with the Constitution. The case differs from the sales fund decision in as far as the circle of enterprises on which the levy was imposed was not identical with the circle of those favoured by the levy. Those who are favoured are, in fact, the severely handicapped citizens of the Federal Republic. The objective of the levy is to cause those economic concerns affected by it to adopt a certain type of behaviour in the interest of the State's economic policy, i.e. in this case to cause employers to take on the severely disabled, or at least to finance measures directly furthering their integration.

It is hardly necessary to mention that all these decisions are very controversial in the literature and as far as those organisations affected are concerned.

PART VI

In conclusion it can be said that the Federal Constitutional Court allows the legislature a relatively large amount of potential influence in the area of economic policy. The Court concentrates on protecting those basic rights central to the Constitution, in particular the freedom to choose one's profession and the guarantee of property. It also wards off excessive pressure put on economic entities by the State, pressure that does not seem necessary in order to achieve the economic policy objectives set by the legislature. On the whole, it can no doubt be said that the jurisdiction of the Federal Constitutional Court has, to a large degree, enabled the basic categories of freedom and social obligation in the economic system to reach a stable state of equilibrium.

b.The constitutional court in the transition to a market economy - Summary of the report by Professor N.V. Vitruk, Vice-President of the Constitutional Court of Russia.

1. The role of the Constitutional Court of the Russian Federation in the transition to a market economy is determined by its powers, as defined in the Constitution of the Russian Federation and in the Constitutional Court Act, as well as by the specific situation prevailing at the present moment. The Constitutional Court of the Russian Federation rules on cases concerning the constitutionality of normative texts of the legislative and executive powers, the implementation of legal texts (by examining individual applications from citizens and legal entities), has the right to initiate legislation, addresses an annual message to the Congress of People's Deputies of the Russian Federation and to the Supreme Soviet of the Russian Federation, and enjoys other powers.

2. Russia's economy is in a deep crisis. The economic difficulties are compounded by the severing of economic links throughout the territory of the former USSR. The beginning of the transition to a market economy amounted to shock therapy, as the population was not prepared; the result has been a sudden impoverishment of the population due to inflation, greater disparities in the incomes of different groups, and psychological trauma for many people. In the circumstances, constitutional justice aims first of all to help legislative bodies to introduce stable legislation regulating industrial relations in a market economy; secondly, to bring the principles of a market economy and of a new, free civil society into everyday use; thirdly, to end, as far as possible, the undesirable practice of implementing legal texts on the basis of outdated laws; and fourthly, to provide effective protection for the constitutional rights and freedoms of citizens and legal entities as property owners, free agents participating with equal rights in contractual relations, etc.

3. The economic upheavals taking place in Russian society are reflected in the authority of the Constitutional Court which can become an important factor in economic, political and judicial stability.

The Court deals primarily with the assessment of the constitutionality of legislation, of the State's management of the economy, in particular the distribution of powers among state bodies, and of the implementation of legislation and regulations relating to property, privatisation, business, and so on.

For example, on 20 May 1992, the Constitutional Court ruled on the case concerning the constitutionality of the Russian Federation's law of 22/11/91 on amendments and additions to Section 3 of the law of the Russian Soviet Federative Socialist Republic on competition and restricting the activity of monopolies on the goods market. These additions were deemed unconstitutional because they extended without justification the powers of the Presidium of the Supreme Soviet of the Russian Federation and gave it the right to approve the rules on the Anti-Monopoly Committee. This did not comply with Articles 113 and 114 of the Russian Constitution which lay down the powers of the Presidium of the Supreme Soviet of the Russian Federation in its capacity as a dependent organ of the Supreme Soviet of Russia organising the activities of the Congress of People's Deputies and the Supreme Soviet of the Russian Federation.

The Constitutional Court is currently examining several cases on the constitutionality of the application of legislation following the failure of arbitration courts in the Russian Federation to enforce laws on property in Russia and on businesses and business activity; it is also examining the constitutionality of the breach of the "level-playing field" principle for private businesses, unjust enrichment during privatisation, etc.

4. The protection of citizens' rights and freedoms in economic and social relations (right of ownership, freedom of enterprise, pecuniary rights, employment rights, pension rights, etc) is another of the Constitutional Court's areas of activity. The State should have a stable fund for compensating citizens for pecuniary and non-pecuniary damage, for example in the case of theft of property, illegal dismissal and rehabilitation.

c.Summary of discussions on "The role of the Constitutional Court"

It was explained that cases could be brought before the Constitutional Court according to two different procedures.

In the first instance, certain public authorities listed in Article 103.5 of the draft Constitution can request the Court to pronounce on the constitutionality of the acts indicated in the same Article; the decision by the Court will then be binding "erga omnes".

In the second instance, individuals and certain authorities listed in Article 103.5.c of the draft Constitution can invoke the unconstitutionality of "law-enforcement practices" after exhaustion of other remedies; the decision of the Court will then be binding "inter partes". Should the Court find in this context that the law on the basis of which the "enforcement practice" was taken is unconstitutional, it will be for Parliament to modify or abrogate it.

The Court had no competence to examine draft laws; it could however examine treaties signed by the Russian Federation before their ratification with a view to ascertaining their compatibility with the Constitution, only case of control "in abstracto" (Article 103.4.c).

It should be stressed that the direct right of appeal by individuals to the Court was not recognised, in order to avoid that the Court be flooded by inadmissible applications.

LIST OF PARTICIPANTS

Constitutional Commission

Mr Oleg G. RUMYANTSEV, Executive Secretary
Mr Ivan V. FEDOSEEV, Secretary, People's Deputy
Mr Anatoliy F. KOVLYAGIN, Member, People's Deputy
Mr Sergey N. BULDAEV, Member
Mr Derenik N. ABRAMYAN, Chief Specialist in the Secretariat
Mr Yevgeniy A. DANILOV, Chief of the Expert's Group
Mr Leonid S. MAMUT, Expert
Mr Pavel A. MEDVEDEV, People's Deputy

Supreme Soviet

Mr Vladimir O. ISPRAVNIKOV, Head of the Supreme Economic Council of the Supreme Soviet
Mr LUBENCHENKO, Director of the Parliamentary Centre of the Supreme Soviet
Mr Alexander PENKIN, Director of the Russian Political Institute at the Parliamentary Centre of the Supreme Soviet

Ministry of Foreign Affairs

Mr B.L. KOLOKOLOV, Deputy Minister for Foreign Affairs
Mr Mark L. ENTIN
Mr Igor D. YEVDOKIMOV

Constitutional Court

Mr Nikolay V. VITRUK, Vice-President, Associate member of the European Commission for Democracy through Law, Rapporteur
Mr Sergey V. BOBOTOV, Head of the Secretariat of the Vice-President
Mr Konstantin I. KOROLYOV, Senior Consultant

Moscow State University

Mr Mikhail N. MARCHENKO, Professor, Vice-Rector
Mr Yevgeniy A. SUKHANOV, Professor, Dean of the Law Faculty, Rapporteur
Mr Vasiliy P. KOLESOV, Professor, Dean of the Economics Faculty
Mr Yasen N. ZASURSKIY, Professor, Dean of the Journalism Faculty
Mr Vladimir A. PANIN, Professor, Dean of the Philosophy Faculty
Mr Aleksey P. ALEKHIN, Professor
Mr Georgiy V. BARABASHEV, Professor
Mr Anatoliy G. BYKOV, Professor
Mr Sergey M. KORNEEV, Professor
Mr Vladislav V. PETROV, Professor
Mr Boris I. PUGINSKIY, Professor, Rapporteur

Mr Yevgeniy P. GUBIN, Lecturer

Mr Petr G. LAKHNO, Lecturer
Mr Andrey Y. SHERSTOBITOV
Mr Petr F. LUNGU
Mr Pavel A. PANKRATOV, Assistant

Institute of Legislation and Comparative Law

Mr Yuriy A. TIKHOMIROV, Professor, First Deputy Director, Rapporteur
Mr Boris S. KRYLOV
Mr Valeriy N. LITOVKIN
Mr Aleksandr Y. POSTINKOV
Ms Alla K. KOLIBAB
Ms Mariya R. SAFAROVA

Institute for State and Law
Mr Boris N. TOPORNIN, Director, Member of the Academy of Science
Mr Vladimir P. KOZIMIRCHUK

Institute of Socio-Political Research

Mr Mikhail S. SAVIN, Head of Humanitarian research

European Commission for Democracy through Law

Mr Godert MAAS GEESTERANUS, Netherlands, Member
Mr Alexander DJEROV, Bulgaria, Member
Mr Aivars ENDZINS, Latvia, Associate Member
Mr Petru GAVRILESCU, Romania, Associate Member
Mrs Boyanka KRUMOVA, Bulgaria
Senator Gérald BEAUDOIN, Canada, Observer
Prof. Michel HERBIET, Belgium, Expert
Prof. Armando MARQUES GUEDES, Portugal, Expert
Prof. Theodor SCHWEISFURTH, Germany, Expert
Mr Elio ROGATI, Italy, Special Adviser to the President
Mr Leonardo PALEARI, Translator

Parliamentary Assembly of the Council of Europe

Mr Uwe HOLTZ, Germany, Member of Parliament

Foreign Rapporteurs

Prof. Jorge MIRANDA, Portugal
Prof. Joze MENCINGER, Slovenia
Prof. Jacques TROMM, Netherlands
Prof. Otto LUCHTERHANDT, Germany

Mentor Group

Mr Thomas KOSMO, President (U.S.A.)

Secretariat - Directorate of Legal Affairs

Mr Gianni BUQUICCHIO, Secretary of the European Commission for Democracy through Law
Mr Roberto LAMPONI, Deputy Secretary of the European Commission for Democracy through Law
Mr Thomas MARKERT, Administrator
Miss Helen MONKS, Administrative Assistant

Interpretation

Mrs Denise BRASSEUR, Chief Interpreter